

In the High Court of Punjab and Haryana at Chandigarh

CWP No. 1690 of 2017 (O&M)
Reserved on: May 24, 2017

Date of Decision: July05, 2017

Bhim Sain Pahuja

... Petitioner

Versus

State of Haryana and others

.... Respondents

CORAM: HON'BLE MR. JUSTICE P.B. BAJANTHRI

Present: Mr. Gurminder Singh, Sr. Advocate with
Mr. Ashwani Bhardwaj and
Mr. Jitender Singh, Advocates,
for the petitioner.

Mr. Amar Vivek, Addl. A.G., Haryana.

Mr. D.S. Nalwa, Advocate,
for respondents no.2 to 5.

Mr. Rajiv Atma Ram, Sr. Advocate with
Mr. Sunil K. Nehra, Advocate,
for respondent No.6.

Mr. Narender Hooda, Sr. Advocate with
Mr. Praveen Gupta, Advocate,
for respondent No.7.

P.B. Bajanthri, J.

1. In the instant writ petition, petitioner has sought for the following reliefs:-

- “i. summon the entire record of the case;*
- ii. issue a writ in nature of mandamus directing the respondent to make appointment to the post of Technical Director in the Haryana Power Utilities strictly in*

accordance with the Notification dated 10.02.2015 (P-1) issued by the State Government after considering the joint seniority of Chief Engineers in the different Corporations as per law;

iii. issue a writ of mandamus directing the respondent to consider and appoint the petitioner to the post of Technical Director of the Haryana Power Utilities, as he is the senior most working Chief Engineer in the department and fully eligible for appointment;

iv. to vii. xx xx xx xx”

2. The Haryana State Electricity Board (for short “HSEB”) was reconstituted as Haryana Vidyut Parsaran Nigam Limited (for short “HVPNL”) on 14.08.1998. Thereafter, on 01.07.1999 HVPNL further reconstituted Uttar Haryana Bijli Vitran Nigam Limited (for short “UHBVNL”) and Dakshin Haryana Bijli Vitran Nigam Limited (for short “DHBVNL”). Thus, three Nigams were constituted on 01.07.1999, namely, HVPNL, UHBVNL and DHBVNL. These three Nigams are separate entity and it has its own Memorandum of Association/Article of Association. Six posts of Technical Directors were created in order to fill up in the aforesaid Nigams. On 10.07.2014, State of Haryana issued a notification relating to filling up future vacancy of Technical Director in the Haryana Power Utilities (for short “HPU”). Method of appointment is that Technical Director as Whole Time Director in each HPUs would be appointed by the State Government through open competition by issuing press advertisement in terms of qualification and experience stated in notification dated 10.07.2014 (Annexure P/4).

3. On 12.09.2014, State of Haryana modified notification dated 10.07.2014 (Annexure P/4) while issuing notification to the extent of filling up post of Technical Director in each HPUs reads as under:-

“Haryana Government

Power Department

Notification

The 12th September, 2014

No. 3/11/2009-1P – The Governor of Haryana is pleased to notify partial modification in earlier Notification No. 3/11/2009-1P, dated 10.7.2014 as under:-

- 1. One post of Technical Director in each HPUs be filled up through internal candidate by following a selection procedure.*
- 2. The second post be filled through open advertisement wherein both external and internal candidate would be able to apply.*
- 3. The other terms & conditions remains the same.*

Devender Singh

Principal Secretary to Government Haryana,

Power Department”

4. On 10.02.2015 while withdrawing notifications dated 10.07.2014 (Annexure P/4) and 12.09.2014 (Annexure P/5) issued fresh procedure to fill up Technical Director as Whole Time Directors on the Boards of Directorate of HPUs, namely, HVPNL, UHBVNL, DHBVNL and Haryana Power Generation Corporation Limited (for short “HPGCL”). Procedures are as under:-

“The Governor of Haryana is further pleased to order that the Technical Directors as Whole Time Directors in the aforesaid four Haryana Power Utilities would be appointed as per the following procedure:-

(i) *The two posts of Technical Directors each in the three Haryana Power Utilities, HVPNL, UHBVNL & DHBVNL will be filled up from amongst the eligible candidates on the basis of the Common Seniority of the Chief Engineers in these three Utilities;*

(ii) *The two posts of Technical Directors as Whole Time Directors in Haryana Power Generation Corporation Limited will be filled up on the basis of the seniority list of eligible Chief Engineers maintained in the HPGCL;*

(iii) *These appointments would be made on the basis of seniority-cum-merit principle;*

(iv) *The tenure of Technical Directors as whole Time Directors would be one year or the date of superannuation of the person concerned, whichever is later;*

(v) *If any of the Power Utility feels the need to need in attract talent from the open market in any specified field like Commercial Operations, Information Technology of any other held one additional post of a Director, with a tenure of two years may be created by the State Government from time to time.*

Detailed selection criteria will also be approved by the State Government separately as and when such a post is decided to be created for the Power Utility concerned”

On 02.03.2015 by executive order criteria of seniority-cum-merit was modified to merit-cum-seniority which is contrary to statutory law.

5. One Sh. J.B. Mudgal filed a writ petition seeking following reliefs in CWP No. 6284 of 2016:-

“(i) issue a writ in the nature of mandamus directing the official respondents to appoint the petitioner on the

post of Director from the date the post is vacant and from the date other persons were appointed on the post of Director i.e. 8.4.2015 or in the alternative directions be issued to the respondents to promote the petitioner from the date junior to him i.e. Sh. Naresh Sardana has been appointed on the post of Director i.e. 19.3.2016.

(ii) to (v) xx xx xx”

During pendency of the aforesaid writ petition, petitioner in the present petition sought for directions to the respondents to make appointment to the post of Technical Director in HPUs strictly in accordance with notification dated 10.02.2015 (Annexure P/1) issued by the State Government. As per the Notification dated 10.02.2015, two posts of Technical Directors each in three HPUs like HVPNL, UHBVNL and DHBVNL would be filled up from amongst the eligible candidates on the basis of common seniority of the Chief Engineers in the aforesaid three Utilities. It was also stated that post of Technical Directors would be filled up on the basis of seniority list of eligible Chief Engineers maintained in the HPGCL. It was also clarified that such appointment would be made on the basis of seniority-cum-merit principle. In this background, Sh. J.B. Mudgal and the present petitioner – Bhim Sain Pahuja filed writ petitions.

6. Petitioner – Bhim Sain Pahuja contended that process of appointment of Technical Director is pending consideration and petitioner is due for retirement on 28.02.2017 in the cadre of Chief Engineer. Therefore, in order to fill up Technical Director's post in HPUs is to be processed in accordance with Notification dated 10.02.2015 (Annexure P/1) while preparing combined seniority list of Chief Engineers of HPUs.

7. In CWP No. 6284 of 2016, State Government filed short reply by way of affidavit of Joint Secretary to Government of Haryana, Power Department and affidavit of Principal Secretary to Government of Haryana, Power Department on 13.01.2017 and 16.02.2017 respectively.

8. In the present petition, an affidavit of Principal Secretary to Government of Haryana, Power Department was filed on 17.02.2017 in which it was stated that process of selection and appointment to the posts of Director Technical is under active consideration from 30.05.2016 and there is a correspondence between the Government and UHBVNL & DHBVNL and relevant data are available on record in the month of October, 2016. It was also contended that post of Director Technical has not been filled up due to pendency of CWP No. 6284 of 2016 filed by Sh. J.B. Mudgal, Chief Engineer, DHBVNL. After noticing the contents of the affidavit dated 17.02.2017, this Court ordered that this Court has not passed any order to not to fill up the post of Director Technical and State and other Nigams. They have also not sought permission of this Court to fill up the post of Director Technical. Thus, an interim direction was given to the official respondents to complete the process of selection and appointment to the post of Director Technical before 28.02.2017 and directed to place the order on record on 01.03.2017. When the matter was listed on 01.03.2017, State counsel informed the Court that on 24.02.2017 (Annexure A-1) superseded notification dated 10.02.2015 relating to procedure to fill up Technical Directors' post and in terms of latest procedure to fill up Technical Directors' posts vide notification dated 24.02.2017 one Sh. Surinder Kumar Bansal – 6th respondent herein was

appointed as Technical Director on 27.02.2017. Taking into the above development between 22.02.2017 to 27.02.2017, this Court directed the respondent – State to file a short reply as to under what circumstances they have circumvented the earlier order of this Court dated 22.02.2017 and further ordered that notification dated 27.02.2017 appointing 6th respondent - Sh. Surinder Kumar Bansal, Chief Engineer, UHBVNL as Technical Director was stayed and also ordered that even if he has assumed the charge of the post, he shall not discharge the duties of post of Technical Director till next date. Thereafter, Sh. Surinder Kumar Bansal – respondent no.6 and one Sh. Dalip Singh – respondent no.7 got themselves impleaded which were allowed. In this background, question for consideration is whether Technical Director's post is required to be filled up in terms of notification dated 10.02.2015 (Annexure P/1) or in terms of notification dated 24.02.2017 (Annexure A-1).

9. Learned counsel for the petitioner submitted that in terms of notification dated 10.02.2015, official respondents commenced the process of selection and appointment to the posts of Technical Director in HPUs on 30.05.2016. There was internal correspondence between the Government, UHBVNL and DHBVNL and relevant data have been collected in the month of October 2016 by the official respondents. Due to pendency of CWP No. 6284 of 2016 filed by Sh. J.B. Mudgal, selection process was not finalized. This Court noticed on 22.02.2017 with reference to affidavit of Principal Secretary to Government of Haryana, Power Department that matter relating to filling up of Technical Director's posts was under process and it is pending consideration and the

same has not been finalized in view of pendency of CWP No. 6284 of 2016. These factual aspects were taken note of by this Court and directed the official respondents to complete the process of selection and appointment to the post of Director Technical before 28.02.2017 and to produce order of appointment on 01.03.2017. Instead of complying the interim direction dated 22.02.2017 read with notification dated 10.02.2015, official respondents have circumvented interim direction and pendency of litigation like CWP No. 6284 of 2016 and present petition, proceeded to issue fresh procedure to fill up Technical Director's post by replacing 10.02.2015 notification vide notification dated 24.02.2017. Once the process of selection to a particular post has already commenced with reference to existing rules/executing orders and procedure, selecting authority cannot amend or change the procedure in the midst of selection process. Undisputedly, in the present case, process of selection to the Technical Director post is with reference to procedure dated 10.02.2015 and it has commenced on 30.05.2016 as it is evident from the affidavit read with record. The official respondents have not disclosed their mind that there is proposal to replace notification dated 10.02.2015 insofar as the procedure to fill up Technical Director's posts even on 22.02.2017 the date on which this Court has directed the official respondents to complete the process of selection to the posts of Technical Director. Replacing notification dated 10.02.2015 is only on 24.02.2017 i.e. subsequent to 22.02.2017 the date on which this Court directed them to complete the process of selection. Thus, there is clear violation of interim direction in order to overcome interim direction and to accommodate 6th respondent.

Respondent-Government have replaced notification dated 10.02.2015 by issuing fresh procedure on 24.02.2017. Hence, whatever procedure to fill up Technical Director posts commenced on 30.05.2016, the same shall have to be completed as per procedure – Notification dated 10.02.2015 (Annexure P/1). Even assuming that 10.02.2015 notification is replaced as on 24.02.2017 procedure to fill up Technical Director posts is notification dated 10.02.2015 since process of selection and appointment has commenced on 30.05.2016. Therefore, whatever notification dated 24.02.2017 would be a prospective and procedure laid down in 24.02.2017 notification would apply to future vacancies. Once the process of selection to the post of Technical Director has already commenced on 30.05.2016 while collecting candidates' data and other eligibility, respondents cannot resort to new procedure while winding up notification dated 10.02.2015 on 24.02.2017. Learned counsel for the petitioner further submitted that prior to 22.02.2017, there is no conscious decision of the State Government in respect of change of procedure to fill up the posts of Technical Directors to the extent that common seniority as Assistant Engineers in HPUs would be taken into consideration. In the absence of conscious decision, procedure dated 10.02.1015 which was in vogue and being proceeded to fill up the post of Technical Director on 30.05.2016 is to be adhered. Thus to over reach interim direction dated 22.02.2017 and pendency of this litigation, official respondents have issued notification dated 24.02.2017 and consequently, 6th respondent has been appointed. Therefore, official respondents' action is highly arbitrary

and illegal. The above action of the official respondents is to defeat the petitioner's claim in the present petition.

10. Per contra, learned State counsel submitted that as per notification dated 10.02.2015 (Annexure P/1), common seniority of Chief Engineers has not been prepared and notified, therefore, question of operating notification dated 10.02.2015 do not arise. Government felt that procedure laid down in notification dated 10.02.2015 is incorrect, consequently, slight procedure is required to be changed to the extent of common seniority list of Chief Engineers with reference to entry into the cadre of Assistant Engineer. In other words, length of service of a Chief Engineer is required to be taken into consideration with reference to entry into Assistant Engineer cadre. To that effect, on 24.02.2017 new procedure has been issued. It was further submitted that there will be heart burning amongst Chief Engineers since Chief Engineers will be chosen of three Nigams, wherein one of the Engineer may be junior to the other one in the cadre of Assistant Engineer who has been promoted to Chief Engineer earlier to the senior with reference to length of service. Therefore, in order to streamline Assistant Engineer's length of service of Chief Engineer is required to be taken into consideration. It was also submitted that Government have not circumvented the interim direction of this Court dated 22.02.2017. Petitioner is junior to 6th respondent in the cadre of Assistant Engineer, even though petitioner was appointed to the post of Chief Engineer earlier to 6th respondent. Thus, 6th respondent has been chosen and appointed to the post of Technical Director on 27.02.2017. In view of later developments, instant petition do not survive

for consideration. Learned State counsel further submitted that both notifications dated 10.02.2015 and 24.02.2017 were issued in the Haryana Government Gazette on 10.02.2015 and 25.02.2017 respectively.

11. Learned counsel for the 6th respondent submitted that Government has every power to amend procedure to fill up the post of Technical Director. Since Government was not satisfied with notification dated 10.02.2015, thus proceeded to replace said notification by issuing notification dated 24.02.2017 by slightly modifying procedure to the extent of Chief Engineers' seniority list to that of their common seniority as Assistant Engineers issued in the erstwhile HSEB. It was further contended that operation of 10.02.2015 procedure is not stipulated with any time bound that Technical Director's post is required to be filled up within a year etc. so as to contend that official respondents have not filled up Technical Director's post under 10.02.2015 notification, therefore, whatever the vacancies of Technical Directors arose between 10.02.2015 to 24.02.2017 is required to be filled up as per notification dated 10.02.2015. The principle laid down in the decision of Supreme Court in the case *Y.V. Rangaiah and others vs. J. Sreenivasa Rao and others, (1983) 3 SCC 284* do not apply to the present case. This Court and Supreme Court time and again distinguished Y.V. Rangaiah's case in the following cases:-

1. **Dr. K. Ramulu vs. Dr. S. Suryaprakash Rao (1997) 3 SCC 59;**
2. **State of Punjab and others vs. Arun Kumar Aggarwal and others, (2007) 10 SCC 402;**

3. **Deepak Agarwal and another vs. State of Uttar Pradesh and others, (2011) 6 SCC 725;**
4. **State of Tripura and others vs. Nikhil Ranjan Chakraborty and others, 2017 (1) Scale 599;**
5. **CWP No. 5534 of 2008 – Gurmeet Singh and others vs. The State of Punjab and others, decided on 29.03.2010;**
6. **Punjab National Bank, formerly New Bank of India Officers Association Moga, through its President Shri S.K. Palta vs. Union of India, through the Secretary, Ministry of Finance (Banking Division), New Delhi and others, 2012(4) SCT 91;**

Learned counsel for 6th respondent further submitted that 6th respondent could be adjusted against 2nd vacancy of Technical Director which accrued on 06.04.2017 with reference to notification dated 24.02.2017. If notification dated 24.02.2017 is implemented, in that event 6th respondent is senior in the cadre of Assistant Engineer. Learned counsel for 6th respondent further submitted that notification dated 10.02.2015 has not been notified in the gazette, consequently, the same cannot be given effect. Thus, petitioner has not made out a case so as to interfere with the appointment of 6th respondent to the post of Technical Director.

12. Learned counsel for 7th respondent while reiterating the arguments advanced by 6th respondent's counsel submitted that between July 1999 till 10.02.2015, official respondents while filling up the posts of Technical Director have adopted the procedure on the basis of common seniority as Assistant Engineers among the HPUs, HVPNL, UHBVNL

and DHBVNL, therefore, official respondents have only rectified the error committed in the notification dated 10.02.2015 while issuing notification dated 24.02.2017. Thus, petitioner has not made out a case so as to seek for a direction to fill up the posts of Technical Directors strictly in accordance with Annexure P/1 notification dated 10.02.2015.

13. Heard learned counsel for the parties.

14. Core issue in the present petition is whether post of Technical Director is required to be filled up with reference to notification dated 10.02.2015 (Annexure P/1) or notification dated 24.02.2017 (Annexure A-1).

15. Petitioner's contention is that process to fill up post of Technical Director was in vogue as on 30.05.2016 necessary material have already been collected through HPUs like particulars of eligible Chief Engineers of HPUs. Therefore, in the midst of selection process official respondents cannot resort to new procedure by replacing notification dated 10.02.2015 by issuing notification dated 24.02.2017. As on 22.02.2017 the date on which interim direction was issued by this Court to complete the selection process by 28.02.2017 and report the same on 01.03.2017, therefore, issuance of notification dated 24.02.2017 to fill up post of Technical Director would be for future vacancies and not the vacancies which were already existing between 10.02.2015 to 24.02.2017 for which process of selection has already commenced. In support of this contention, petitioner's counsel relied on ***Y.V. Rangaiah's case*** (supra) is applicable, so also ***K. Manjusree vs. State of Andhra Pradesh and another*** reported in **(2008) 3 SCC 512 (Para 18)** and

Hemani Malhotra vs. High Court of Delhi reported in **(2008) 7 SCC 11**
(Paras 14 and 15).

16. On the other hand, learned State counsel and counsel for respondents no.6 and 7 contended that in order to proceed with notification dated 10.02.2015 common seniority of Chief Engineers of HPUs has not been prepared and published. Thus, question of implementing notification dated 10.02.2015 do not arise. It was submitted that under notification dated 24.02.2017 there is slight change in mode of filling up post of Technical Director to the extent “seniority-cum-merit” to “merit-cum-seniority” and seniority is with reference to entry into the cadre of Assistant Engineers in the respective HPUs. Thus, the 6th respondent who entered the post of Assistant Engineer earlier to petitioner has been chosen for appointment to the post of Technical Director on 27.02.2017. Non-preparation of Chief Engineers’ seniority list as per notification dated 10.02.2015 is a lacuna committed by appointing authority to the post of Technical Director. On the other hand, Sh. Anurag Rastogi, Principal Secretary to Government of Haryana, Power Department has filed an affidavit in CWP No. 6284 of 2016 on 16.02.2017 (Annexure P/12) in which he has extracted service particulars of petitioner, 6th & 7th respondents and others in which it is evident that petitioner entered Chief Engineers’ cadre earlier to respondents no.6 and 7. Since notification dated 10.02.2015 provides for common seniority of Chief Engineers, seniority list of eligible Chief Engineers maintained in the HPGCL and seniority-cum-merit principle, therefore, even non-preparation of common seniority list of Chief Engineers may not be

hurdle for operating notification dated 10.02.2015 since service particulars of all the Chief Engineers is evident who entered Chief Engineer post on what date etc. Moreover, from 10.02.2015 till 16.02.2017 the date on which affidavit has been filed, combined Chief Engineers' seniority list could have been prepared and notified. Therefore, contention of State respondent that there is no combined seniority list of Chief Engineers, would not be hurdle for operating notification dated 10.02.2015. That apart process of selection was already commenced on 30.05.2016 as admitted in one of the affidavit of the official respondents.

17. Learned counsel for the respondents submitted that from the date of creation of Technical Director's post, post is being filled up with reference to seniority of Assistant Engineer read with entry into Chief Engineer's post. 6th respondent had joined the post of Assistant Engineer earlier to the petitioner, therefore, rightly 6th respondent has been appointed. The above contention is not tenable for the reasons that notification dated 10.02.2015 do not speak of entry into Assistant Engineers' cadre is required to be taken into consideration. On the other hand, Chief Engineer's seniority is to be taken into consideration. Moreover post of Technical Director is not a promotional post to Chief Engineer so as to take length of service of an Engineer. Basic requirement is one must be in the cadre of Chief Engineer and criteria is seniority-cum-merit. Therefore, seniority in the cadre of Chief Engineer is to be taken. Hence, aforesaid contention is hereby rejected.

18. Learned counsel for the 6th respondent vehemently contended that ***Y.V. Rangaiah's case*** (supra) do not applicable in the present case for

the reasons that in ***Y.V. Rangaiah's case*** (supra), rule which was question for consideration was relating to time bound implementation of the rules, whereas in the present case, notification dated 10.02.2015 do not stipulate any time to fill up post of Technical Director. In support of the said contention, learned counsel for the 6th respondent relied on various decisions cited supra in para no.11 of this judgment. No doubt it is true that notification dated 10.02.2015 do not stipulate any time bound to fill up the post of Technical Director. At the same time, perusal of the records wherein process of selection to the post of Technical Director has already commenced and it is in vogue as admitted by the official respondents that process has commenced on 30.05.2016 while collecting various service particulars of the eligible Chief Engineers as well as other data by means of affidavit. Therefore, cited decisions on behalf of 6th respondent are distinguishable since process of selection has already commenced and in the midst of process of selection, official respondents have modified the criteria or replaced the criteria to fill up the post of Technical Director on 24.02.2017 while replacing notification dated 10.02.2015. Therefore, whatever vacancies which were available between 10.02.2015 to 24.02.2017 are required to be filled up as per the procedure laid down under notification dated 10.02.2015. Supreme Court in the case of ***K. Manjushree*** (supra) in para no.18 held as under:-

“18. The Rules did not prescribe any procedure for selection. When the posts were advertised, the only criterion for selection that was mentioned was that the selection will be done by holding a written examination followed by an interview. The manner of holding

written examinations and interviews, the marks for written examination and interview, whether the candidates should secure any minimum marks in the written examination and/or interview, were all yet to be decided.”

Supreme Court in the case of **Hemani Malhotra’s case** (supra) in para nos. 14 and 15 held as under:-

“14. It is an admitted position that at the beginning of the selection process, no minimum cut-off marks for viva voce were prescribed for Delhi Higher Judicial Service Examination, 2006. The question, therefore, which arises for consideration of the Court is whether introduction of the requirement of minimum marks for interview, after the entire selection process was completed would amount to changing the rules of the game after the game was played. This Court notices that in K. Manjusree v. State of A.P. (2008) 3 SCC 512 the question posed for consideration of this Court in the instant petitions was considered and answered in the following terms: (SCC pp. 526-27, para 33)

“33. The Resolution dated 30-11-2004 merely adopted the procedure prescribed earlier. The previous procedure was not to have any minimum marks for interview. Therefore, extending the minimum marks prescribed for written examination, to interviews, in the selection process is impermissible. We may clarify that prescription of minimum marks for any interview is not illegal. We have no doubt that the authority making rules regulating the selection, can prescribe by rules, the minimum marks both for written examination and interviews, or prescribe minimum marks for written

examination but not for interview, or may not prescribe any minimum marks for either written examination or interview. Where the rules do not prescribe any procedure, the Selection Committee may also prescribe the minimum marks, as stated above. But if the Selection Committee wants to prescribe minimum marks for interview, it should do so before the commencement of selection process. If the Selection Committee prescribed minimum marks only for the written examination, before the commencement of selection process, it cannot either during the selection process or after the selection process, add an additional requirement that the candidates should also secure minimum marks in the interview. What we have found to be illegal, is changing the criteria after completion of the selection process, when the entire selection proceeded on the basis that there will be no minimum marks for the interview.”

From the proposition of law laid down by this Court in the abovementioned case it is evident that previous procedure was not to have any minimum marks for viva voce. Therefore, prescribing minimum marks for viva voce was not permissible at all after the written test was conducted.

15. *There is no manner of doubt that the authority making rules regulating the selection can prescribe by rules the minimum marks both for written examination and viva voce, but if minimum marks are not prescribed for viva voce before the commencement of selection process, the authority concerned, cannot either during the selection process or after the selection process add an additional requirement/qualification that the candidate should also secure minimum marks in the interview. Therefore, this Court is of the opinion that prescription of*

minimum marks by the respondent at viva voce test was illegal.”

In view of aforesaid legal position, cited decisions by the 6th respondent are distinguishable with reference to facts of the present case read with the records.

19. To evident that process has commenced, page nos.92 to 94 of file of the Department which reads as under:-

“5. The post of Technical Director in HVPNL/UHBVNL/DHBVNL has been appointed in April/2015, March/2016 and May/2016 from existing Chief Engineers in HVPNL/UHBVNL/DHBVNL as per combined seniority of Assistant Engineers/Electrical in the erstwhile HSEB.

6. On the direction of the Hon’ble Punjab & Haryana High Court vide order dated 17.12.2016 (F/E) in CWP No. 6284 of 2016 filed by Sh. J.B. Mudgul, CE/DHBVNL, an affidavit after getting it vetted from the AG and after getting it approved from PS/Power-cum-Chairman, HVPNL/HPGCL was filed by the Joint Secretary/Power on 13.01.2017 (F/F). Thereafter, in pursuance to the Hon’ble Punjab & Haryana High Court order dated 7.02.2017 (F/G), an affidavit was again filed by PS/Power on dated 16.02.2017 (F/H).

Order dated 17.12.2016 (F/E)

“Let the Additional Chief Secretary, Power Department, Haryana file an affidavit explaining his decision dated 02.03.2015 and as to how he introduced the principle of ‘merit-cum-seniority’ for appointment of Technical Directors in the three HPUs. He would also explain why he failed to notice and deal with notification dated

10.02.2015 issued by him earlier where in Clause (iii), two posts of Technical Directors in each of the three HPUs was to be made on the principle of 'seniority-cum-merit'. The question arising is; whether the Additional Chief Secretary could by an executive order passed by him override the notification issued by the Government and change the principle of appointment from 'seniority-cum-merit' to 'merit-cum-seniority' which is a paradigm shift. The petitioner is before the Court supporting the decision dated 02.03.2015, which the petitioner asserts has not been complied with in toto by the Coordination Committee constituted by the Government to appoint six Technical Directors in the three HPUs.

In the affidavit, it would also be explained as to how the criteria of one year service as Chief Engineer was introduced as a condition of eligibility, when the executive action cannot prima facie be traced to legislative sanction; and still further was the volte face ever approved by the State Government. He would also explain whether he was exercising delegated powers of the State and was sub-delegating his powers to the Coordination Committee and whether this is legally permissible.

Let the affidavit be filed within three weeks.

List again on 07.02.2017.

Mr. Sunil Nehra states that his client is due to superannuate on 31.12.2016 and by reason of retirement, he should not be deprived of his

legitimate and retrospective rights, in case the petition succeeds and retirement should not be an impediment in the future and on the present litigation.

Apart from the above, the Additional Chief Secretary would also disclose in the affidavit, whether final seniority lists of Chief Engineers have been issued in the three HPUs before the appointment process was initiated.”

Order dated 7.02.2017 (F/G)

“Pursuant to the order dated 17.12.2016 vide which the Additional Chief Secretary was directed to file affidavit containing the details stated in the order dated 17.12.2016, whereas, Ms. Vibha Midha, Joint Secretary to Government of Haryana has filed an affidavit. When there is specific direction to the Additional Chief Secretary, under what capacity, Joint Secretary has filed the affidavit. It shows that there is a total non-application of mind in filing the affidavit and shirking responsibility. Therefore, why exemplary cost should not be imposed for violating the order dated 17.12.2016 by the Additional Chief Secretary as well as Joint Secretary in not understanding the order of this Court dated 17.12.2016.

At this stage, learned State counsel seeks further time to seek instructions in the matter.

List this matter on 22.2.2017.”

7. *As per available record with Administration Wing/HVPNL, the seniority of the existing Chief Engineers is as under:-*

Seniority of Chief Engineer in HVPNL / UHBVNL /
DHBVNL as per promotion to the post of Chief
Engineer

Sr. No	Name of officer & Designation	Date of promotion as Chief Engineer	Date of joining the post of Chief Engineer	Date of retirement	Name of Utility
1.	Bhim Sain Pahuja	06.08.2014 (Deemed date w.e.f 30.04.2014)	07.08.2014	28.02.2017	HVPNL
2.	Sanjeev Kumar Bansal	30.04.2014	30.04.2014	31.10.2021	HVPNL
3.	Dalip Singh	30.06.2014	01.07.2014	31.07.2017	DHBVNL

Seniority of Chief Engineer in HVPNL / UHBVNL /
DHBVNL as per combined seniority of
AEs/Electrical in erstwhile HSEB

Sr. No.	Name of officer & Designation	DOB	Date of joining the post of Chief Engineer	Date of retirement	Sty. No. As AE	Name of Utility
1.	Surinder Kumar Bansal	20.12.61	17.04.2015	31.12.2019	721	UHBVNL
2.	Dalip Singh	15.07.59	30.06.2014	31.07.2017	723	DHBVNL

8. A number of representations have been received as per details given below:-

i) Representation from HVPNL Engineers (F/I) regarding appointment of Technical Directors from the senior most Chief Engineer in HVPNL.

ii) Representation from Sh. B.S. Pahuja (F/J) for appointment of Technical Director being senior most Chief Engineer in HVPNL / UHBVNL / DHBVNL as per notification dated 10.02.2015.

iii) Representation of Sh. Surinder Kumar Bansal and Sh. Dalip Singh (F/K) for appointment as Technical Director on the basis of combined seniority of AEs and representation (F/K-I) regarding not to grant extension to Sh. J.K. Juneja, Director/Technical, HVPNL.

iv) *Representation of Shri K.D. Bansal, President, Haryana Power Engineers Association (F/L) vide which it is requested that Technical Director should retire on the date of superannuation i.e. 58 years of service in accordance with the policy of GOH and in the scale of EIC and no officer of any cadre including Director should be given extension.*

9. *Shri Ashwani Bhardwaj, Advocate vide letter dated 22.02.2017 (F/M) has stated that during the course of hearing and considering the affidavit provided by Respondent, courts has directed the respondent to appoint the Technical Director against the vacant post before 28.02.2017 and to intimated the same, matter is listed now 01.03.2017. My client Mr. B.S. Pahuja CE is senior most amongst the CE in HPUs and appoint him as Technical Director in compliance of the order passed in the above said case.*

In view of the position explained in above office note, following is submitted for consideration and orders of Principal Secretary/Power-cum-Chairman, HVPNL / HPGCL please:-

- i) *To initiate the process for appointment of Technical Director against the vacant post of Technical Director in DHBVNL keeping in view the Hon'ble High Court order dated 22.02.2017 (F/A) vide which it has been directed to complete the process of selection and appointment to the post of Technical Director before 28.02.2017 and place the same on 1.03.2017.*
- ii) *The HVPNL Administration may be authorized to process the case for appointment of*

*Technical Director in HVPNL / UHBVNL /
DHBVNL.”*

So as on 23.02.2017, process of selection and appointment to the post of Technical Director is with reference to notification dated 10.02.2015. On 24.02.2017 when file was perused by Principal Secretary, Power, he suggested for change of selection criteria to the extent “seniority-cum-merit” to that of “merit-cum-seniority” and so also Assistant Engineers’ seniority (entry into cadre) are required to be amended. Based on the suggestions of the Principal Secretary, Power on 24.02.2017 official respondents proceeded to issue amended notification dated 24.02.2017 by replacing notification dated 10.02.2015. Official respondents before going for amendment of notification dated 10.02.2015, side track the interim directions of this Court passed in present writ petition on 22.02.2017 where after perusal of affidavit of the Principal Secretary dated 17.02.2017 directed official respondents to complete the process of selection and appointment to the posts of Director Technical before 28.02.2017 and place the same on 01.03.2017 with reference to fact that petitioner is attaining age of superannuation and retiring on 28.02.2017. Thus, official respondents have circumvented the interim directions of this Court dated 22.02.2017 in order to avoid consideration of petitioner’s name and to pass favourable order in favour of 6th respondent in a jet speed and to defeat the present petition. Official respondents have issued notification dated 24.02.2017 itself the date on which Principal Secretary, Power, propose for amendment. Thereafter, it was notified in the gazette on 25.02.2017. Consequently, on 27.02.2017 6th respondent was appointed as Technical Director in terms of later notification dated

24.02.2017. Since mode of seniority-cum-merit is changed to merit-cum-seniority, while considering 6th respondent's name there should have been zone of consideration. Perusal of records it is evident that there is no merit assessment among Chief Engineers and straightaway 6th respondent has been appointed. The above action of the official respondent is crystal clear with a mala fide intention to favour the 6th respondent. Notification dated 10.02.2015 has been superseded by changing the selection criteria. If the State Government's intention was in public and administration interest, they could have moved an application between 23.02.2017 to 27.02.2017 in this petition apprising that they intend to change the criteria to fill up Technical Director's post from seniority-cum-merit to merit-cum-seniority in the Chief Engineers' cadre read with seniority in the cadre of Assistant Engineers. Thus, intention to change criteria is arbitrary when petition is pending. Therefore, in order to defeat petitioner's claim in a hurriedly changed the criteria. It must emphasized that when the Court intends a particular state of affairs to exist while in its scission of a lis that state of affairs is not only required to be maintained but it is presumed to exist till the Court order or direct otherwise. The Court in these circumstances has a duty, as also the right, to treat the action taken in disregard of the interim direction as having not taken place at all for its purpose. Supreme Court in the case of ***Pratap Singh vs. State of Punjab***, reported in ***AIR 1964 SC 72*** held as follows:-

“.....Constitution enshrines and guarantees the rule of law and Article 226 is designed to ensure that each and every authority in the State, including the Government, acts bona fide and within the limits of its power and we

consider that when a Court is satisfied that there is an abuse or misuse of power and its Jurisdiction is invoked, it is incumbent on the Court to afford justice to the individual.”

20. In view of above facts and circumstances, official respondents are directed to fill up the vacancies which were existing as on 23.02.2017 in terms of notification dated 10.02.2015. Thereafter, vacancies accrued on 06.04.2017 be filled up in accordance with notification dated 24.02.2017. 6th respondent's selection and appointment to the post of Technical Director is held to be void and it has to be reconsider, since there is no assessment of merit with reference to merit-cum-seniority principle as is evident from the records. In other words, there is no merit assessment among the Chief Engineers so as to pick the name of 6th respondent who is stated to be more merited. Thus only seniority of Assistant Engineer has been taken into consideration while ignoring merit-cum-seniority criteria. Whereas notification dated 24.02.2017 require merit-cum-seniority and seniority in the cadre of Assistant Engineer. Supreme Court in the case of ***U.V. Mahadkar vs. Subhash Anand Chavan and others***, reported in ***(2016) 1 SCC 536*** held as under:-

“12. It is well settled that there is a sharp distinction between “merit-cum-seniority” and “seniority-cum-merit”. In the former case, the merit shall have to be given preference over the seniority. It is only when the senior-most candidate has no merit and he is not suitable to be appointed on the selection post, merely because of seniority, then the Committees have to select a

meritorious candidate. The question as to the distinction between the two is no longer res integra.

13. *In the case of B.V. Sivaiah v. K. Addanki Babu, (1998) 6 SCC 720, while considering the principle of promotion on merit-cum-seniority and seniority- cum-merit, this Court held that the principle of merit-cum-seniority lays greater emphasis on merit and ability and seniority plays a less significant role. Seniority is to be given weight only when merit and ability are approximately equal.*

14. *The Constitution Bench of this Court in the case of Guman Singh vs. State of Rajasthan, (1971) 2 SCC 452, was considering a question as to whether promotion based on merit, as embodied in the Rajasthan Administrative Service Rules, 1954, is violative of Articles 14 and 16 of the Constitution. This Court held that:*

“33. We are unable to accept this contention. The State Government has taken a decision in 1965 that selection to the service and promotion have to be on the basis of merit and seniority-cum-merit. There can be no controversy that the main object in such matters is to serve public interest and not the personal interest of the members of the official group concerned. As stated by Leonard D. White in his Introduction to the Study of Public Administration, 4th Edn., p. 380: “The Public interest is best secured when reasonable opportunities for promotion exist for all qualified employees, when really superior civil servants, are enabled to move as rapidly up the promotion ladder as their merits deserve and as vacancies occur, and when selection for

promotion is made on the sole basis of merit. For the merit system ought to apply as specifically in making promotions as in original recruitment”.

15. *In Central Council for Research in Ayurveda & Siddha v. K. Santhakumari, (2001) 5 SCC 60, this Court, considering the similar question, held*

“6. The principle of merit-cum-seniority is an approved method of selection and this Court in Sant Ram Sharma v. State of Rajasthan, AIR 1967 SC 1910, held that promotion to “selection grade posts” is not automatic on the basis of ranking in the gradation list and the promotion is primarily based on merit and not on seniority alone. At p. 1914 of the judgment, it is stated as under: (AIR para 6)

“6.....The circumstance that these posts are classed as ‘selection grade posts’ itself suggests that promotion to these posts is not automatic being made only on the basis of ranking in the gradation list but the question of merit enters in promotion to selection posts. In our opinion, the respondents are right in their contention that the ranking or position in the gradation list does not confer any right on the petitioner to be promoted to selection post and that it is a well-established rule that promotion to selection grades or selection posts is to be based primarily on merit and not on seniority alone. The principle is that when the claims of officers to selection posts is under consideration, seniority should not be regarded except where the merit of the officers

is judged to be equal and no other criterion is, therefore, available.”

16. Reference may also be made to a decision of this Court in the case of *K. Samantaray v. National Insurance Co. Ltd.*, (2004) 9 SCC 286, observed as under:

“7. The principles of seniority-cum-merit and merit-cum-seniority are conceptually different. For the former, greater emphasis is laid on seniority, though it is not the determinative factor, while in the latter, merit is the determinative factor. In State of Mysore v. Syed Mahmood, AIR 1968 SC 1113 it was observed that in the background of Rule 4(3)(b) of the Mysore State Civil Services (General Recruitment) Rules, 1957 which required promotion to be made by selection on the basis of seniority-cum-merit; that the rule required promotion to be made by selection on the basis of “seniority subject to the fitness of the candidate to discharge the duties of the post from among persons eligible for promotion”. It was pointed out that where the promotion is based on seniority-cum-merit the officer cannot claim promotion as a matter of right by virtue of his seniority alone and if he is found unfit to discharge the duties of the higher post, he may be passed over and an officer junior to him may be promoted. But these are not the only modes for deciding whether promotion is to be granted or not.”

Thus official respondents have not followed one of the criteria of merit-cum-seniority principle while appointing 6th respondent to the post of Technical Director. Supreme Court in a reported decision viz. **(2015) 10**

SCC 241 held that where statute prescribed manner in which action is to be performed it must be carried out strictly in consonance thereto. Since appointment of 6th respondent to the post of Technical Director is declared as void with reference to records made available that later procedure laid down has not been adhered, the official respondents are directed to fill up such number of vacancies of Technical Directors with reference to 10.02.2015 notification as on 23.02.2017 and thereafter to fill up vacancies which were existed as on 24.02.2017 in terms of 24.02.2017 notification while considering names of the petitioner and respondents no.6 and 7 and other eligible Chief Engineers, if any, within a period of one month from today.

21. In terms of the above order, instant writ petition stands disposed of.

July 05, 2017
vkd

[P.B. Bajanthri]
Judge

Whether speaking / reasoned : Yes

Whether reportable : Yes