

IN THE HIGH COURT OF JUDICATURE AT PATNA
Letters Patent Appeal No.1946 of 2016

In
Civil Writ Jurisdiction Case No.10029 of 2016

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

... .. Appellant/s

Versus

1. The State of Bihar, through the Principal Secretary, Rural Works Department, Government of Bihar, Patna.
2. The Principal Secretary, Rural Works Department, Government of Bihar, Patna.
3. The Deputy Secretary, Rural Works Department, Government of Bihar, Patna.
4. The Special Secretary, Rural Works Department, Government of Bihar, Patna.
5. The Principal Secretary, Road Construction Department, Government of Bihar, Patna.
6. The Additional Secretary, Road Construction Department, Government of Bihar, Patna.
7. Sri Rampravesh Kumar Singh, son of name not known to the petitioner, at present posted as Technical Secretary to Engineer- in- Chief, Rural Work Department, Govt. of Bihar, Bailey Road, Patna.
8. Sri Krishna Nand Prasad, son of Yoganand Prasad, at present posted as Superintending Engineer, State Quality Coordinator, Rural Work Department, Govt. of Bihar, Bailey Road, Patna.
9. Sri Shankar Prasad Singh, son of Late Ram Bachan Singh, at present posted as Superintending Engineer, Rural Work Department, Works Circle, Samastipur.
10. Sri Binod Kumar Agrawal, son of Sri Ram Avtaar Agrawal, at present posted as Superintending Engineer, Rural Work Department, Works Circle, Siwan.
11. Sri Anil Kumar, son of Late Ram Prasad Sahu, at present posted as Superintending Engineer, Local Area Engineering Organization, Patna.
12. Sri Indu Bhushan Prasad Kushvanshi, son of Late Suresh Prasad



- Kushvanshi, at present posted as Superintending Engineer, Rural Work Department, Works Circle, Sitamadhi.
13. Sri Rajeev Ranjan Sharma, son of name not known to the petitioner, at present posted as Technical Secretary to Engineer cum Superintending Engineer, Rural Work Department, Works Circle, Kishanganj.
 14. Md. Sahid Hussain, son of Md. Anwar Alam, at present posted as O.S.D., Secretary Cell, Rural Work Department, Govt. of Bihar, Bailey Road, Patna.
 15. Md. Yusuf Zafar, son of Md. Baliuddin, at present posted as Technical Secretary to Superintending Engineer cum Superintending Engineer, Rural Work Department, Works Circle, Purnea.
 16. Sri Subhash Chandra, son of Sri Ram Chandra Prasad, at present posted as Technical Secretary to Superintending Engineer cum Superintending Engineer, Rural Work Department, Works Circle, Darbhanga.
 17. Sri Kamar Javed, son of Md. Abdul Gaffar, at present posted as Technical Secretary to Superintending Engineer cum Superintending Engineer, Rural Work Department, Works Circle, Sasaram.
 18. Md. Riassuddin, son of Md. Sahabuddin, at present posted as Executive Engineer, Monitoring cum Evaluation, Office of the Chief Engineer- 4, Rural Work Department, Govt. of Bihar, Bailey Road, Patna.
 19. Md. Kaiser Rasheed, son of Dr. S.K. Rahamtullah, at present posted as Technical Secretary to Superintending Engineer cum Superintending Engineer, Rural Work Department, Works Circle, Chapra.
 20. Sri Praveen Kumar Thakur, son of Late Jagdish Narayan Thakur, at present posted as Executive Engineer, Rural Work Department, Kharagpur, Tarapur and Holding Additional Charge of Superintending Engineer, Rural Works Department, Works Circle, Munger.
 21. Sri Loknath Singh, son of name not known to the petitioner, at present posted as Technical Secretary to Superintending Engineer cum Superintending Engineer, Rural Work Department, Works Circle, Bhagalpur.

... .. Respondent/s

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with



Letters Patent Appeal No. 1951 of 2016

In

Civil Writ Jurisdiction Case No.9962 of 2016

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

... .. Appellant/s

Versus

1. The State of Bihar through Chief Secretary.
2. The General Administrative Department, Government of Bihar through its Principal Secretary, Old Secretariat, Patna.
3. The Rural Works Department, Government of Bihar, Patna through the Secretary, Vishweshwaraiya Bhawan, Bailey Road, Patna.
4. Special Secretary, Rural Works Department, Government of Bihar, Patna.
5. The Road Construction Department, Government of Bihar, Patna through the Secretary, Vishweshwaraiya Bhawan, Bailey Road, Patna.
6. The Water Resources Department, Government of Bihar, Patna through the Secretary, Sichai Bhawan, Patna
7. The Bihar Public Service Commission, through its Secretary, Bailey Road, Patna.
8. Sri Ram Pravesh Kumar Singh, Son of not known, posted as Technical Secretary to Engineer in Chief, Rural Works Department, Vishweshwaraiya Bhawan, Bailey Road, Patna.
9. Sri Krishna Nand Prasad, Son of Late Yoganand Prasad, posted as Superintending Engineer, State Quality Coordinator, Rural Works Department, Bailey Road, Patna.
10. Sri Shankar Prasad Singh, Son of Late Ram Bachan Singh, posted as Superintending Engineer, Rural Works Department Works Circle, Samastipur.



11. Sri Binod Kumar Agrawal, Son of Sri Ram Avtaar Agrawal, posted as Superintending Engineer, Rural Works Department Works Circle, Siwan.
12. Sri Anil Kumar, Son of Late Ram Prasad Sahu, posted as Superintending Engineer, Local Area Engineering Organisation, Planning and Development Department, Patna.
13. Sri Indu Bhushan Prasad Kushvanshi, son of Late Suresh Prasad Kushvanshi, posted as Superintending Engineer, Rural Works Department, Works Circle, Sitamadhi.
14. Sri Rajeev Ranjan Sharma, son of not known, posted as Technical Secretary to Superintending Engineer cum Superintendent Engineer, Rural Works Department, Works Circle, Kishanganj.
15. Md. Sahid Hussain, son of Md. Anwar Alam, posted as O.S.D., Secretary Cell, Rural Works Department, Patna.
16. Md. Yusuf Zafar, son of Md. Baliuddin, posted as Technicla Secretary to Superintending Engineer cum Superintending Engineer, Rural Works Department, Works Circle, Purnea.
17. Sri Subhash Chandra, son of Sri Ram Chandra Prasad, posted as Technical Secretary to Superintending Engineer cum Superintending Engineer, Rural Works Circle, Darbhanga.
18. Md. Kamar Javed, son of Md. Abdul Gaffar, posted as Technical Secretary to Superintending Engineer cum Superintending Engineer, Rural Works Circle, Sasaram.
19. Md. Riazuddin, son of Md. Sahabuddin, posted as Executive Engineer, Monitoring cum Evaluation office of the Chief Engineer-4, Rural Works Department, Vishweshwaraiya Bhawan, Bailey Road, Patna.
20. Md. Kaiser Rasheed, son of Dr. S.K. Rahamatullah, posted as Technical Secretary to Superintending Engineer cum Superintending Engineer, Rural Works Department, Works Circle, Chapra.
21. Sri Praveen Kumar Thakur, son of Late Jagdish Narayan Thakur, posted as Executive Engineer, Rural Works Department, Kharagpur, Tarapur and holding Additional Charge of Superintending Engineer, Rural Works Department, Works Circle Munger.
22. Sri Dhruv Ji Prasad, son of Late Shankar Prasad, posted as Executive Engineer, Rural Works Department, Works Division, Kishanganj-2

... .. Respondent/s



Appearance :

(In Letters Patent Appeal No. 1946 of 2016)

For the Appellant/s	:	Mr. Ashish Giri, Advocate
For the State	:	Mr. Manish Kumar, A.C. to AAG 6
For the Respondent/s	:	Mr. Bindhyachal Singh, Sr. Advocate Mr. Janmejy Giridhar, Advocate

(In Letters Patent Appeal No. 1951 of 2016)

For the Appellant/s	:	Mr. Ashish Giri, Advocate
For the State	:	Mr. Manish Kumar, A.C. to AAG 6
For the Respondent/s	:	Mr. Bindhyachal Singh, Sr. Advocate Mr. Janmejy Giridhar, Advocate

CORAM: HONOURABLE THE CHIEF JUSTICE

and

HONOURABLE MR. JUSTICE PARTHA SARTHY

C.A.V. JUDGMENT

(Per: HONOURABLE MR. JUSTICE PARTHA SARTHY)

Date : 25-09-2023

1. Heard learned counsels for the appellants and learned counsel for the respondents.

2. The two appeals ie. LPA no.1951 of 2016 which arises from CWJC no. 9962 of 2016 and LPA no.1946 of 2016 which arises from CWJC no. 10029 of 2016, both having been dismissed by a common judgment dated 28.9.2016, have been taken up together for adjudication.

3. In both the cases the writ petitioners-appellants have challenged the final gradation list relating to the post of Executive Engineer and above of the Bihar Engineering Service (Civil) Class- I services contained in notification no. 6716 dated 1.6.2016 issued under the signature of the Special Secretary, Rural Works Department, Government of Bihar. The appellants



have also prayed that while fixing the seniority in the cadre of Executive Engineer which is in the Bihar Engineering Service ('BES' in short) Class-1 service, the service rendered in any other class/cadre cannot be considered. A further prayer is made to direct the respondents to re-fix the seniority of the appellants by considering the period in service rendered in that cadre alone and for other reliefs.

4. The case of the appellants in LPA no.1951 of 2016 are as follows:

(i) The appellant no.1 was appointed as an Assistant Engineer (Civil) in the year 1985 in the Road Construction Department, Government of Bihar. He was promoted as Executive Engineer, Road Construction Department (BES Class-I service) in the year 1993 and was further promoted to the post of Superintending Engineer on 23.9.2006.

(ii) The appellant no.2 was appointed as an Assistant Engineer in the year 1987 in the Road Construction Department, Government of Bihar. He was promoted as Executive Engineer in the year 1996 and was further promoted as Superintending Engineer by notification dated 30.7.2008.

(iii) The appellant no.3 was appointed as an Assistant Engineer



in the year 1989 in the Water Resources Department, Government of Bihar. He was promoted as an Executive Engineer in the year 1999 w.e.f. 1997 and was subsequently promoted as Superintending Engineer in the year 2009.

5. The sole appellant in LPA no.1946 of 2016 was promoted on the post of Executive Engineer by notification dated 27.8.1996 and was subsequently promoted as Superintending Engineer in the Road Construction Department, Government of Bihar on 30.7.2008.

6. It is the case of the appellants that in preparing the gradation/seniority list in relation to BES Class-II, which consists of the Assistant Engineers from amongst the promotees from the Bihar Subordinate Engineering Service, the services rendered in the Bihar Subordinate Engineering Service is not taken into consideration. Similarly, while preparing the gradation/seniority list in the BES Class-I (which consists of the Executive Engineer, the Superintending Engineer, the Chief Engineer and the Engineer-in- Chief) the service rendered in the BES Class-II cadre as Assistant Engineer is not to be taken into consideration.

7. The respondents in the year 2014 vide



notification dated 13.11.2014 came out with a provisional gradation list in BES Class-I services which was prepared on the basis of the date of appointment by way of promotion to the respective post on BES Class-I service. The service rendered in the BES Class-II service was not considered. Although the said provisional gradation list was in accordance with law and should have been made final, another provisional gradation list was prepared and objections invited vide letter dated 6.5.2016. Learned counsel for the appellants submits that the gradation list has not been prepared on the basis of the date of joining in BES Class-I service but has been prepared on the basis of date of entry in BES Class-II service in the post of Assistant Engineer. The same has resulted in persons junior to the appellants in the post of Superintending Engineer to be shown as seniors to them even though they have been appointed much subsequent to the appellants.

8. It is further submitted by learned counsel for the appellants that taking into consideration the definition of 'the service' as defined under Rule 2A of the Public Works Department Code ('PWD Code' in short) it is important to note that Rule 27 thereof provides that seniority in service is to be determined by the date of the officer's substantive appointment



to the service. Learned counsel lastly submits that though the resolution dated 28.1.2012 issued by the State Government may have been set aside by the learned Single Judge in the case of Sushil Kumar Singh vs State of Bihar (C.W.J.C no.19114 of 2012) and also affirmed by the L.P.A Bench, however the appeal against the same preferred by the State of Bihar is pending in the Hon'ble Supreme Court. Further, in view of these facts, the resolution contained in memo no.213 dated 7.6.2002 of the Government of Bihar which took back the earlier decision dated 30.1.1997 and approved the consequential seniority of the SC and ST candidates who got promotion on account of reservation, is applicable and as such the respondents have committed an error in preparation of the final gradation/seniority list. The final gradation list dated 1.6.2016 is contrary to law and fit to be set aside.

9. The contention of respondent nos.3 and 4 in their counter affidavit filed in the writ application was that the provisions of the PWD Code have been misinterpreted by the appellants and that the impugned gradation list has been prepared strictly in accordance with law. Referring to contents of the letter no.4800 dated 1.4.2016 issued under the signature of the Additional Secretary, General Administration Department,



Government of Bihar it is submitted that pursuant to the order passed in CWJC no. 19114 of 2012 (Sushil Kumar Singh vs State of Bihar) whereby the resolution dated 21.8.2012 was set aside, a decision was taken as contained in letter dated 1.4.2016 that till further orders, seniority on the higher post would be given as per the seniority position of the person in the feeder/basic post. Thus it was submitted that the gradation list having been prepared strictly in accordance with the latest circular as contained in the letter dated 1.4.2016, there was no illegality in the same and the writ application be dismissed.

10. A separate counter affidavit was filed on behalf of the private respondents submitting that so far as the use of the term 'substantive appointment' in Rule 27 of the PWD Code is concerned, the same is applicable for direct recruitment only. The issue had been settled by the Hon'ble Supreme Court in the case of **S. Panneer Selvam and others vs Government of Tamil Nadu and anr.**; (2015) 10 SCC 292 wherein it was held that seniority is to be counted on the basis of the respective seniority in the feeder/entry level post of Assistant Engineer. It was submitted that in view of the law settled by the Hon'ble Supreme Court as also the guidelines contained in letter dated 1.4.2016 of the General Administration Department, the private



respondents had regained their seniority as per the 'catch-up' rule. The final gradation list has been prepared in accordance with the law laid down by the Hon'ble Supreme Court in the case of **N. Nagaraj and others vs Union of India**; (2006) 8 SCC 212, there is no illegality in the gradation list prepared and thus the case be dismissed.

11. CWJC no. 10029 of 2016 was filed by the sole petitioner therein praying for quashing the final gradation list published vide memo no.6717 dated 1.6.2016 under the signature of the Special Secretary, to direct the respondents to revise the final gradation list and to put the petitioner at the appropriate place. CWJC no.9962 of 2016 was filed by the three petitioners therein also for quashing the final gradation list dated 1.6.2016 in relation to post of Executive Engineer, to declare that the seniority list in relation to Executive Engineer and above be prepared on the basis considering the period of service rendered in the cadre of Executive Engineer (as it is a different cadre of BES (Civil) Class I) only and to refix the seniority list accordingly. Both the writ applications having been dismissed by common judgment dated 28.9.2016, the instant appeals have been preferred.

12. Heard learned counsel for the appellants, learned



counsel for the State of Bihar, learned counsel for the private respondents and perused the material on record.

13. The appellants herein are aggrieved by the final gradation/seniority list of all the groups of BES (Civil) cadre as contained in memo no.6717 dated 1.6.2016 issued under the signature of the Special Secretary, Rural Works Department, Government of Bihar on the ground that as per their case, persons junior to the appellants have been shown as senior to them.

14. The departments under which the appellants herein are posted comes under the Public Works Department. As per the PWD Code, the establishment of the PWD consists of the following :

- (i) The Bihar Engineering Service, Class-I;
- (ii) The Bihar Engineering Service, Class-II;
- (iii) The Bihar Subordinate Engineering Service;
- (iv) Revenue Establishment;
- (v) Office Establishment;
- (vi) Petty establishment.



15. The BES Class-II cadre consists of only the post of Assistant Engineer. The BES Class-I cadre consists of the posts of the Executive Engineer, the Superintending Engineer, the Chief Engineer and the Engineer-in-Chief. Recruitment to the post of Executive Engineer, as per the PWD Code is by way of direct recruitment as well as by promotion from the BES Class-II cadre.

16. From the records of the case it transpires that the respondents came out with the provisional gradation list of both BES Class-I as also in BES Class-II vide notification dated 13.11.2014. This according to the appellants, was prepared on the basis of the date of appointment by way of promotion to the respective posts of BES Class-I service and not considering the service rendered in BES Class-II service. The respondents however did not proceed with the same and came out with a fresh provisional gradation list on 6.5.2016 inviting objections to the same within a period of ten days. The appellants filed their objections. By notification bearing no.6716 dated 1.6.2016 issued under the signature of the Special Secretary, Rural Works Department, Government of Bihar, the respondents came out with the final gradation list which was challenged in the writ application. The challenge having failed, the instant appeals



have been preferred against the common judgment of the learned Single Judge.

17. Article 16 of the Constitution of India deals with equality of opportunity in matters of public employment. Article 16(1) provides that there shall be equality of opportunity for all citizens in matters relating to employment for appointment to any office under the State. At the same time, Article 16(4) enables the State to make provisions for reservation of appointment on posts in favour of backward class of citizens which in the opinion of the State is not adequately represented. The judgement in the case of **Indra Sawhney vs Union of India**; 1992 Supp.(3) SCC 217 led to the Constitutional amendment in the year 1995 by which clause (4A) was added to Article 16. Article 16(4A) provides that nothing in the Article would prevent the State from making any provision for reservation in matters of promotion to any class or classes of posts in the services under the State in favour of SC and ST where in the opinion of the State, they are not adequately represented in the services under the State.

18. In the case of **Union of Indian and Ors. vs Virpal Singh Chauhan and Ors**; (1995) 6 SCC 684, the question arose as to whether a person belonging to SC or ST



category who is junior to another person in general category and gets an accelerated promotion because of reservation, will also get the consequential seniority or whether on the person senior to him in the general category getting promotion subsequently, the seniority of the person belonging to the general category will be restored. The Hon'ble Supreme Court in paragraph no.24 held as follows:-

“24. ...In short, it is open to the State, if it is so advised, to say that while the rule of reservation shall be applied and the roster followed in the matter of promotions to or within a particular service, class or category, the candidate promoted earlier by virtue of rule of reservation/roster shall not be entitled to seniority over his senior in the feeder category and that as and when a general candidate who was senior to him in the feeder category is promoted, such general candidate will regain his seniority over the reserved candidate notwithstanding that he is promoted subsequent to the reserved candidate. There is no unconstitutionality involved in this. It is permissible for the State to so provide...”

19. This subsequently came to be known as the ‘catch-up rule’. In the case of **Ajit Singh Januja and Ors. vs State of Punjab and Ors.**; (1996) 2 SCC 715, the Supreme Court concurring with the judgement in the case of Virpal Singh Chauhan (supra) held that the seniority between the reserved



category candidates and general candidates in the promoted category shall continue to be governed by their panel position that is with reference to their *inter se* seniority in the lower grade. It further held that the rule of reservation gives accelerated promotion but it does not give accelerated consequential seniority.

20. Subsequent to the above two judgments, in the case of **Jagdish Lal and ors. vs. State of Haryana and ors.**; (1997) 6 SCC 538 wherein the Hon'ble Supreme Court held that a person starts discharging his duties of his post as soon as he is appointed to a cadre/grade. His seniority is determined on the basis of that date unless his appointment is only a stop gap arrangement or *ad hoc* or *dehors* the rules. The Hon'ble Supreme Court, as can be seen in the case of Jagdish Lal (supra) took a different view from its earlier judgments in the case of Virpal Singh Chauhan (supra) and Ajit Singh Januja (supra).

21. The question relating to seniority of the reserved candidates who were promoted earlier to the senior general candidates as a result of roster points came up for consideration before the Constitution Bench of the Hon'ble Supreme Court in **Ajit Singh (II) and others vs. State of Punjab and others**; (1999) 7 SCC 209. The Hon'ble Supreme Court referring to the



case of Virpal Singh Chauhan (supra) observed that if the reserved candidate who got promotion at roster points earlier to a general candidate who gets promoted later, it would be open to the State to provide that as and when the senior general candidate got promoted, the general candidate would be treated as senior to the reserved candidate (roster point promotee at the promotional level as well unless the said reserved candidate had got further promotion to a higher post). This was described as the 'catch-up' rule. The Hon'ble Supreme Court in the case of Ajit Singh (II) (supra) accepted the 'catch-up' principle as laid down in Virpal Singh Chauhan (supra). It further held that the judgments in Virpal Singh Chauhan (supra) and Ajit Singh (I) (supra) had been correctly decided while conclusion arrived at in the case of Jagdish Lal (supra) was held to be incorrect.

22. At this stage, it would be relevant to quote paragraph no.13 from the judgment of **Ajit Singh (II)** (supra) which mentions the points which arose for consideration in the said judgment:

“13. On the above contentions, the following four main points arise for consideration:

Points

(1) Can the roster-point promotees (reserved category) count their seniority in the promoted category from the date of their continuous



officiation vis-à-vis general candidates who were senior to them in the lower category and who were later promoted to the same level?

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

(3) Whether the "catch-up" principles contended for by the general candidates are tenable?"

(4) What is the meaning of the "prospective" operation of Sabharwal and to what extent can Ajit Singh be prospective?

23. The question with respect to the seniority of the roster point promotees ie persons belonging to the reserved category in the promoted category vis-a-vis general candidates was dealt with and the relevant paragraphs dealing with this issue from the judgment of **Ajit Singh (II)** (supra) are being extracted hereinbelow:

“(iii) Seniority of roster promotees

43. Question is whether roster-point promotions from Level 1 to Level 2 to reserved candidates will also give seniority at Level 2? This is the crucial question.

44. We shall here refer to two lines of argument on behalf of the reserved candidates. Ajit Singh was an appeal from the judgment of the Full Bench of the Punjab & Haryana High Court in Jaswant Singh v. Secy. to Govt. Punjab, Education Deptt. In that



case, reliance was placed by the reserved candidates on a general circular dated 19-7-1969 issued by the Punjab Government which stated that the roster-point promotions would also confer seniority. In fact, while dismissing the writ petitions filed by the general candidates the High Court declared that the State was obliged to count seniority of the reserved candidates from the date of their promotion as per the circular dated 19-7-1969. The judgment of the Full Bench was reversed by this Court in Ajit Singh in the appeal filed by the general candidates. That resulted in the setting aside of the above declaration regarding seniority of roster-point promotees as stated in the Punjab circular dated 19-7-1969.

45. But before us, reliance was placed by the reserved candidates as was done in Jagdish Lal upon the general seniority rule contained in various Punjab Service Rules applicable in the Civil Secretariat, Education, Financial Commissioner, etc. Departments which rules generally deal with method of recruitment, probation, seniority and other service conditions. All these rules provide a single scheme for recruitment by promotion on the basis of seniority-cum-merit and then for seniority to be determined in the promotional post from the date of "continuous officiation", whenever the promotion is as per the method prescribed in those rules. It is on this seniority rule relating to "continuous officiation" at the promotional level that reliance was placed before us by the reserved candidates, as was done in Jagdish Lal. Question is whether roster-



point promotees can rely on such a seniority rule?

46. In this context it is necessary to remember two fundamental concepts.

a) Statutory rules relating to promotion and seniority

47. We shall take up the rules in one of these services in Punjab — namely the rules concerning Ajit Singh in which the present IAs have been filed.

48. There are three sets of rules for Class I, II and III services. The Punjab Secretariat Class III Service Rules, 1976 deal with the posts of Clerk (Level 1), Assistant (Level 2) and Superintendent Grade II (Level 3). At each of these two Levels 1 and 2, there is a roster which implements reservation. The reservation is by way of the circular dated 19-7-1969 in Punjab. For promotion from Level 1 to Level 2 and from Level 2 to Level 3, the employees are respectively governed by Rule 7 for promotion and by Rule 9 for seniority. It is provided in proviso (iii) to Rule 7(1) that all promotions shall be made by selection on the basis of seniority-cum-merit and no person shall have a right of promotion on the basis of seniority alone. Rule 9 speaks of seniority from the date of continuous officiation.

49. The Civil Secretariat Service Class II Service Rules, 1963 deal with Superintendents (Grade I) i.e. Level 4 and Rule 8(2) states that promotion to the above posts in Class II is by the method of seniority-cum-merit and Rule 10 states that seniority is to be counted from the date of continuous officiation.



Above Class II is Class I which consists of posts of Under-Secretary (Level 5) and Deputy Secretary (Level 6). Rule 6(3) of the Punjab Civil Secretariat Class I Rules, 1974 refers to promotion by seniority-cum-merit while Rule 8 thereof speaks of seniority by continuous officiation. For promotion to Class II and Class I, there is no roster promotion i.e. no reservation. There is reservation only in Class III posts by way of roster at two stages.

50. It is clear, therefore, that the seniority rule relating to “continuous officiation” in promotion is part of the general scheme of recruitment — by direct recruitment, promotion, etc. — in each of the services in Classes I, II and III — and is based upon a principle of equal opportunity for promotion. In our opinion, it is only to such promotions that the seniority rule of “continuous officiation” is attracted.

b) Statutory rule of seniority cannot be delinked and applied to roster-point promotions

51. As stated above in Ajit Singh the promotion rule in Rule 7(1) proviso (iii) and the seniority rule in Rule 9 under the 1976 Rules for Class III form a single scheme and are interlinked. In other words, only in case the officers have reached the level of Superintendents Grade II (Level 3) in the manner mentioned in Rule 7(1) proviso (iii) by competition between the Assistants (Level 2) and on consideration of their cases on the basis of seniority-cum-merit, can the seniority rule in Rule 9 relating to continuous officiation in the post of



Superintendent Grade II (Level 3) be applied. Here there is a roster in Ajit Singh for promotion from Level 1 to Level 2 and from Level 2 to Level 3. The consequence is that in the case of roster-point promotees, the said candidates who get promoted as Superintendents Grade II (Level 3) as per the roster, — having not been promoted as per Rule 7(1) proviso (iii) of the 1976 Rules i.e. upon consideration with their cases on the basis of seniority-cum-merit at the Assistants' level (Level 2), — they cannot rely upon Rule 9 of the 1976 Rules dealing with seniority from the date of “continuous officiation” as Superintendents Grade II (Level 3). It is not permissible to delink the seniority rule from the recruitment rule based on equal opportunity and apply it to promotions made on the basis of the roster which promotions are made outside the equal opportunity principle.”

(emphasis supplied)

24. Paragraph nos.56 and 57 of Ajit Singh (II)

(supra) which dealt with and held the case of Jagdish Lal (supra) not to have been correctly decided is quoted hereinbelow for ready reference :-

“56. Thus, in the Class III as well as Class II (Group B) services, the “continuous officiation” rule was interlinked with the promotion rule based on equal opportunity, as in Ajit Singh [(1996) 2 SCC 715 : 1996 SCC (L&S) 540 : (1996)



33 ATC 239] and formed a single scheme.

57. The Court in Jagdish Lal [(1997) 6 SCC 538 : 1997 SCC (L&S) 1550] delinked Rule 11 from the recruitment rules and applied the same to the roster promotees. For the reasons given already in regard to Ajit Singh [(1996) 2 SCC 715 : 1996 SCC (L&S) 540 : (1996) 33 ATC 239] we hold that Jagdish Lal [(1997) 6 SCC 538 : 1997 SCC (L&S) 1550] arrived at an incorrect conclusion because of applying a rule of continuous officiation which was not intended to apply to the reserved candidates promoted at roster points.”

25. Further in the case of Ajit Singh (II) (supra) the Hon’ble Supreme Court in paragraph no.66 held that the Punjab Circular dated 19.7.1969 which declared ‘roster points to be seniority points’ and which was held to be valid by the Full Bench of the High Court, was reversed. Relevant portion of paragraph no.66 of **Ajit Singh (II)** (supra) is quoted herein below for ready reference:

“66. In Virpal it was not necessary for the Court to go into the question whether any circular — if it gave seniority to the roster-point promotees (reserved candidates) — could be treated as valid. But, in Ajit Singh which was an appeal against the Full Bench judgment in Jaswant Singh this Court was dealing with a declaration made by the Full Bench for implementation of the Punjab circular dated 19-7-



1969 (see para 29 of the Full Bench) which positively declared that the “roster points were seniority points”. That was why in Ajit Singh this Court had to consider the validity of such a circular. In Ajit Singh this Court held that the declaration granted in the impugned judgment of the Full Bench in Jaswant Singh on the basis of the Punjab circular would be in conflict with Article 14 and Article 16(1). This Court had therefore to lay down that any circular, order or rule issued to confer seniority to the roster-point promotees would be invalid. Thus, the decision in Ajit Singh cannot be found fault with.”

26. The Hon’ble Supreme Court further held in paragraph nos.80 to 82 of **Ajit Singh (II)** (supra) that in case any senior general candidate later on reaches the same level where the reserved candidate had been promoted earlier on account of roster point, the seniority list will have to be amended showing the general candidate as senior to him. Paragraph nos.80 to 82 are extracted herein below :

“80. So far as the extreme contention of the general candidates that at Level 3, the roster candidate must wait at Level 3 — before being promoted to Level 4 — till the last senior general candidate at Level 1 reached Level 3, — we reject the same inasmuch as that will not amount to a reasonable balancing of the rights of the candidates in the two groups. Nor do we accept that posts must be kept vacant and no



promotions of the roster candidates be made.

Other catch-up rule

81. As accepted in Virpal (see SCC at p. 702) and Ajit Singh (see SCC at p. 729), we hold that in case any senior general candidate at Level 2 (Assistant) reaches Level 3 (Superintendent Grade II) before the reserved candidate (roster-point promotee) at Level 3 goes further up to Level 4 in that case the seniority at Level 3 has to be modified by placing such a general candidate above the roster promotee, reflecting their inter se seniority at Level 2. Further promotion to Level 4 must be on the basis of such a modified seniority at Level 3, namely, that the senior general candidate of Level 2 will remain senior also at Level 3 to the reserved candidate, even if the latter had reached Level 3 earlier and remained there when the senior general candidate reached that Level 3. In cases where the reserved candidate has gone up to Level 4 ignoring the seniority of the senior general candidate at Level 3, seniority at Level 4 has to be refixed (when the senior general candidate is promoted to Level 4) on the basis of when the time of reserved candidate for promotion to Level 4 would have come, if the case of the senior general candidates was considered at Level 3 in due time. To the above extent, we accept the first part of the contention of the learned counsel for the general candidates. Such a procedure in our view will properly balance the rights of the reserved candidates and the fundamental rights guaranteed under Article 16(1) to the general candidates.



No difficulty in amending seniority list

82. One of the objections raised before us and which appealed to the Full Bench in Jaswant Singh case was that this “catch-up” principle would lead to frequent alteration of the seniority list at Level 3. We do not find any difficulty in this behalf. The seniority list at Level 3 would have only to be merely amended whenever the senior general candidate reaches Level 3.” (emphasis supplied)

27. In view of the above judgments especially in the case of Virpal Singh Chauhan and Ajit Singh Januja, the Government of India came out with the Constitution (85th Amendment) Act, 2001 amending Article 16 of the Constitution (retrospectively with effect from 17.6.1995) by substituting the words “in matters of promotion to any class” by the words “in matters of promotion, with consequential seniority, to any class”. The amended Article 16(4A) as it stands after the 85th Constitutional Amendment which received the assent of the President on 4.1.2002 reads as follows:-

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



State.]”

28. The Government of Bihar came out with the resolution contained in memo no.213 dated 7.6.2002 under the signature of the Secretary, Personnel and Administrative Reforms Department (Annexure-S/1 to the supplementary affidavit of the appellants) which provided that pursuant to the decision of the Hon’ble Supreme Court in the case of Virpal Singh (supra), the Government of Bihar had come out with the decision on 30.1.1997 which provided that in case a person belonging to the Scheduled Caste/Scheduled Tribe gets promotion to a higher post/grade prior to a person in the general category and the person in the general category is promoted subsequently, the person belonging to the general category would get back his earlier seniority. It further provided that pursuant to the 85th Constitutional amendment, amending Article 16(4A), it had been decided to take back the earlier decision dated 30.1.1997. It had been decided that in case a person belonging to the Scheduled Caste/Scheduled Tribe gets promotion on account of reservation prior to a person belonging to the general category or other backward Class, the said person belonging to the general category/other backward Class would rank junior to the person who got promoted earlier on the roster



points conceded to SC & ST.

29. The Constitution (85th Amendment) Act, 2001, inserting Article 16(4A) (retrospectively with effect from 17.6.1995) providing reservation in promotion with consequential seniority came to be challenged in the Hon'ble Supreme Court in the case of **M. Nagaraj vs. Union of India**; (2006) 8 SCC 212. The contention of the petitioners therein was to the effect that in the case of Indra Sawhney (supra), it had been held that under Article 16(4), reservation to the backward class was permissible only at the time of initial recruitment and not in promotion. The impugned amendment had reversed the decisions of the Hon'ble Supreme Court in the case of Virpal Singh Chauhan (supra), Ajit Singh (I) (supra), Ajit Singh (II) (supra) besides other cases. It was held that the concept of 'catch-up rule' appeared for the first time in Virpal Singh Chauhan (supra). So far as Articles 16(4) and 16(4A) are concerned, they did not confer any fundamental right of reservation but were only enabling provisions. It was for the appropriate Government to apply the cadre strength as a unit, in order to ascertain whether a given class/group is adequately represented in the service. The amendments in Article 16(4A) gave freedom to the State that in an appropriate case depending



upon the ground reality, it may provide for reservation in the matters of promotion to any class or classes of posts in the services and the State has to form its opinion on the quantifiable data regarding an adequacy of representation. Paragraph no.86 in the case of **M. Nagaraj** (supra) is extracted herein below:-

*“86. Clause (4-A) follows the pattern specified in clauses (3) and (4) of Article 16. Clause (4-A) of Article 16 emphasises the opinion of the States in the matter of adequacy of representation. It gives freedom to the State in an appropriate case depending upon the ground reality to provide for reservation in matters of promotion to any class or classes of posts in the services. The State has to form its opinion on the quantifiable data regarding adequacy of representation. Clause (4-A) of Article 16 is an enabling provision. It gives freedom to the State to provide for reservation in matters of promotion. Clause (4-A) of Article 16 applies only to SCs and STs. The said clause is carved out of Article 16(4). Therefore, clause (4-A) will be governed by the two compelling reasons- "backwardness" and "inadequacy of representation", as mentioned in Article 16(4). If the said two reasons do not exist then the enabling provision cannot come into force. The State can make provision for reservation only if the above two circumstances exist. Further, in *Ajit Singh (II)* this Court has held that apart from "backwardness" and "inadequacy of representation" the State shall also keep in mind "overall efficiency" (Article 335).*



Therefore, all the three factors have to be kept in mind by the appropriate Government in providing for reservation in promotion for SCs and STs.”

(emphasis supplied)

30. Further in paragraph no.102 in the case of **M. Nagaraj** (supra), the Hon’ble Supreme Court proceeded to hold that the concept of ‘catch-up rule’ and consequential seniority are not constitutional requirements nor are they implicit in Clauses 1 and 4 of Article 16. They are not constitutional principles but are concepts derived from the service jurisprudence. As per the requirement of Article 16(4), although it enables the State to take affirmative action by way of reservation, it requires that the State has to be satisfied that there existed circumstances of backwardness in inadequacy of representation and the said satisfaction had to be based on quantifiable data. In case the State fails to identify and measure the backwardness, inadequacy and overall administrative efficiency, the provision for reservation would be invalid. Relevant part of paragraph no.102 is extracted herein below :

“102. In the matter of application of the principle of basic structure, twin tests have to be satisfied, namely, the "width test" and the test of "identity". As stated hereinabove, the concept of the "catch-up" rule and "consequential seniority" are not constitutional



requirements. They are not implicit in clauses (1) and (4) of Article 16. They are not constitutional limitations. They are concepts derived from service jurisprudence. They are not constitutional principles. They are not axioms like, secularism, federalism, etc. Obliteration of these concepts or insertion of these concepts does not change the equality code indicated by Articles 14, 15 and 16 of the Constitution. Clause (1) of Article 16 cannot prevent the State from taking cognizance of the compelling interests of Backward Classes in the society. Clauses (1) and (4) of Article 16 are restatements of the principle of equality under Article 14. Clause (4) of Article 16 refers to affirmative action by way of reservation. Clause (4) of Article 16, however, states that the appropriate Government is free to provide for reservation in cases where it is satisfied on the basis of quantifiable data that Backward Class is inadequately represented in the services. Therefore, in every case where the State decides to provide for reservation there must exist two circumstances, namely, "backwardness" and "inadequacy of representation". As stated above, equity, justice and efficiency are variable factors. These factors are context-specific. There is no fixed yardstick to identify and measure these three factors, it will depend on the facts and circumstances of each case. These are the limitations on the mode of the exercise of power by the State. None of these limitations have been removed by the impugned amendments. If the State concerned fails to identify and measure backwardness, inadequacy and overall administrative efficiency then in that event the provision for reservation would be invalid....."



(emphasis supplied)

31. It further proceeds to hold in paragraph no.107 of **M. Nagaraj** (supra) as follows:-

“107. It is important to bear in mind the nature of constitutional amendments. They are curative by nature. Article 16(4) provides for reservation for Backward Classes in cases of inadequate representation in public employment. Article 16(4) is enacted as a remedy for the past historical discriminations against a social class. The object in enacting the enabling provisions like Articles 16(4), 16(4-A) and 16(4-B) is that the State is empowered to identify and recognise the compelling interests. If the State has quantifiable data to show backwardness and inadequacy then the State can make reservations in promotions keeping in mind maintenance of efficiency which is held to be a constitutional limitation on the discretion of the State in making reservation as indicated by Article 335. As stated above, the concepts of efficiency, backwardness, inadequacy of representation are required to be identified and measured. That exercise depends on availability of data. That exercise depends on numerous factors. It is for this reason that enabling provisions are required to be made because each competing claim seeks to achieve certain goals. How best one should optimise these conflicting claims can only be done by the administration in the context of local prevailing conditions in public employment. This is amply demonstrated by the various decisions of this Court



discussed hereinabove. Therefore, there is a basic difference between "equality in law" and "equality in fact" (see Affirmative Action by William Darity). If Articles 16(4-A) and 16(4-B) flow from Article 16(4) and if Article 16(4) is an enabling provision then Articles 16(4-A) and 16(4-B) are also enabling provisions. As long as the boundaries mentioned in Article 16(4), namely, backwardness, inadequacy and efficiency of administration are retained in Articles 16(4-A) and 16(4-B) as controlling factors, we cannot attribute constitutional invalidity to these enabling provisions. However, when the State fails to identify and implement the controlling factors then excessiveness comes in, which is to be decided on the facts of each case. In a given case, where excessiveness results in reverse discrimination, this Court has to examine individual cases and decide the matter in accordance with law. This is the theory of "guided power". We may once again repeat that equality is not violated by mere conferment of power but it is breached by arbitrary exercise of the power conferred." (emphasis supplied)

32. Further in paragraph no.117 of **M. Nagaraj** (supra), it was held as follows:-

"117.....The extent of reservation has to be decided on the facts of each case. The judgment in Indra Sawhney does not deal with constitutional amendments. In our present judgment, we are upholding the validity of the constitutional amendments subject to the limitations. Therefore, in each case the



Court has got to be satisfied that the State has exercised its opinion in making reservations in promotions for SCs and STs and for which the State concerned will have to place before the Court the requisite quantifiable data in each case and satisfy the Court that such reservations became necessary on account of inadequacy of representation of SCs/STs in a particular class or classes of posts without affecting general efficiency of service as mandated under Article 335 of the Constitution.” (emphasis supplied)

33. In *M. Nagaraj* (supra), the Hon’ble Supreme Court upheld the constitutional validity of the 77th, 81st, 82nd and 85th Constitutional amendments and at the same time holding that if the State wish to exercise their discretion and make reservation for SCs and STs in matters of promotion, the State has to collect quantifiable data showing backwardness of the class and inadequacy of representation of that class in public employment in addition to compliance with Article 335. Relevant part of paragraph no.123 of **M. Nagaraj** (supra) is extracted herein below :

“**123.**.....The State is not bound to make reservation for SCs/STs in matters of promotions. However, if they wish to exercise their discretion and make such provision, the State has to collect quantifiable data showing backwardness of the class and inadequacy of representation of



that class in public employment in addition to compliance with Article 335.....”

34. This Court perused the records of C.W.J.C no.19114 of 2012, Sushil Kumar Singh vs. State of Bihar. From the contents of the counter affidavit filed therein on behalf of the General Administration Department, Government of Bihar, it transpires that after the 85th Constitutional Amendment, the Personnel and Administrative Reforms Department, Bihar (which was subsequently named as the General Administration Department) came out with memo no.213 dated 7.6.2002 granting the benefit of promotion with consequential seniority to SC and ST employees. On complaints being received, a clarification was also issued to the Water Resources Department and Road Construction Department vide memo no.745 dated 5.2.2008. The said clarification came to be challenged in C.W.J.C no.5649 of 2008 (Arun Prasad & Ors. vs State of Bihar & Ors.) and other cases. The writ application was allowed vide order dated 8.7.2011 passed in C.W.J.C no.5649 of 2008 whereby the letter dated 5.2.2008 was quashed on the ground that the Government had not undertaken the exercise to objectively collect quantifiable data showing backwardness and inadequacy of representation of the members of SC and ST in the Engineering services of the State. Appeals were preferred



against the said order and while the same was still pending, in view of the judgment in the case of M. Nagaraj (supra), the Government decided to make SC and ST Welfare Department as a Nodal Department for submitting the report regarding backwardness and overall administrative efficiency. The report was prepared and submitted by the Nodal Department to the Government and it was then that the General Administration Department came out with resolution dated 21.8.2012 taking the decision to continue with the provision of promotion with consequential seniority to the Scheduled Castes and Scheduled Tribes employees in services under the State Government.

35. The said resolution dated 21.8.2012 came to be challenged in the case of **Sushil Kumar and others vs State of Bihar and others**, 2015 (2) PLJR 844. The learned Single Judge by his judgment dated 4.5.2015 was pleased to quash the resolution. The same was challenged by the State of Bihar in LPA no.1066 of 2015 **State of Bihar vs Sushil Kumar Singh**; 2015 (3) PLJR 593. By judgment dated 30.7.2015, the appeal was dismissed. As per the respondents, SLP (C) no.29770 of 2015 has been preferred by the State of Bihar in the Hon'ble Supreme Court and the same is pending.

36. The resolution dated 21.8.2012 having been set



aside on 5.8.2014, the department came out with an order contained in memo no.11218 dated 12.8.2014 according to which the sittings of all the Departmental Promotion Committees were stayed till further orders. The said order was challenged and set aside by this Court by order dated 15.2.2016 passed in CWJC no.16366 of 2015 (Birendra Kumar Rai and others versus the State of Bihar and others). Stating all these facts, the Additional Secretary, General Administration Department, Government of Bihar wrote a letter no.4800 dated 1.4.2016 addressed to all the Principal Secretaries, Divisional Commissioners, District Magistrates, Secretary, Bihar Public Service Commission etc. stated that pursuant to the opinion received from the learned Advocate General a decision had been taken to take back the order dated 12.8.2014 and start the process of promotion. It further provided that till further orders promotion will be given as per the seniority in the basic grade and no benefit of reservation would be given. All the earlier circulars/decisions shall be treated to be accordingly modified.

37. It was subsequent to the aforesaid letter dated 1.4.2016 that respondents came out with the final gradation list dated 1.6.2016 which was challenged unsuccessfully by the appellants in the writ applications and from which the instant



appeals arise.

38. So far as the reliance placed by the learned counsel for the appellants on the resolution dated 7.6.2002 is concerned, it may be stated here that the Hon'ble Supreme Court in the case of M. Nagaraj (supra) clearly held that the State in order to exercise its discretion of making reservation for SCs and STs in matter of promotion, had to collect quantifiable data showing backwardness of the class and inadequacy of representation of that class in public employment. In view of their attempt to give reservation with consequential seniority in the year 2008 which was set aside by this Court and specially taking into account the ratio of the judgment in the case of M. Nagaraj (supra), the respondents came out with resolution dated 21.8.2012 which was also quashed by the learned Single Judge in the case of Sushil Kumar Singh (supra) and affirmed in the appeal by the learned Division Bench. In view of these facts, this Court does not find merit in the contention of learned counsel for the appellant that in view of the 2012 resolution having been quashed, the respondents should have proceeded as per the resolution dated 7.6.2002. The resolution of 21.8.2012, while providing for promotions in accordance with seniority, with no benefit of reservation, also



modified the earlier decisions accordingly. The resolution of 7.6.2002 hence does not survive.

39. So far as the facts of the instant case are concerned, it is not in dispute that both the appellants as also the private respondents entered the service as Assistant Engineers. It is also not in dispute that all the four appellants in both the appeals are junior to the private respondents as Assistant Engineers. Reservation in promotion in the State of Bihar is governed by the Bihar Reservation of Vacancies in Posts and Services (for Scheduled Castes and Scheduled Tribes and Other Backward Classes) Act, 1991 ('Act of 1991' in short). While section 4 of the Act of 1991 deals with the reservation in direct recruitment, section 6 deals with roster points in both direct recruitments and promotions and the same is extracted herein below for ready reference:

***“6. Model Roster.-** (1) The State Government shall prescribe a Model Roster or 100 points for direct recruitment and 50 points for promotion both for the State and District level vacancies.*

(2) The appointing authority shall maintain separate running rosters for recruitment and promotion in prescribed form for each category of posts under his control.”



40. Perusal of the contents of the two writ applications would show that the three appellants in LPA no.1951 of 2016 got promoted on the post of Executive Engineer vide different orders dated 14.7.1993, 27.8.1996 and 4.8.1999 while the appellant in LPA no.1946 of 2016 got promoted vide notification dated 27.8.1996. It would be relevant to take note of the fact that all these notifications were orders of promotion from Assistant Engineer to Executive Engineer, of the four appellants and which had been given to them pursuant to their belonging to the reserved category, enabling out of turn promotion on account of roster points. The private respondents belonging to the general category being senior to the roster promotees ie the appellants herein in the cadre of the Assistant Engineer, in the opinion of the Court, pursuant to the principle of 'catch-up rule' as held in the case of Virpal Singh (supra) and upheld by the Constitution Bench in the case of Ajit Singh (II) (supra), on their subsequent promotion to the post of Executive Engineer/Superintending Engineer they would regain their seniority (on the appellants ie the roster promotes) in the said cadre and the seniority list will have to be amended as held in Ajit Singh (II). This is what was done by the respondent authorities in coming out with the final gradation list.



41. Thus the final gradation list issued by the Rural Works Department, rightly shows the private respondents to be senior to the appellants, the same being in accordance with the decision of the Constitution Bench of the Hon’ble Supreme Court in the case of Ajit Singh (II) (supra). There exists no rule for reservation on roster points as of now. The rule; of consequential seniority conferred on the earlier roster point promotees of 2002 stands modified by the State and that of 2012 was set aside by this Court.

42. The Court finds no merit in the case of the appellants and both the appeals are dismissed.

(Partha Sarthy, J)

K. Vinod Chandran, CJ: I agree.

(K. Vinod Chandran, CJ)

Bibhash/shiv

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