

IN THE HIGH COURT AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICTION
ORIGINAL SIDE

Present: Hon'ble Justice Shampa Sarkar

WPO 133 of 2021
IA NO: GA 1 of 2021
Sri Rihan Sanyal and ors.
Vs.
State of West Bengal and ors.

For the petitioner : Mr. Ranajit Chatterjee,
Mr. A. Mitra.

For private respondents : Mr. Soumya Majumdar
Mr. R.N. Chakraborty
Ms. Amrita De

For the State : Mr. Indranil Roy.
Mr. Vivek Basu

For the KMC : Mr. Alak Kumar Ghosh
Mr. Swapan Kumar Debnath

Hearing concluded on : 27.08.2024
Judgment on : 20.11.2024

Shampa Sarkar, J.:-

1. The challenge in the writ petition is an office order dated March 3, 2021, issued by the Chief Manager (Personnel), Kolkata Municipal Corporation (in short KMC). The order was issued pursuant to a decision of the Municipal Commissioner of even date, by which six out of ten existing vacancies in the post of Deputy Chief Engineer (Civil), Kolkata Municipal Corporation (in short KMC) were filled up by promotion from the feeder post of Executive Engineer (Civil), by candidates belonging to the schedule caste (SC) category.

2. Prayers were made for a direction upon the KMC to grant promotion to the petitioners by strictly following the seniority rules, the prescribed ceiling limit of 22% reservation for SC candidates and implementation of the catch-up rule. The petitioners prayed for retrospective promotion from the respective dates of occurrence of vacancies in the post of Deputy Chief Engineer (Civil). Mandamus was further prayed for a direction upon the respondents to incorporate appropriate provisions of the Circular No. 13 of 1984, in order to safeguard the interests of the promotees from the unreserved category and to enable them to regain their seniority in the promotional post over their juniors from the reserved category (SC and ST). Prayer was also made to revise the gradation list of the Executive Engineer (Civil) dated July 8, 2019, by following the catch-up rule and restoring/maintaining the seniority of the petitioners, according to their respective seniority in the feeder post of Assistant Engineers (Civil).

3. The writ petitioners belong to the general/unreserved (UR) category. They were all Executive Engineers (Civil), when the order impugned was issued. However, pending hearing of the writ petition, the petitioner Nos.1 to 8 have been promoted to the post of Deputy Chief Engineer (Civil) on various dates. The petitioner Nos.9, 10 and 11 have still not been promoted to the post of Deputy Chief Engineer (Civil). The respondent Nos.5, 7 and 8 have been promoted to the next higher post of Director General (Civil) on August 2, 2024.

4. The petitioners have assailed the aforementioned decision of KMC on various grounds. The ceiling limit of 22% reservation for SC category

candidates imposed under Section 5 of the West Bengal Schedule Castes and Schedule Tribes (Reservation of Vacancies and Services and Posts) Act 1976, (in short the 1976 Act), had been exceeded. Three SC candidates were already working in the post of Deputy Chief Engineer (Civil), out of the cadre strength of 19. There was scope for promotion of only one more SC candidate in the normal course. Five out of 19 would take the number of SC candidates in the cadre to 26.31%, which was more than the ceiling limit. Even assuming that another SC candidate was accommodated against a carried forward vacancy as submitted by the KMC, the appointment of six candidates from the SC category was violative of the ceiling limit, prescribed by law.

5. The appointments of the respondent Nos.5 to 10, against the six vacancies, by treating Ujjwal Kumar Sarkar and Sanjoy Kumar Mondal, respondent Nos.5 and 6 respectively as UR category candidates, was wholly illegal. Their promotions were given on the basis of seniority alone, and not on the basis of merit. Promotion by way of a competitive method was not contemplated under the Rules. The Rules only provided that appointments to the post of Deputy Chief Engineer (Civil) would be made by promotion from the post of Executive Engineer (Civil), that is, those executive engineers having a degree in the relevant stream.

6. The rules did not provide for promotion either on the basis of open examination or by any other method of selection, by which merit could be assessed. Thus, the question of promoting Ujjwal and Sanjoy against UR vacancies, was contrary to the provisions of law and the various decisions of

the Hon'ble Apex Court, namely ***Indra Sawhney and Ors. Vs Union of India and Ors.*** reported in **1992 Supp (3) SCC 217**, ***M. Nagaraj and Ors. vs Union of India and Ors.*** reported in **(2006) 8 SCC 212** and ***K. Manorama vs Union of India*** reported in **(2010) 10 SCC 323**.

7. Rule 10(b) of the Rules framed under the 1976 Act provided that SC and ST candidates who obtained promotion on the basis of merits (with due regard to seniority) shall be promoted against UR vacancies. Such was not the situation in the present case, as the respective merit of Ujjwal and Sanjoy, had never been evaluated. By accommodating Ujjwal and Sanjoy against UR vacancies in the promotional post of Deputy Chief Engineer (Civil), KMC had illegally made a berth for the SC candidates against the UR vacancies, thereby depriving UR category candidates of their promotional avenue.

8. The other challenge was with regard to the vires of Rule 10(d) under the 1976 Act, which permitted appointment of an SC candidate in a vacancy reserved for ST and vice versa, in case of unavailability of the respective category candidate.

9. According to Mr. Ranajit Chatterjee, learned Advocate for the petitioners, the Rule was ultra-vires the constitution and the law laid down by the Hon'ble Apex Court in ***R.K. Sabharwal and Ors. vs State of Punjab and Ors.*** reported in **(1995) 2 SCC 745**. A prayer was made that the Rule should be struck down. Promotion of Swapan Karmakar, that is, the respondent No.10, by conversion of a post reserved for ST to SC, should be cancelled.

10. Two SC candidates, Durjoy Sarkar and Uday Ranjan Saha, the respondent Nos. 8 and 9, were granted promotion, again posts which were reserved for SC candidates in the 50-point roster. Whereas, according to the 22% ceiling stipulated by the Act, only one SC candidate could be promoted.

11. According to Mr. Chatterjee, promotion of the respondent Nos. 8 and 9 against the 18th and the 21st point in the 50-point roster, which were reserved for SC candidates, was also contrary to the decision of the Hon'ble Apex Court in the **R. S. Garg vs State of U.P. and Ors.**, reported in **(2006) 6 SCC 430**. The Hon'ble Apex Court held that if there was a conflict between the Act and the roster, the Act must prevail. The contentions of KMC that the six SC candidates were promoted against the ten vacancies in the post of Deputy Chief Engineer (Civil) as they were within the zone of consideration, was contrary to the decision of the Hon'ble Apex Court in the matter of **Pragjyotish Gaonlia Bank and anr. v. Brijlal Dass**, reported in **(2009) 3 SCC 323**. Merely by coming within the zone of consideration, an SC or ST candidate, would not be entitled to automatic selection. The seniority rules of the KMC vide circular No.13 of 1984 provided as follows :-

1. relative seniority of a direct recruit would be determined on the basis of the order of merit in the selection test, Rule (4),
2. persons appointed on the basis of an earlier selection would be senior to those appointed on the result of a subsequent examination (Rule 5 III)and,
3. seniority of persons appointed on promotion to any post would be determined from the date of joining such post, Rule 5 (I).

12. Mr. Chatterjee further submitted that the respondents Nos.7 to 9 were recruited as Assistant Engineers (Civil) on the basis of the recruitment process of 1998-99, that is, after the writ petitioners. The respondent No.10 was promoted to the post of Assistant Engineer on March 3, 2010. The writ petitioners and the respondent Nos. 5 and 6, that is, Ujjwal and Sanjoy, joined KMC as Assistant Engineers (Civil) being selected in the same recruitment process. The position of the respondent Nos. 5 and 6 was below the writ petitioners in the merit list by virtue of their rank in the selection process. The said recruitment process was conducted by the Municipal Service Commission in the year 1996 and 1997. The respondent Nos. 5 to 6, could never be treated as senior to the petitioners. The petitioners were entitled to catch up with these respondents upon promotion to the available vacancy in the higher post, even if the respondents Nos. 5 and 6 were promoted to next higher post, by virtue of their fortuitous circumstances.

13. Mr. Chatterjee vehemently urged that according to the rules, the relative seniority of all persons appointed directly through a competitive exam was to be determined by their respective merit position in the selection list published at the time of their selection. The petitioner Nos. 1 to 7 were promoted as Executive Engineer (Civil) on October 1, 2005. Likewise, Ujjwal and Sanjoy were also promoted as Executive Engineer (Civil) on October 1, 2005. The petitioner Nos. 8 to 11 were, on the other hand, promoted as Executive Engineers (Civil) on March 1, 2006. Ujjwal and Sanjoy were promoted before those petitioners only because of the reservation quota (SC). They were much

below the petitioners in the gradation list of Assistant Engineer (Civil). Utpal and Durjay, respondent Nos. 7 and 8, were promoted as Executive Engineers (Civil) against the reserved vacancies in 2006 and they joined on November 24, 2006.

14. Uday Ranjan Saha and Swapan Karmakar, respondent Nos. 9 and 10, joined the post of Executive Engineers (Civil) on January 5, 2008 and January 3, 2010, respectively. According to the petitioners, in the gradation list of Executive Engineers (Civil) dated April 7, 2009, the seniority of the petitioners vis-a-vis their SC counterparts were correctly reflected. However, in the gradation list published on October 1, 2010, the seniority of Ujjwal and Sanjoy were incorrectly shown above the petitioners for unknown reasons.

15. By an office order dated September 3, 2016, the petitioners and several other Executive Engineers, as well as Ujjwal and Sanjoy, were upgraded and re-designated as Deputy Chief Engineers (Civil) with lien on the post of Executive Engineers (Civil). The order was passed pursuant to a resolution of the Mayor-in-Council dated August 24, 2016, which was subsequently approved by the Corporation on October 26, 2016.

16. Mr. Chatterjee referred to the provisional gradation list published on May 08, 2019, in order to show how the relative seniorities of the petitioners and the six schedule caste candidates had been reflected. According to Mr. Chatterjee, the seniority of Ujjwal and Sanjoy were incorrectly shown above the petitioners. From the final gradation list dated July 8, 2019, it was seen that all the petitioners had been designated as Deputy Chief Engineer (Civil) on or

before that date, while the respondent Nos.7 to 10 were still designated as Executive Engineers (Civil) on that date.

17. Mr. Chatterjee contended that the seniority of Ujjwal and Sanjoy as reflected in the gradation list of Assistant Engineer (Civil) should have been maintained even after their promotion as Executive Engineer (Civil), particularly because the petitioners Nos.1 to 7 had been granted such promotion on the same dates Ujjwal and Sanjoy. Further, although the petitioners Nos.8 to 11 were promoted subsequently, that is, on March 01, 2006, their seniority over Ujjwal and Sanjoy should have been restored once they were promoted as Executive Engineer (Civil), by implementation of the catch up rule as enunciated by the Hon'ble Apex Court.

18. As the respondent Nos. 5 and 6 and the petitioner Nos. 1 to 7 joined the promotional post of Executive Engineer (Civil) on the same day that is October 1, 2005, according to Mr. Chatterjee, the respondent Nos.5 and 6 could not be made senior to the writ petitioners by applying any principle of reservation whatsoever. Support for such submission was drawn from Rule 5(1) of the Seniority Rules of KMC.

19. According to Mr. Chatterjee, the petitioners had suffered immensely on account of reverse discrimination practiced by the KMC. They were deprived from being promoted against at least four out of the six vacancies which were sought to be filled up only by SC category candidates by violating the reservation rules, the seniority rules and the law laid down by the Hon'ble Apex Court.

20. The petitioners not having been promoted to the post of Deputy Chief Engineers (Civil) were further deprived from being considered for the next promotional post of Director General (Civil). There were no reservations in the said post. Only a minimum tenure for discharge of duties as Deputy Chief Engineers (feeder post) along with other qualifications were the eligibility criteria.

21. Mr. Chatterjee urged that the percentage of reservation provided by the rules would have to be strictly followed. The prescribed percentage could not be varied by accommodating the reserved category candidates against seats earmarked for the UR category. A roster was permitted to operate till the total posts in a cadre was filled and thereafter the vacancies falling in the cadre were to be filled by the same category of person whose death or retirement etc., caused the vacancies. In such a situation, the balance between the reserved category and the general category would be maintained. Each point in the roster indicated a post which had to be filled up by the particular category of candidate to be appointed against it and any subsequent vacancy had to be filled up only by those category candidates. The question of clubbing the unfilled vacancies with current vacancies could not arise. With the introduction of the concept of post based roster, specific slots for OBCs, SCs and STs as well as URs had to be maintained in the roster. For want of a candidate in a particular category, the post should remain unfilled. In case of any conflict between the percentage of reservation and the roster, the percentage of reservation would prevail. Thus, as the reservation was confined to 22 % Even

though, there were only 19 posts in the cadre, KMC had progressed beyond the 50 roster point.

22. Relying on the affidavit-in-opposition filed by KMC in writ petition No.WPA 133 of 2021, Mr. Chatterjee contended that KMC had themselves admitted that there were 19 posts of Deputy Chief Engineer (Civil) in KMC. Maximum of four of such posts could be reserved for the schedule caste candidates. Kamal Sarkar, Mridul Mondal and Mrinal Mondal were already occupying three posts against SC quota. Meaning thereby, only one SC candidate could be promoted. Mr. Chatterjee further referred to paragraph 11 of the affidavit-in-opposition. KMC had admitted that on the basis of the circular dated April 23, 1984, recruits of an earlier recruitment process could not be superseded by a subsequent batch. Accordingly, the respondent Nos. 7 to 10, who were appointed as Assistant Engineers after the person's figuring in the order dated September 3, 2016, could neither in facts or in law, claim seniority over the 17 engineers, whose names had appeared in the said office order. By such office order, the petitioners were upgraded to the post of Deputy Chief Engineer (Civil), by keeping lien against the post of Executive Engineer (Civil).

23. Alternatively, Mr. Chatterjee contended that the petitioner Nos.1 to 7 were entitled to be promoted to the existing vacancies in the post of Deputy Chief Engineer (Civil) against at least four vacancies as per their seniority in the gradation list, on the same date, by accommodating Ujjwal and Sanjoy (at best), against one SC vacancy and one carried forward vacancy. The catch up

rule was enunciated by the Hon'ble Apex Court to do away with the claim of the reserve candidates promoted earlier, for consequential seniority, by providing that the senior general category candidates would regain seniority on being promoted. Therefore, it was imperative that the gradation list of the Executive Engineers be set aside and a direction be passed to revise the same by maintaining the seniority as per the gradation list of the Assistant Engineers (Civil).

24. Mr. Chatterjee also referred to the resolution of the Board of Administrators of the KMC dated April 21, 2020, by which a decision was taken that the entire matter should be placed before the learned Advocate General, Government of West Bengal, for opinion and on the basis of such opinion, the department would process the matter. The written opinion of the learned Advocate General dated January 20, 2021, was relied upon. According to the learned Advocate General, Ujjwal and Sanjoy were entitled to be promoted against the SC posts. Thus, it was urged that none of the other scheduled caste candidates could be considered as they were recruited in the subsequent selection process and were junior to the petitioners even as executive engineers (civil). The Board of Administrator's earlier resolution was deviated from. Later, the Board mooted a proposal made by the Chief Municipal Law Officer of KMC on February 10, 2021, to grant promotion to six SC candidates who were holding the post of Executive Engineer (Civil), to the post of Deputy Chief Engineer (Civil), against the ten vacancies. The prayers in the writ petition were reiterated by Mr. Chatterjee.

25. Mr. Alak Kumar Ghosh, learned Advocate for the KMC submitted that the reservation was based on vacancy and not on the cadre. In view of Section 5 of the 1976 Act, 22% reservation for SC candidates in the 50 point roster was different from filling up of vacancies which could have occasioned due to fortuitous circumstances arising out of the carry forward rule or by conversion of ST to SC. By the order dated March 3, 2021, which has been challenged before this court, 10 Executive Engineers (Civil) were promoted to the post of Deputy Chief Engineer (Civil). Out of the ten posts, six posts were filled up by SC candidates, whereas four posts were filled up by general category candidates. The question as to whether the ten vacancies which had arisen out of the sanctioned post of 19, could be filled up by six Executive Engineers (Civil) in the SC category and four in the general category, could be answered by referring to the vacancy in the roster number. As per the roster, 15th vacancy was to be filled up by an SC candidate. At the material point of time (earlier promotional drive), no SC candidate was available within the zone of consideration. The vacancy was filled up by a UR candidate. The 16th point was to be filled up by a SC candidate. This unreserved post was thus, filled up by the carried forward SC. As there were ten vacancies for the post of Deputy Chief Engineer (Civil), 50 candidates were considered in the ratio of 1:5 as per Rule 10 (a) of the Reservation Rules of 1976. The vacancies were required to be filled up from the 16th point to the 25th point of the 50 point roster. As per the roster, the vacancy positions were to be filled up by the reserved and unreserved categories in the manner that, 16th vacancy = unreserved;

17thvacancy = unreserved, 18th=vacancy scheduled caste; 19thvacancy = unreserved; 20thvacancy = unreserved; 21stvacancy = scheduled caste; 22ndvacancy = unreserved; 23rdvacancy = unreserved; 24thvacancy = scheduled tribe and 25thvacancy = unreserved. Therefore, as per the roster of vacancies from the 16th to the 25th points, there were two vacancies to be filled up by the SC candidate, one by the ST candidate, and the other vacancies were to be filled up by unreserved candidates. Having due regard to the relevant provisions of the reservation rules as amended, the available vacancies were filled up in the instant case by giving appointment to six SC candidates. The 16th point vacancy was for unreserved candidate but was treated as a carried forward (SC) vacancy.

26. Utpal Mistry having his position in the gradation list at serial No. 19 was given appointment to the carried forward post (16th point).The 24th point although, was reserved for ST candidate, but due to non-availability of a ST candidate within the zone of consideration, Swapan Karmokar, being an SC candidate, at serial No. 22 of the gradation list was given appointment, upon converting the post from ST to SC. Seniority position of the candidates in the gradation list was the sole basis for giving promotion to the post of Deputy Chief Engineer (Civil) from the post of Executive Engineer (Civil). Ujjwal and Sanjoy although SC category candidates had their seniority positions at serial Nos. 3 and 6 respectively, in the gradation list. Accordingly, they were appointed against vacancy roster point Nos. 19 and 23 (unreserved) respectively, as per their seniority in the gradation list of executive engineers

against the UR posts. The vacancies in the 18th and the 21st point of the roster were reserved for SC candidates and those were filled up by Durjay and Uday, having regard to their respective positions in the gradation list at 20 and 21. In such manner, six executive engineers in the SC category got promotion in the ten vacancies.

27. Rule 10(c) of the Reservation Rules of 1976 provided that in the absence of a qualified scheduled caste or scheduled tribe candidate for a particular reserved vacancy, the reserved vacancy should be carried forward till the next reserved vacancy occurred in the 50 point roster, but not beyond. Rule 10(d) provided that while vacancies reserved for scheduled caste or scheduled tribe candidates would be continued to be reserved for the respective community only, a scheduled caste employee may also be considered for appointment against a vacancy reserved for scheduled tribe and vice versa, where the appropriate reserved vacancy could not be filled up by a scheduled tribe candidate or a scheduled caste candidate, as the case may be.

28. Rule 10(b) provided that if a candidate from the scheduled caste or scheduled tribe obtained promotion on the basis of merit with due regard to seniority, his promotion should be made against unreserved vacancy and the reserved vacancy should be filled up by selecting candidates from the remaining scheduled caste or scheduled tribe category, irrespective of merit, from those who were within the normal zone of consideration and fit for promotion.

29. In KMC, a combined gradation list for both reserved and unreserved categories of employees was prepared. No separate gradation list was maintained in a particular cadre for each category of employees. Had there been category wise gradation, the proposition of the petitioners may have had some merit. As the situation was otherwise, it could not be contended that 22% ceiling stipulated in the Act of 1976 had been violated by promoting six SC category persons in the post of Deputy Engineer (Civil) out of ten available vacancies. Whether the reservation exceeded the permissible limit or not, could not be decided only by looking at the existing vacancies and filling up of the said vacancies by the reserved and unreserved categories. The matter would have to be considered from the initial stage when the 1976 Act and the 50 point roster had become operative. At no stage, the vacancies in the post of Deputy Chief Engineer (Civil) were filled up by the reserved category employees, in excess of the prescribed percentage in the 50 point roster.

30. According to Mr. Ghosh, the catch up rule would not apply at all. The rule could be applied only in case a reserved category candidate was promoted to a higher rank earlier than an unreserved candidate, when both the reserved and unreserved candidate came within the zone of consideration for the next higher post. In the instant case, the petitioners and the respondent Nos. 7 to 10 were all in the gradation list of Executive Engineers (Civil), having their respective positions therein. The promotion had been effected to the post of Deputy Chief Engineer (Civil) after taking into account the respective positions of the concerned employees in the zone of Executive Engineer (Civil). The 1976

Act and the Reservation Rules of 1976 framed there under, together with the 50 point roster, permitted promotion of those six reserved category (SC) candidates. That being the position, the petitioners did not have any scope to catch up with the employees in the reserved category by applying the catch up rule.

31. According to KMC, a reserved category candidate could occupy an unreserved post in the 50 point roster by applying their seniority position, by having due regard to the amended Rule 10(b) of the Rules.

32. Article 16 (4B) of the Constitution of India was referred to, in support of the carry forward rule with the permissibility of filling up to 50% reservation on the total number of vacancies of that particular year. It was submitted that Article 16(4) of the Constitution of India authorized the State to make preferential provision for reservation of appointments or posts in favour of any backward class. The expression any backward class referred to all categories of reservations and not only to OBC.

33. Mr. Ghosh submitted that the petitioners and the respondents Nos. 5 to 10 were appointed in the feeder post of Assistant Engineer (Civil) on diverse dates. The office order dated September 3, 2016, had been issued on the basis of the judgment and order dated March 16, 2016, passed by the High Court in APO 272 of 2013 with FMA 2555 of 2013. The High Court had directed that the dispute between the direct recruits and the promotees should be resolved in a particular way. Thus, the question of following the reservation rules did not arise. The petitioners and the respondent Nos. 5 and 6 were directly recruited

as Assistant Engineer (Civil) in the year 1996-97, whereas, the respondent Nos. 7, 8 and 9 were directly recruited in the month of December 1999 and the respondent No. 10 was promoted as Assistant Engineer (Civil) on May 12, 2000 and as Executive Engineer (Civil) on March 3, 2010. The petitioner Nos. 1 to 7 were promoted as Executive Engineer (Civil) on October 1, 2005. The respondent Nos. 5 and 6 were promoted to the post of Executive Engineer (Civil) on the same day. The petitioner Nos. 8 to 11 were promoted to the post of Executive Engineer on 1st March 2006. The respondent Nos. 7 and 8 were promoted to the post of Executive Engineer (Civil) against reserved vacancies in the year 2006. The seniority position of the petitioners, vis-a-vis their counterparts had been reflected in the gradation list of Executive Engineer dated April 7, 2009. Subsequently, the provisional gradation list for the post of Executive Engineer (Civil) was published on 8th May 2019.

34. 16 promotees had filed a writ petition being WP No. 21394(W) of 2000, challenging appointment of 26 direct recruits, in the post of Assistant Engineer (Civil). They prayed for re-determination of *inter se* seniority of the said promotees vis-a-vis the direct recruits. The direct recruits also filed a writ petition being WP No. 936 of 2003. The aforesaid writ petitions were disposed of by a learned Single Judge, inter alia, directing the Corporation to re-fix the seniority of the promotees who were petitioners in WP 21394(W) of 2000 notionally, above the person who had been appointed against the 9th vacancy for the post of Assistant Engineer (Civil) by way of direct recruitment during the

period 1996 to 1998 and to act on such seniority for all purpose in future. The other writ petition being WP No. 936 of 2003, was also disposed of accordingly.

35. In compliance with the said order, the seniority of 14 promotees was notionally fixed from August 7, 1997 by reckoning the date of appointment of Amitabh Pal, the holder of the 9th vacancy. Therefore, those engineers were notionally promoted to the post of Deputy Chief Engineer (Civil)(supernumerary) with effect from November 20, 2010, by retaining their lien in the post of Executive Engineer (Civil) till their absorption or regularization in the post of Deputy Chief Engineer (Civil). Such promotions were given considering the date of promotion of Amitabh Pal, “the 9th vacancy holder to the post of Deputy Chief Engineer (Civil) amongst the direct recruits in the post of Assistant Engineer (Civil)” during July 15, 1996 to July 15 1998.

36. Some of the parties filed appeals and cross-appeals against the said order. The appeals and cross appeals were disposed of upon holding that the promotees were entitled to receive monetary and other benefits, incidental to such promotion, with effect from the date of notional promotion. Accordingly, the appeals were dismissed. 17 Executive Engineers (Civil) were directly appointed as Assistant Engineers during 1997-1998. The petitioner Nos. 1 to 7 and the respondent Nos. 5 and 6 were also part of such recruitment process. By order of the court, the promotees who moved the writ petition, were notionally promoted to the post of Deputy Chief Engineer (Civil) category with effect from November 24, 2006, by the office order dated November 15 2017. As Rihan Sanyal and others were holding the post of Executive Engineer (Civil),

the KMC decided to re-designate and upgrade them so that the administrative chain of command would not get disturbed. The upgradation and re-designation to the post of Deputy Chief Engineer (Civil) was not a promotion. In the final gradation list of Executive Engineers (Civil) published on July 8, 2019, Ujjwal and Sanjoy were depicted to be senior to the petitioners. Such gradation list was not challenged at the appropriate time. In the absence of any challenge to the gradation list, the petitioners could not claim any relief with regard to the change of seniority position. Petitioners were enjoying the pay-scale of Deputy Chief Engineer (Civil) since the month of September 2016, but they were discharging the duties and functions as Executive Engineers (Civil). The petitioners were not promoted to the existing vacancies in the post of Deputy Chief Engineer (Civil), only because their turn had not arrived.

37. According to Mr. Ghosh, the catch-up rule would not come into operation after the introduction and implementation of the 85th amendment of the Constitution of India for the employees in Kolkata Municipal Corporation. By the 85th amendment, SC, ST employees were allowed to enjoy notional arrear/consequential benefits, including consequential seniority under cadre-wise gradation list.

38. The contention of the petitioners that the carried forward vacancy could not be alive for more than three years was vehemently objected to by Mr. Ghosh. Mr. Ghosh submitted that no such guideline or notification of the government had been published in this regard. The Backward Classes Welfare Department, West Bengal, always directed that the vacancy should be carried

forward and Rule 10 (c) of the said Reservation Rules of 1976, were to be followed. The Rule provided that in the absence of a qualified scheduled caste or scheduled tribe candidate against a particular reserved vacancy, the reserved vacancy should be carried forward till the next reserved vacancy occurred in the 50 point roster, but not beyond.

39. Mr. Ghosh vehemently urged that reservation of 22% for SC category in the 50 point roster model was not the maximum limit. Moreover, Rule 10(d) of the said Reservation Rules of 1976 clearly indicated that an SC employee could always be considered for appointment against a vacancy reserved for ST or vice versa, when the reserved vacancy could not be filled up by a SC or ST candidate, as the case may be. The promotion proposal was elaborately discussed with the Backward Classes Welfare Department and after obtaining concurrence from the said Department, the decision was taken.

40. Mr. Indranil Roy, learned Advocate for the State of West Bengal, adopted the submissions of KMC, but restricted his submissions to prayer (h) of the writ petition. Prayer (h) of the writ petition is quoted below:-

“(h) Declaration that Rule 10(d) of the West Bengal Scheduled Castes and Scheduled Tribes (Reservation of Vacancies of Services and Posts) Rules, 1976, providing for filing up of Scheduled Tribes vacancies by Scheduled Castes candidates and vice-versa in the event of non-availability of ST/SC candidates (as the case may be), is bad in law and ultra vires;”

41. According to Mr. Roy, the petitioners did not have the locus to challenge the conversion as they were not entitled to the 24th point in the roster. Moreover, Article 16 (4) of the Constitution of India empowered the States to make provisions for reservation and appointment of backward classes. Under

the Constitutional scheme, the State Government was within its right to frame the Rules of 1976, thereby, allowing inter-changeability and conversion of an SC post to an ST post, or vice versa. As the petitioners did not have any claim over the converted post, they were not entitled to challenge the conversion of the post reserved for ST to a SC post and the consequent promotion of a candidate from the SC category against such converted post. As there was no violation of the provisions of the Constitution, the Rule should be treated as *intra vires*. The petitioners could only challenge the appointment, if more than 50% reservation on the whole had been made in the promotional post. Moreover, the 1976 Act authorized the State Governments to frame their own rules, to carry out the provisions of the Act.

42. Mr. Majumdar, learned Advocate for the respondent Nos.5 to 10 submitted that the respondent Nos.5 and 6 were senior to the petitioners. They were appointed as Assistant Engineers (Civil) in the reserved category of ST on December 10, 1997, whereas the petitioners were appointed in 1998. The respondents Nos. 7 to 9 were appointed in 1999 and the respondent No. 10 was appointed in 2000. Petitioners Nos. 1 to 7 and the respondent Nos. 5 to 6 were promoted as Executive Engineers (Civil) on the same day. The respondent Nos. 5 and 6 were shown as senior to the petitioners by maintaining *inter se* seniority. The respondent Nos. 7 to 10 were promoted as Executive Engineers by rescheduling their seniority with effect of March 1, 2006, by creation of supernumerary posts, to avoid supersession under the unreserved category. Restoration was made to cure the defect in the seniority caused due to split

vacancies. If the same was not done, it would bring all the reserved categories candidates within the zone of consideration in one go, on an earlier date. By an order of September 3, 2016, the petitioners with the respondent Nos. 5 and 6 were upgraded and re-designated as Deputy Engineers (Civil) with lien against the post of Executive Engineers (Civil). The upgradation/re-designation was on account of a direction of the High Court to re-fix seniorities of promotees, notionally, in accordance with law from the stage of the promotion of the first direct recruit in the post of Assistant Engineer (Civil).

43. On May 8, 2019, a provisional gradation list was published, showing the respondent Nos. 5 and 6 as senior to the petitioners. In 2020, ten vacancies arose in the rank of Deputy Chief Engineer (Civil). The respondent Nos. 5 and 6 were considered for promotion for an unreserved post as per their position above the petitioners in the gradation list of Executive Engineers (Civil). Out of the ten vacancies, 2 were reserved for the SC category, 1 was carried forward, 1 was interchanged with ST, as per Rule 10(d) of the Reservation Rules, 1976. Two of the senior most Executive Engineers in the SC category, were treated to be unreserved by reason of automatic choice, in view of their seniority. The promotion of the respondent Nos. 5 to 10 were not illegal. The 16th point was carried forward, which was filled by an SC candidate. The other vacancy, which was designated for ST, was interchanged and filled up by an SC candidate due to non-availability of an ST candidate. Such interchangeability was also permitted under the law. Therefore, the promotions were strictly in accordance with the Act and the 1976 Rules as also the circular of KMC.

44. Thus, the adherence to 22% reservation by SC in the 50-point roster, could not in any way prevent the KMC to carry forward a SC post to the next recruitment drive and also to swap an ST post with an SC post, which was also permitted by law. The petitioners were holding lien against the substantive post of Executive Engineer (Civil). At the time of filing of the writ petition, respondent Nos. 5 to 10 had already become Deputy Chief Engineer (Civil) and were holding the next higher post. Therefore, the catch-up rule would not be applicable. Catch-up rule would be applicable only if a reserved category candidate was promoted to a higher rank, earlier than an unreserved candidate when both had become due for consideration for the next higher post reckoned to catch up with the reserved category candidate with effect from the date on which the reserved candidate got seniority/promotion by reason of the reservation policy. The later promoted unreserved candidate would then be deemed to have regained his seniority in the next higher post. In the instant case, there were ten vacancies of Deputy Engineer (Civil). Therefore, 50 candidates would be considered with a ratio of 1:5 as per Rule 10(a) of the Rules of 1976.

45. The reserved candidates could also occupy unreserved post in the 50-point roster both by reason of merit/seniority and also by applicability of the carry-forward rule. The determination of seniority as per the circular of the KMC No. 13 of 1984-1985 in respect of direct recruits would appear from Regulation 4 of the Calcutta Municipal Corporation (Determination of Seniority Regulations) 1983. Admittedly, Ujjwal and Sanjoy were senior to the writ

petitioners both at the induction level and also at the promotional level of Executive Engineer (Civil). In the absence of any provision for determining merit for promotion to the rank of Deputy Chief Engineer (Civil), KMC treated the rank occupancy to be the guiding factor for determining merit, i.e. seniority rules were applied. The constitutional mandate incorporated by the 85th amendment of the Constitution, permitted the corporation to make preferential positions for reservation of appointment or post in favour of any backward classes.

46. The expression “backward class” referred to in the said provision, would not only mean OBC. Article 16(4) was introduced by the 77th Amendment with effect from June 17, 1995. Special provision for promotion with regard to seniority of SC and ST was incorporated in the constitution. The retrospective effect of the Amendment of 2001 from June 17, 1995, was intended to correlate and reconcile the reservation of SC and ST with seniority as well. Article 16(4B) was introduced with effect from June 9, 2000 to apply the carry forward rule with the permissibility of filling up 50% reservation on a total number of vacancies of a particular unit. The argument of the petitioners to the extent of reservation of 22% for SC category of the cadre was demolished by the applicability of Article 16(4B) of the Constitution.

47. Mr. Majumdar emphasized that the petitioners did not belong to the scheduled caste category. They belonged to the unreserved category and did not have any right to be appointed against the posts filled up by the respondent Nos. 7 to 10. They did not have any right to challenge the appointment of the

respondent Nos. 5 and 6 against the unreserved category for the reason that the said respondents were senior to the petitioners. They were selected in the same recruitment process, but joined earlier. Appointment to the post of Deputy Engineer (Civil) was to be made by promotion from persons borne in the common cadre of Executive Engineer (Civil) with a degree in Civil, Mechanical and Electrical Engineering from a recognized university or equivalent.

48. The total strength of Deputy Engineers (Civil) in the cadre was 19. Ten vacancies arose in the said cadre, upon retirement and also promotion of the incumbents to the next higher post. The next point in the 50 point roster was 16, which was reserved for an SC as a carried forward vacancy. Accordingly, out of the existing ten vacancies, three vacancies were treated to be reserved for SC and one was reserved for ST. The rest of the vacancies were unreserved. Due to non-availability of an ST category candidate, the same was filled in by a schedule caste candidate. As per the gradation list of Executive Engineer (Civil) published by the Chief Manager Personnel dated July 8, 2019, the promotion started from gradation list No.2, as the employee in gradation list No.1, namely Amit Sengupta, had already retired. As per Section 5 of the 1976 Act, zone of consideration was to be counted in the ratio of 1:5.

49. 15 SC candidates were available within the normal zone of consideration, as eligible for promotion. Out of those 15, candidates at serial Nos. 3 and 6 in the gradation list were placed in the unreserved point as they had become eligible as per seniority cum merit. Four candidates (scheduled caste) from the

referred zone were taken from serial Nos.19, 20, 21 and 22 of the gradation list. Accordingly, the respondent Nos. 5 to 10 were appointed in six out of ten vacancies.

50. Referring to the appointment letters of the respondent Nos. 5 and 6, Mr. Majumdar submitted that even at the induction level, the said respondents were senior to the petitioners, irrespective of the fact that they had been selected in the same recruitment process. Appointment letters were issued in favour of the petitioners upon approval from the commission, much later. Ujjwal and Sanjoy joined earlier.

51. Rule 10(b) of the said amended Rules provided that if a candidate belonging to scheduled caste or scheduled tribe obtained promotion on the basis of merit with due regard to seniority, his promotion would be made against the unreserved vacancy and the reserved vacancy would be filled up by selecting candidates from the remaining scheduled tribe or scheduled caste candidates, irrespective of merit, but who were within the normal zone of consideration and were considered fit for promotion.

52. The promotion of the respondent Nos. 7, 8, 9 and 10 were strictly as per the 50 point roster in terms of schedule II of Section 5 of the 1976 Act. Further, due to the carry-forward rule and interchangeability, the restriction of 22% reservation for scheduled caste candidates was not applicable as the promotions were totally dependent on the roster points as per the availability of the vacant posts of scheduled caste and scheduled tribe candidates. The reservation was never post-based.

53. As per Rule 10(d) of the 1976 Rule, interchangeability of vacancy reserved for scheduled caste by a scheduled tribe candidate and vice versa, was permissible.

54. Accordingly, the Municipal Commissioner implemented the procedure for filling up the vacancy in the post of Deputy Chief Engineer (Civil). The gradation list of Assistant Engineer (Civil) published by the Kolkata Municipal Corporation on February 23, 2001, which was heavily relied upon by the petitioners, was not the final gradation list, but a draft copy. Upon receipt of objections from different employees against the draft gradation list of Assistant Engineer (Civil), a final gradation list of Assistant Engineer (Civil) was prepared upon considering all aspects including *inter se* seniority and existing vacancy positions.

55. The existing vacancy positions, according to Mr. Majumdar, were reflected in the promotion order of Executive Engineer (Civil) dated September 30, 2005. The note of the legal advisor dated September 9, 2002, was relied upon.

56. Mr. Majumdar further contended that the petitioners intentionally did not either produce their appointment letters or their date of joining as they were appointed sometime in 1998. Thus, they were precluded from challenging the seniority of Ujjwal and Sanjoy. As Ujjwal and Sanjoy had been recommended for appointment in 1997. The appointments were made in batches, according to the availability of vacancy, during the period of one year (validity of the panel).

57. The legal advisor's note was further relied upon to emphasize that the personnel department had placed the names of the scheduled caste, scheduled tribe and backward classes candidates according to their merit position in the draft gradation list, erroneously. Their dates of joining had not been taken into account. Accordingly, office order dated September 30, 2005, was issued, which was the end result of a decision dated August 26, 2005, passed by the High Court in WP No.1690 of 2005 and WP No. 2139W of 2000.

58. By the said office order, those employees were directed to report to the personnel department within October 1, 2005, to collect their posting orders by maintaining inter se seniority. In the office order dated September 30, 2005, Ujjwal and Sanjoy were placed higher than the petitioners by reckoning their *inter se* seniority. The seniority of the respondent Nos. 5 and 6 were maintained all along, even during the confirmation of the post of the petitioners and the said respondents in the post of Assistant Engineer (Civil). The confirmation order dated January 22, 2000, was referred to in order to point out that the respondent Nos. 5 and 6 were placed in a senior position than the petitioners.

59. Further reference was made to the gradation list of Executive Engineer (Civil), which was published from time to time between 2010 and 2019. In all such gradation lists, Ujjwal and Sanjoy were shown at a senior position than the petitioners.

60. KMC, upon consideration of the objections of the employees had corrected the gradation list and prepared several gradation lists. In all those gradation lists, respondent Nos. 5 and 6 were shown as seniors. The petitioners

Nos. 8 to 11 were promoted as Executive Engineer (Civil) on March 1, 2006. The respondent Nos. 7 and 8 on November 24, 2006, the respondent No. 9 on October 05, 2008 and the respondent No. 10 on March 3, 2010, upon KMC rescheduling the dates of promotion. Such rescheduling was done to implement the 85th Amendment of the Constitution of India.

61. The benefit of promotion given to the scheduled caste candidate in terms of implementation of the 85th Amendment, could not be challenged by candidates belonging to the general category. The petitioners did not challenge the office order dated December 30, 2005. The gradation lists which were prepared on and from 2009 to 2018, remained unchallenged until the promotion of the respondent Nos. 5 to 10 to the post of Deputy Chief Engineer (Civil).

62. Mr. Majumdar, relied on the following decisions:-

- (a) ***Dhole Govind Sahebrao and Ors. vs Union of India and ors.*** reported in ***(2015) 6 SCC 727***
- (b) ***Nair Service Society vs Dr. T. Beermasthan and Ors.*** reported in ***(2009) 5 SCC 545***
- (c) ***Management of Brooke Bond India (P) Ltd. vs Workmen*** reported in ***AIR 1966 SC 668.***

63. The court first proceeds to decide the challenge to the conversion of roster point number 24, from ST to SC by KMC on the ground of non-availability of a ST category candidate within the zone of consideration. The

said step was taken by the authority in terms of Rule 10(d) of the Reservation of 1976 Rules. Rule 10(d) is quoted below:-

“10(d). While vacancies reserved for Scheduled Castes and Scheduled Tribes will continue to be reserved for the respective community only, a Scheduled Caste employee may also be considered for appointment against a vacancy reserved for Scheduled Tribes, or vice-versa, where the appropriate reserved vacancy could not be filled by a Scheduled Tribe or a Scheduled Caste candidate, as the case may be.”

64. The contention of the petitioners was that such conversion was not permissible and the post should be filled up only by a person from the ST category as per the 50 point roster. The petitioners’ argument was that the Hon’ble Apex Court had deprecated such practice of conversion.

65. Mr. Roy learned Advocate for the State-respondent submitted that the rules were framed in exercise of power conferred by Section 13 of the West Bengal Scheduled Castes and Scheduled Tribes (Reservation of Vacancy in Services and Posts) Act, 1976. Section 13 of the said Act contains the rule making power. Section 13 is quoted below:-

“13.(1) The State Government may make rules for carrying out the purposes of this Act.

(2) In particular and without prejudice to the generality of the foregoing power such rules may provide for all or any of the following matters, namely:—

(a) form in which every establishment shall submit annual report to the State Government regarding the number of persons recruited in such establishment;

(b) any other matter which has to be or may be prescribed by rules made in this behalf.”

66. Mr. Roy drew the attention of the court to Article 16(4) of the Constitution of India and submitted that nothing in Article 16 prevented the

State from making any provision for reservation of appointment or post in favour of any backward class of citizen, which in the opinion of the State was not adequately represented in the service under the State.

67. Under such circumstances, this court finds that the rules have been framed in exercise of power conferred under the parent Act. This court also finds that the rule has been framed in consonance with the mandate of the Constitution under Article 16(4). A rule can be struck down, inter alia, on the following grounds:-

- a) The rule is ultra vires the Constitution;
- b) That same has been framed either without the legislative competence or in excess of power or authorization.
- c) The Rule was occasioned by failure to exercise administrative discretion, or if the rule making body acted at the behest of another or if the rule making authority was unlawfully contravening a government policy;
- d) The procedure prescribed for laying down a rule had not been followed, and
- e) The rule was framed in abuse of power, arbitrarily, in bad faith and the same suffered from unreasonableness.

68. The petitioners could not satisfy the court that Rule 10(d) of the Reservation Rules of 1976 which permit interchangeability of a post from SC to ST and vice versa, suffer from the above disqualifications.

69. Section 13(1) of the 1976 Act, delegates a general power to the State Governments to make rules for carrying out the purposes of the Act. Section

13(2) gives some specifications. The Hon'ble Apex Court, in the matter of ***Naresh Chandra Agarwal vs. ICAI and ors.*** reported in **2024 SCC Online SC 114**, explained the position of generality versus enumeration. It was held that the delegation of the rule making power for carrying out the purposes of the parent Act upon the rule making authority, was a general delegation. If the rule making power was not expressed in general terms, but explicitly listed in the statute, then it had to be seen if the rules made were protected by the limits prescribed by the parent Act. If the power fell within the general powers conferred, the rules would be intra vires, provided such rules stayed within the overall scope of the Act. In ***State of Jammu and Kashmir vs. Rakhinder Kumar***, reported in **(2013) 6 SCC 333**, it was held that when a general power to make regulations was followed by a specific power to make regulations, the latter did not limit the former. When the body making the rule had derived the power from the statute, it must function within the purview of the statute. In this case, there was a general delegation. Mr. Chatterjee has not been able to establish before the court that the delegated legislation had offended either the statute or the same was beyond the scope of the statute. It is not the case of the petitioners that the state government had acted in excess of power or that the delegated legislation was inconsistent with the provisions of the parent Act. The source of power is Section 13 of the parent Act, which conferred jurisdiction upon the State Government to frame its own rules. The delegation is in general terms. The court does not find the arguments of the petitioners to be tenable in law. The Hon'ble Apex Court had held that even if the rule did not

fall within a particular enumerated head, the general power to make rules, to carry out the purpose of the act, was not restrictive in any way. Thus, the object of the act is required to be considered to see whether the State Government had acted within the limits of the delegation (carrying out the purpose of the act). The statute was enacted to provide for reservation of vacancies in services and posts for the members of the scheduled caste and scheduled tribe. The rules were framed accordingly. Rule 10(d) provided that if in a particular recruitment drive, a roster point reserved for the SC or ST category candidate would remain unfilled due to non-availability of such candidates within the zone of consideration, the same could be interchanged. The provision of the Act was to provide reservation to persons belonging to certain categories of persons who were not adequately represented in the services. The rule permitting interchangeability is within the scope of the Act. If a ST category candidate is not available, the same can be filled by a SC category candidate and vice versa. The rules have been widely followed in the Corporation, ever since.

70. Under such circumstances, the challenge to the rule is unfounded and the prayer to declare Rule 10(d) of the said Rules as ultra vires is rejected. In the decision of ***Nair Service Society vs. Dr. T. Beermasthan and Ors.*** reported in **(2009) 5 SCC 545**, the Hon'ble Apex Court held that different State Governments in the country may have separate methods for providing reservation and the same would be valid as long as the method adopted by a particular State Government did not violate the Constitutional provisions or the

statute. It was not for the court to decide on the wisdom or otherwise of the said method of reservation. The court should exercise judicial restraint and not interfere with the Rules, unless there was clear illegality. In the opinion of the Hon'ble Apex Court, the method prescribed by the rule made by the State Government did not suffer from any infirmity or illegality. Hence it was held that the High Court had wrongly exercised its power by entertaining the writ petition. The relevant paragraphs are quoted below:-

“22. A bare perusal of Rule 14(a) of the Rules shows that a unit for appointment for the purpose of Rule 14 shall be 20, of which 2 are reserved for SC/ST candidates and 8 for OBC candidates, while the remaining 10 shall be on the basis of open merit. The proviso to Rule 14(a) states that out of 5 posts reserved for SC/ST candidates one post shall go to ST candidates and the remaining to an SC candidates, and in the absence of ST candidates it shall go to an SC candidate and vice versa.

56. Different State Governments in the country may have different methods for providing reservations, and these will be valid as long as the method adopted by a particular State Government does not violate any constitutional provision or statute. It is not for this Court to decide on the wisdom or otherwise of the said method of reservation. This Court should exercise judicial restraint and not interfere with the same unless there is some clear illegality. In our opinion the method prescribed by the Rules made by the State Government suffers from no infirmity or illegality, and hence the High Court acted wrongly in allowing the writ petition.”

71. Also, if a particular rule had been made applicable since its inception and has been an accepted practice for a long period, the same should not be disturbed on the mere asking, unless there were compelling reasons. Even if two interpretations were possible, the interpretation which favoured the

practice which was being followed for a long period should ordinarily be preferred, unless there was ex-facie violation of law.

72. In *Nagaraj (supra)*, the Hon'ble Apex Court held that the criteria for determining the validity of the law, was the competence of the law making authority. The same would depend on the ambit of the legislative power and the limitation imposed thereon, as also, the limitations on the mode of exercise of the power.

73. R.K. Sabharwal (Supra), was relied upon by the petitioners to urge that when a percentage of reservation was fixed in respect of a particular cadre and the roster indicated the reserve point, it had to be taken that the posts would be filled up from amongst those members of the reserved category and not otherwise. The decision does not deal with the rule of interchangeability. The ratio of the said judgment was that a running account was to operate till the quota provided was reached and not thereafter. The paragraph relied upon by the petitioners deals with a different proposition and the same is quoted below:-

“4. When a percentage of reservation is fixed in respect of a particular cadre and the roster indicates the reserve points, it has to be taken that the posts shown at the reserve points are to be filled from amongst the members of reserve categories and the candidates belonging to the general category are not entitled to be considered for the reserved posts. On the other hand the reserve category candidates can compete for the non-reserve posts and in the event of their appointment to the said posts their number cannot be added and taken into consideration for working out the percentage of reservation. Article 16(4) of the Constitution of India permits the State Government to make any provision for the reservation of appointments or posts in favour of any Backward Class of citizens which, in the opinion of the State is not adequately represented in the Services under the State. It is, therefore, incumbent on the State

Government to reach a conclusion that the Backward Class/Classes for which the reservation is made is not adequately represented in the State Services. While doing so the State Government may take the total population of a particular Backward Class and its representation in the State Services. When the State Government after doing the necessary exercise makes the reservation and provides the extent of percentage of posts to be reserved for the said Backward Class then the percentage has to be followed strictly. The prescribed percentage cannot be varied or changed simply because some of the members of the Backward Class have already been appointed/promoted against the general seats. As mentioned above the roster point which is reserved for a Backward Class has to be filled by way of appointment/promotion of the member of the said class. No general category candidate can be appointed against a slot in the roster which is reserved for the Backward Class. The fact that considerable number of members of a Backward Class have been appointed/promoted against general seats in the State Services may be a relevant factor for the State Government to review the question of continuing reservation for the said class but so long as the instructions/rules providing certain percentage of reservations for the Backward Classes are operative the same have to be followed. Despite any number of appointees/promotees belonging to the Backward Classes against the general category posts the given percentage has to be provided in addition. We, therefore, see no force in the first contention raised by the learned counsel and reject the same.”

74. Thus, the authority acted as per the Rules, and converted the 24th point from ST to SC.

75. The next question which arises, is with regard to carry forward of 15th point to the 16th point. The categorical submission of the Corporation was that the 16th point in the roster although UR, was treated as a reserved post in view of carry forward of one SC post (15th point). The principle of carry forward is permissible under Article 16(4B) of the Constitution of India and the Reservation Rules of 1976.

76. The Rules, namely, 10(c) is quoted below:-

“10(c) In the absence of a qualified Scheduled Caster or Scheduled Tribe candidate against a particular reserved vacancy, the reserved vacancy

shall be carried forward till the next reserved vacancy occurs in the twenty point roster but beyond.”

77. Rule 10(c) provides that in the absence of a qualified SC candidate or ST candidate against a particular reserved vacancy, the reserved vacancy shall be carried forward till the next vacancy occurred. Article 16(4B) was introduced with effect from June 9, 2000, to apply the carry forward rule with the permissibility of filling up 50% reservation on total number of vacancies of a particular year. Moreover, the petitioners have not been able to establish either by way of pleadings, arguments or evidence that the contention of the Corporation that the 16th point vacancy was carried forward for an SC post from the earlier round of promotion was either incorrect or contrary to the record. The 15th point (SC reserved) was filled by a general candidate. Although, this was not permissible, the question cannot be reopened now. Article 16(4B) of the Constitution of India is quoted below:-

“16(4B) Nothing in this article shall prevent the State from considering any unfilled vacancies of a year which are reserved for being filled up in that year in accordance with any provision for reservation made under clause (4) or clause (4A) as a separate class of vacancies to be filled up in any succeeding year or years and such class of vacancies shall not be considered together with the vacancies of the year in which they are being filled up for determining the ceiling of fifty per cent, reservation on total number of vacancies of that year.”

78. Thus, the carrying forward of the SC post from the 15th point to the 16th point cannot be held to be either illegal or contrary to law.

79. The question which now arises is whether the promotions of the respondent No.5 to 10 were in accordance with law.

80. The first issue is whether Ujjwal and Sanjoy could be promoted to UR posts. The seniority of Ujjwal and Sanjoy in the common gradation list is not in dispute. The fact that they joined earlier than the petitioners, is not in dispute. The dates of joining are available from the gradation list. However, records reveal that Ujjwal and Sanjoy had all along been treated as scheduled caste candidates. They have been depicted above the petitioners all along in the common gradation list of Executive Engineer (Civil), but as SC candidates. Regulation 5 of the circular dated April 23, 1984 of the corporation provides that seniority of persons appointed on promotion to any post, cadre, pay-scale/grade shall be determined from the date of joining of such post, cadre or pay-scale. Thus, the seniority of the Ujjwal and Sanjoy in the combined gradation list cannot be challenged at this stage, by the petitioners. Ujjwal and Sanjay were promoted to the post of Executive Engineer (Civil) on the same day as the petitioner Nos.1 to 7, i.e., on October 1, 2005. The records reveal that the gradation list was prepared upon considering different orders of the High Court passed in various writ petitions. The submissions of Mr. Ghosh and Mr. Majumdar with regard to the finality of the gradation list are accepted. The discussions have been made in paragraphs 32 to 35 and 41 to 59 of this judgment.

81. Rule 10(b) of the Reservation Rules of 1976, provides as follows :-

“10(b)- If a candidate from the Scheduled Castes or Scheduled Tribes obtains promotion on the basis of merit with due regard to the seniority, his promotion shall made against unreserved vacancy and reserved vacancies shall be filled up by selecting candidates from the remaining Scheduled Castes or Scheduled Tribes candidates irrespective of merit

but who are within the normal zone of consideration and are considered fit for promotion.”

82. The rules clearly mandate that, if a candidate from the scheduled caste or scheduled tribe obtains promotion on the basis of merit with due regard to seniority, his promotion shall be made against unreserved vacancy. In such a situation, reserved vacancies were to be filled up by selecting candidates from the remaining scheduled caste or scheduled tribe candidates, irrespective of merit, who were within the normal zone of consideration and were considered fit for promotion. Ujjwal and Sanjoy ought to have been treated as reserved category candidates, for promotion to the post of Deputy Chief Engineer (Civil). Even if, a combined gradation list was prepared for both reserved and unreserved category candidates and Ujjwal and Sanjoy were placed above the petitioners in the gradation list, in the absence of assessment of merit of these candidates by way of open competition amongst the persons eligible for promotion to the vacant posts of Deputy Chief Engineer (Civil), the question of promoting two scheduled caste candidates only on the ground of seniority against unreserved vacancies, would not arise. There cannot be any migration from SC to UR.

83. In 2018, the proposal for filling up the existing vacancies in the post of Deputy Chief Engineer (Civil) by way of promotion from the cadre of Executive Engineer (Civil) had been initiated for the first time. This was followed in 2019. Significantly, none of the proposals contained any suggestion that the Ujjwal and Sanjoy would be promoted against the vacancy reserved for UR category.

The change in the stand occurred in February 2021, culminating in the passing of the impugned order dated March 3, 2021. Those proposals form a part of the supplementary affidavit filed by the petitioners.

84. Neither the respondent Nos. 5 to 10, nor the corporation have been able to establish before this court that merit of Ujjwal and Sanjoy were assessed at any point prior to such promotion, thereby, making them eligible to be promoted against UR category posts. Thus, the promotion of Ujjwal and Sanjoy to unreserved vacancies, according to their seniority position in the gradation list of Executive Engineer (Civil), was contrary to law. Without any assessment on merit, such promotion to UR posts was not permissible.

85. In ***R.K. Sabharwal (supra)***, the Hon'ble Apex Court held that scheduled caste candidates, who competed along with general category candidates, should not be counted within the percentage of reservation made for schedule caste candidates in the service. They had competed with the general category candidates and were selected on their merit, they should be treated as unreserved.

86. In the decision of ***Indra Sawhney (supra)***, the Hon'ble Apex Court held that, it could well happen that some members belonging to scheduled caste had got selected in open competition on the basis of their own merit. They would not be counted within the quota reserved for scheduled caste and they would be treated as open competition candidates. Such principle was also followed in ***Union of India and Another vs. another versus Ms. A***

Shainamol IAS and Another decided in ***Civil Appeal Nos. 11480-81 of 2018***.

87. If a candidate was selected on merit, without recourse to the benefit of reservation, then, appointment of such candidate albeit belonging to a reserved category, would be treated as an appointment to a general post and the quota of reservation available to the reserved category, would not be diminished by such appointment.

88. The promotion on the basis of seniority, without any evaluation of the respective merits of the reserved candidates could not be justified on the ratio of these decisions.

89. In the decision of ***K. Manorama (supra)***, the principle that when a member belonging to a scheduled caste got selected in open competition on the basis of merit, the candidate should not be counted against the quota reserved for scheduled caste, but should be treated as an open candidate, was once again reiterated. Such rule would apply only with regard to promotion etc., by open competition and not to promotions effected solely on the basis of seniority-cum-suitability.

90. In the decision of ***Ajit Singh Januja and others vs. State of Punjab and others***, reported in ***(1996) 2 SCC 715***, the Hon'ble Apex Court held that there could be no promotion for reserved category candidates on the basis of their accelerated seniority. Once the quota was full and roster had stopped for members of the scheduled castes and backward classes in respect of whom reservation had been made and the roster had been prescribed, their case for

promotion to a still higher grade against general category posts had to be considered by not treating them as members of the scheduled castes and backward classes, “on any crutch”. They could not be promoted only on the basis of their accelerated seniority. It was reiterated that for being considered for appointment or promotion against a general category post, merit was the primary consideration because the employee was to enter into the service or grade of service through merit channel.

91. Thus, Ujjwal and Sanjoy ought to have been promoted against the 16th point (carried forward SC) and the 18th point (reserved for SC) and not against UR vacancies.

92. As the court has already held that carry forward and conversion were permissible, thus filling up such posts by SC category candidates were not contrary to law. The irregularities which may have occurred prior to the concerned promotional drive cannot be reopened at this stage. The two vacancies (roster point 18 and 21) which were reserved in the roster point for SC candidates could be filled up by SC candidates. Thus, promotion of four SC candidates in the concerned promotional drive was permissible, i.e., 16th point carry forward SC, 18 and 21, reserved for SC as per roster and 24th point converted to SC from ST.

93. The 16th post should have been filled by Ujjwal, who was No.3 in the gradation list and the 18th post should have been filled up by Sanjoy, who was No.6 in the gradation list.

94. The 17th point was unreserved which was rightly filled by Samiran Ghosh who was at serial number 2 in the gradation list. The 19th point was an unreserved vacancy, to which Ujjwal was wrongly promoted as already discussed above. Jyoti Prakash Sarkar appearing at serial no.4 of the gradation list should have been promoted against the 19th point. The 20th point was also unreserved and Partho Sarathi Samanto appearing at serial no.5 of the gradation list ought to have been promoted to such post. The 21st point was reserved for SC against which the next senior most SC candidate Utpal Mistry who is at serial no. 19 of the gradation list deserved to be promoted to. The 22nd and 23rd points were unreserved, to which Anindya Kumar Ghosh and Subhasish Bhattacharya at serial no. 7 and 8 respectively, of the gradation list, were to be promoted. The 24th point was converted from ST to SC against which, Durjay Sarkar at serial number 20 of the gradation list, should have been promoted. The 25th point being unreserved, should have been filled up by Santanu Roy who was at serial no.9 of the gradation list.

95. The petitioner numbers 2 and 3, by virtue of their seniority in the gradation list, (Subhasish and Santanu) ought to have been promoted against two unreserved posts which were wrongly filled up by Ujjwal and Sanjoy. They shall be given notional promotion from the same day as the respondent numbers 5 and 6. Necessary office order will be issued forthwith. Their seniority will be restored in the cadre of Deputy Chief Engineer (Civil). All monetary benefits, and other incidental benefits shall be given to them retrospectively from the said date. Promotion of Uday Ranjan Shah against the

21st point, to which Utpal should have been promoted and promotion of Swapan to the 24th point, which was converted from ST to SC and to which Durjay should have been promoted, were illegal and contrary to law. Uday and Swapan were not entitled to be promoted in view of the discussion hereinabove being at serial no. 21 and 22 in the gradation list. Durjay at serial number 20 of the gradation list should have been the last SC candidate to be promoted.

96. Under such circumstances, this court holds that the posts held by Uday and Swapan, in the cadre of Deputy Chief Engineer (Civil), should be treated as supernumerary posts and they shall continue to hold the post till their retirement or promotion to the next higher post and thereafter those posts shall stand abolished. It is informed that Swapan has since retired. Ujjwal, Utpal, and Durjay have been promoted to the post of Director General (Civil) on ad hoc basis during the pendency of the writ petition, for six months and or till regularization, subject to the recommendation of the selection committee. The promotion was by selection from the feeder post of Deputy Chief Engineer (Civil). Their promotions are set aside. They would be treated to be officiating in the said post of Director General (Civil) and cannot claim any equity. Fresh selection shall be held. Subhasish and Santanu must be considered by the selection committee along with Ujjwal, Utpal and Durjay for the post of Director General (Civil). Ujjwal, Utpal, Durjay, Jyoti Prakash, Partha, Anindya, Subhasish and Santanu should have been promoted to the post of Deputy Chief Engineer (Civil) on the same date. They were to compete for being selected to the post of Director General (Civil). The post of Director General

(Civil) does not contain any reservation. The promotion is by selection. Experience for a number of years in the post of Deputy Chief Engineer (Civil) is the requirement. Ujjwal, Utpal, Durjay, Jyoti, Partha and Anindya were required to compete with Subhasish and Santanu for promotion to the post of Director General (Civil).

97. Jyoti, Partha and Anindya who were also selected on ad hoc basis, subject to certain conditions, were not parties to the proceeding and thus the court does not comment on their promotions. The promotion order will govern them and the matter is left to KMC for a decision as to how their selection shall be treated, pursuant to this judgment and the observations made above.

98. The petitioner numbers 1, 4 to 8 who have already been promoted to the post of Deputy Chief Engineer (Civil), by virtue of being senior to Uday and Swapan (retired), must be restored their seniority in the cadre of Deputy Chief Engineer (Civil) by applying the catch up rule. Necessary steps be taken forthwith.

99. With regard to the petitioner number 9, 10 and 11, they shall be entitled to be promoted to the post of Deputy Chief Engineer (Civil) as and when vacancy arises, and they shall be entitled to regain seniority over those SC candidates who were promoted earlier, but were junior to them and not entitled to be appointed, as already discussed.

100. The Hon'ble Apex Court has explained the catch up Rule. In the matter of ***Ajit Singh and ors. (II) v. State of Punjab and ors.***, reported in **(1999) 7 SCC 209**, the Hon'ble Apex Court held as follows:-

77. We, therefore, hold that the roster-point promotees (reserved category) cannot count their seniority in the promoted category from the date of their continuous officiation in the promoted post, — vis-à-vis the general candidates who were senior to them in the lower category and who were later promoted. On the other hand, the senior general candidate at the lower level, if he reaches the promotional level later but before the further promotion of the reserved candidate — he will have to be treated as senior, at the promotional level, to the reserved candidate even if the reserved candidate was earlier promoted to that level. We shall explain this further under Point 3. We also hold that Virpal [(1995) 6 SCC 684 : 1996 SCC (L&S) 1 : (1995) 31 ATC 813] and Ajit Singh [(1996) 2 SCC 715 : 1996 SCC (L&S) 540 : (1996) 33 ATC 239] have been correctly decided and that Jagdish Lal [(1997) 6 SCC 538 : 1997 SCC (L&S) 1550] is not correctly decided. Points 1 and 2 are decided accordingly.

101. In the matter of ***B.K. Pavitra and ors. v. Union of India and ors.***, reported in **(2017) 4 SCC 620**, the Hon'ble Apex Court held as follows:-

28. In *S. Panneer Selvam v. State of T.N.* [*S. Panneer Selvam v. State of T.N.*, (2015) 10 SCC 292 : (2016) 1 SCC (L&S) 76], question before the Court was whether in absence of any policy decision by the State for giving consequential seniority to candidates promoted on the basis of reservation prior to a senior general category candidate, claim for consequential seniority could be accepted. Answering the question in the negative, it was held that in absence of provision for consequential seniority, “catch-up” rule will be applicable and the roster point promotees cannot claim such consequential seniority. The senior general candidates will regain their seniority on being promoted. Observations relevant in this regard are as follows : (SCC pp. 312-13, paras 34 & 36)

“34. If we look at the above comparative table of the service particulars of the appellants and the respondents, it is seen that the contesting respondents U. Palaniappan joined the service almost seven years after the appellants, his seniority is automatically accelerated at an unprecedented rate and as on 1-4-2004 his seniority rank as ADE is 150 and seniority of V. Appadurai is 120. The appellants who are qualified and senior than the contesting respondents are placed much below in rank in comparison to the person belonging to the reserved class promotees who were promoted following the rule of reservation. It is to be noted that the private respondents in the present case have been promoted temporarily under Rule 39(a) and Rule 10(a)(i) of the General Rules with the condition that their inclusion in the promotional order shall not confer on them any right whatsoever in the service. Determination of seniority is a vital aspect in the service career of an employee and his future promotion is

dependent on this. Therefore, determination of seniority must be based on some principles which are just and fair. In the absence of any policy decision taken or rules framed by the State of Tamil Nadu regarding Tamil Nadu Highways Engineering Service, accelerated promotion given to the respondents following rule of reservation in terms of Rule 12 will not give them consequential accelerated seniority.

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

(emphasis in original)

29. It is clear from the above discussion in *S. Panneer Selvam* case [*S. Panneer Selvam v. State of T.N.*, (2015) 10 SCC 292 : (2016) 1 SCC (L&S) 76] that exercise for determining “inadequacy of representation”, “backwardness” and “overall efficiency”, is a must for exercise of power under Article 16(4-A). Mere fact that there is no proportionate representation in promotional posts for the population of SCs and STs is not by itself enough to grant consequential seniority to promotees who are otherwise junior and thereby denying seniority to those who are given promotion later on account of reservation policy. It is for the State to place material on record that there was compelling necessity for exercise of such power and decision of the State was based on material including the study that overall efficiency is not compromised. In the present case, no such exercise has been undertaken. The High Court erroneously observed that it was for the petitioners to plead and prove that the overall efficiency was adversely affected by giving consequential seniority to junior persons who got promotion on account of reservation. Plea that persons promoted at the same time were allowed to retain their seniority in the lower cadre is untenable and ignores the fact that a senior person may be promoted later and not at the same time on account of roster point reservation. Depriving him of his seniority affects his further chances of promotion. Further plea that seniority was not a fundamental right is equally without any merit in the present context. In absence of exercise under Article 16(4-A), it is the “catch-up” rule which fully applies. It is not necessary to go into the question whether the Corporation concerned had adopted the rule of consequential seniority.

30. In view of the above, we allow these appeals, set aside the impugned judgment and declare the provisions of the impugned Act to the extent of doing away with the “catch-up” rule and providing for consequential seniority under

Sections 3 and 4 to persons belonging to SCs and STs on promotion against roster points to be ultra vires Articles 14 and 16 of the Constitution. The judgment will not affect those who have already retired and will not affect financial benefits already taken. Consequential promotions granted to serving employees, based on consequential seniority benefit, will be treated as ad hoc and liable to be reviewed. Seniority list may be now revised in the light of this judgment within three months from today. Further consequential action may be taken accordingly within next three months.

- 102.** The writ petition and connected application are accordingly disposed of.
- 103.** There will be no order as to costs.
- 104.** Parties are directed to act on the server copy of this judgment.

(Shampa Sarkar, J.)