

CASE NO.:
Appeal (civil) 1078-1081 of 2005

PETITIONER:
SHIV NATH PRASAD

RESPONDENT:
SARAN PAL JEET SINGH TULSI & ORS.

DATE OF JUDGMENT: 10/01/2008

BENCH:
A.K. MATHUR & MARKANDEY KATJU

JUDGMENT:
J U D G M E N T

A.K. MATHUR, J.

1. These appeals are directed against the order dated 15th may 2003 passed by the Division Bench of Madhya Pradesh High Court in Writ Petition No. 5634 of 1999, whereby Shiv Nath Prasad, appellant (herein) challenged the order passed by the State Administrative Tribunal challenging the promotion of petitioner/appellant before us and private respondents who belong to non-scheduled caste. The case of the appellant (herein) was that he was appointed as Assistant Engineer in the Public Works Department after selection through Madhya Pradesh Public Service Commission. Petitioner/Appellant (Scheduled Caste) alongwith other Schedule Caste and other private respondents (non-SC) were selected and appointed as Assistant Engineers on the basis of Civil Services Examination conducted by the Madhya Pradesh Public Service Commission. The names of scheduled caste candidates appeared at S.Nos. 23, 24 and 25 below the name of the respondent Saran Pal Jeet Singh Tulsi (herein). After their appointment, they joined the duties on the post of Assistant Engineer on different dates in the year 1972. The names of the petitioner/appellant and other scheduled caste candidates were shown in the select list prepared by the Public Service Commission in lower position and their seniority was also drawn on the post of Assistant Engineer in the order mentioned in the select list. In the gradation list, issued for the post of Assistant Engineer as on 1.4.1982, the names of the petitioner/appellant and other scheduled caste candidates duly selected appeared at S. Nos 187, 189 and 190, while the name of the respondent no. 1 (herein) and others appeared between S.Nos 168-186. Therefore, admittedly, the respondents (herein) were senior to the petitioner/appellant. Thereafter, the petitioner/appellant was promoted to the post of the Executive Engineer in July, 1980 against the reserved post of the Executive Engineer, whereas, other private respondents (non-scheduled caste candidates) were not considered for promotion on account of non-availability of post in general category. But, they were considered and appointed on the post of Executive Engineer in the year 1985, i.e. much after the promotions of the scheduled caste candidates including that of petitioner/appellant before us. A provisional gradation list was issued and published on 18.6.1991 and objections were invited and that list was finalized on 8.10.1991. In this gradation list, the candidates who were appointed against the scheduled caste vacancies were shown above the other private respondents who were appointed against the general quota. Persons who were promoted against the reserved category were placed low in the merit prepared by the Public Service Commission, but shown as senior, on account of their earlier promotion on the post of Executive Engineer against reserved category, and thereby having march over the persons of the general quota, who were promoted later than these candidates, i.e. scheduled castes/scheduled tribes. This list

was challenged before Tribunal and a prayer was made that they be placed above the scheduled caste candidates, because they were not superseded by the scheduled caste candidates but on account of non-availability of post under general quota, they could not be promoted. Therefore, there is no case of supersession and as such, the seniority position of the Assistant Engineers, prepared on the basis of the merit list of the Public Service Commission should be followed and they be made senior to the persons, who were appointed against the scheduled caste quota. It was also contended before the Tribunal that on account of General Administration Department circulars dated 2.5.1975 and 17.5.1975 and as per the provisions of the M.P. Civil Service (General Conditions of Service) Rules, 1961 (hereinafter referred to as Rules of 1961), they are entitled to be placed higher in the seniority list of Executive Engineer, though they might have been promoted later. This petition was opposed before Tribunal by private respondents (Scheduled Caste candidates), as well as by the State. The claim of the petitioner was denied before Tribunal and according to the return filed by the private respondents, it was claimed that since the private respondents, i.e., scheduled caste candidates were promoted on recommendation of DPC in different years, therefore, by virtue of their date of appointment, they became senior to the person from general quota and as such they are entitled to higher seniority. The objection of limitation was also raised. The objection of limitation was overruled by Tribunal and Tribunal allowed the application of those applicants and directed to consider all the petitioners before Tribunal and other persons similarly selected against general quota, for promotion to the post of Superintending Engineer from the date prior to the date on which private respondent no. 2 (petitioner/appellant) was promoted by calling a Review Departmental Promotion Committee and consequently, all benefits to be given to them, if they were found suitable including for the post of the Chief Engineer and if it would become necessary to revert the private respondent no. 2 (petitioner/appellant) from the post of Chief Engineer for want of the post, such order shall be made within two months, however, no arrears shall be paid. Aggrieved against this order of Tribunal, the present writ petition was filed by the petitioner/appellant challenging the order of the Tribunal.

2. The contention raised before the High Court was that since the appellant (herein) was promoted to the post of Executive Engineer earlier than to the respondent (herein) and thereafter, he was promoted to the post of Superintending Engineer and the respondent (herein) was promoted to the post of Superintending Engineer later, therefore, he cannot be equated with the petitioner as such order of Tribunal is not sustainable. He also claimed seniority over the respondent (herein), because the petitioner/appellant was promoted to the post of Executive Engineer much earlier than him. He claimed seniority in the cadre of Executive Engineer on account of longer length of officiation. Therefore, the challenge of the respondent (herein) before the Tribunal, claiming seniority over and above him on the post of Executive Engineer was not sustainable and in that connection, the case of Akhil Bhartiya Soshit Karamchari Sangh was relied (AIR 1996 SCC 3534). As against this, it was contended on behalf of respondent (herein) that since the respondent was placed higher in the seniority in the post of Assistant Engineer, i.e. the feeder cadre on the basis of the selection made by the Public Service Commission, therefore, he will carry his seniority on promotion to the post of Executive Engineer and that seniority cannot be disturbed, simply because the petitioner got the promotion on the post of Executive Engineer earlier than the petitioner on account of the reserved post being available, the basic seniority cannot be disturbed and in that connection, reliance was placed in the case of Ajit Singh Juneja and others vs. State of Punjab and others (1996) 2 SCC 715 and Ajit Singh and others vs. State of Punjab and others (1999) 7 SCC 209. It was contended on behalf of the State that on account of the amendment in the Article 16(4A) in the Constitution, the law laid

down in the case of Ajit Singh I and Ajit Singh II(Supra) lost their basis and, therefore, they are not applicable. It was also contended by the State that since they were promoted against the reserved category on the post of Executive Engineer by five years earlier than the general quota candidates, therefore, they would carry their seniority in the cadre of the Executive Engineer from their date of promotion. It was also contended that subsequently, candidates from reserved category including petitioner/appellant was promoted to the post of Superintending Engineer on 7.4.1993, while general category persons as Superintending Engineer on 8.6.1995. In this background, the High Court framed two questions which reads as under:

\0231. Whether the general category candidates are entitled to higher seniority in the promotional cadre of Executive Engineer as they were senior in the feeder cadre of Assistant Engineer irrespective of their date of promotion?

2. Whether the reserved category candidates should be held to be senior to that of general category candidates on account of their length of seniority in the cadre of Executive Engineer from the date of their actual officiation based on their regular promotion to this post?"

3. The recruitment to the promotions within the service are governed by the provisions of the M.P. Public Works Department Engineering (Gazetted Service Recruitment) Rules 1969 (hereinafter referred to Rules of 1969). The promotion to the post of Executive Engineer, as per these rules is hundred per cent from the post of Assistant Engineer. Therefore, the feeder cadre for the post Executive Engineer is Assistant Engineer. The selection is required to be made on the basis of merit-cum-suitability. It further contemplates that a person with exceptional merit and suitability can be recommended by the Departmental Promotion Committee for promotion to the post of Executive Engineer and that list is to be sent to the Public Service Commission for approval and, thereafter, the Government makes appointment on the recommendation so made by the Departmental Promotion Committee. Therefore, the feeder cadre for promotion is the Assistant Engineer on the basis of seniority list so prepared. But the rules did not provide that in case the promotion is made against the scheduled caste vacancy, then how seniority will be assigned. In order to fill up this gap, Executive Memoranda were issued by the State Government on 2.5.1975 and 17.5.1975, which provide for reservation in promotion as well as provisions made for fixation of inter-se seniority between those who were promoted against reserved quota on the basis of roster-point. Para 3(3) of the Memorandum contemplated that though the persons may have been promoted against reserved category but their inter-se seniority between the general category candidates and the reserved category candidates so promoted shall be maintained as was in the feeder cadre from which they were promoted. In the present case, the appellant (herein) was not selected on account of exceptional merit, but on account of the post being available against the roster-point, scheduled caste category. Therefore, his promotion was on account of the reserved quota and as such he will carry his seniority as was in the feeder post, i.e., Assistant Engineer. Sub-para 3 of para 3 of the above said memorandum, which is reproduced, reads as under:

\023All the persons selected in the promoted post including Scheduled Caste and Scheduled Tribe persons, their inter-se seniority will be determined according to their seniority in the post from which they have been promoted. But if any person has been placed above the persons so promoted on the basis of his special qualification, his seniority in the promoted post will be fixed according to his seniority.\024

4. Therefore, in this background it was held that the petitioner/appellant will carry his seniority as was given in the feeder post and he cannot have a march on account of his earlier promotion against the reserved category. The Division Bench of the High Court relied on the decision of this Court in the case of Ajit Singh I and Ajit Singh II (Supra). In this background, High Court confirmed the order of the Tribunal and dismissed the writ petition of appellant aggrieved by this order of the Division Bench of High Court dated 15.5.2003, the present appeal was filed.

5. Learned counsel for the appellant submitted that since the petitioner/appellant was promoted on the post of Executive Engineer in 1980 and respondents were promoted in 1985, therefore, petitioner/appellant had already had a march over the respondent and he also submitted that by virtue of the 77th and 85th constitutional amendment of Article 16 (4A), the promotion of these persons shall be deemed to be validly made, therefore, the petitioners are entitled to that higher seniority and consequential benefit of earlier promotion to the post of Executive Engineer, Superintending Engineer and likewise to the post of Chief Engineer. It was submitted that this was a constitutional mandate and Court cannot ignore the constitutional mandate. Therefore, the learned counsel submitted that the view taken by the High Court cannot be sustained. He also submitted that the ratio laid down in the case of Ajit Singh I and Ajit Singh II (Supra) does not hold good anymore in view of the 77th and 85th constitutional amendment and that shall deem to be come into force retrospectively. Consequently, all the benefit given by the petitioner is correct. As against this, the learned counsel for the respondent strenuously urged before us that the constitutional amendments i.e. 77th and 85th were retrospective with effect from 17.6.1995 and it cannot go beyond that. Therefore, present case has to be decided on the basis of legal position obtaining at the relevant time. The retrospectivity cannot be given to constitutional mandate beyond what Parliament has already given.

6. Before we proceed to consider the rival submissions, it would be appropriate to reproduce both the 77th and 85th constitutional amendments. The 77th amendment in the Constitution was inserted by Article 16 (4A) with effect from 17.6.1995 enabling State Government to make provision for reservation in State services in favour of scheduled castes and scheduled tribes in matter of promotion which was not there prior to this amendment, but it did not provide any benefit of seniority. Therefore again Article 16 (4A) was amended by the Constitution (85th Amendment) Act, 2001 with effect from 17.6.1995 providing consequential seniority. Both amendments reads as under: (4A) Nothing in this article shall prevent the State from making any provision for reservation in matters of promotion of any class or classes of posts in the services under the State in favour of the Scheduled Castes and Scheduled Tribes which in the opinion of the State are not adequately represented in the services under the State.

(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 Scheduled Tribes which in the opinion of the State are not adequately represented in the services under the State.

7. As a result of this subsequent amendment which came into force by the Constitution (85th Amendment) Act, 2001 with effect from 17.6.1995, the candidates who have been given promotion against reserved category could possibly claim a consequential seniority. In fact, both these amendments in Article 16 (4A) facilitated the rules to be framed by the State Government. Prior to this, the State Government had issued only executive instructions to cover this omission. This

constitutional mandate came to the rescue of the State so as to enable the State to provide reservation in promotion and consequential seniority with effect from 17.6.1995. In fact, these two amendments necessitated because of the decision given in the Ajit Singh II vs. State of Punjab wherein their Lordships observed as under:

\023The roster-point promotees (reserved category) cannot, therefore, count their seniority in the promoted category from the date of their continuous officiation in the promoted post vis-a-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. Virpal and Ajit Singh have been correctly decided and Jagdish Lal is not correctly decided. In Jagdish Lal the seniority rule which referred to continuous officiation and which applied to promotions made after providing equal opportunity as per rules was delinked from the promotion rule and applied to roster promotees, which was the main reason for arriving at a different result.\024

8. In fact, by virtue of this ratio laid down the Constitution Bench, 85th Amendment was necessitated which came by the Amendment Act of 2001 and it was made retrospective with effect from 17.6.1995. In case of Ajit Singh II, all earlier cases were considered by this Court, therefore, no useful purpose will be served by referring to all the decisions referred by learned counsel for the petitioner. After the 85th amendment, the position has now been crystallized and the State Government also framed consequently, Rules of 2002, known as Madhya Pradesh Public Service Commission (Services Promotion Rules 2002). Prior to that the State Government had already framed the Act known as Madhya Pradesh Lok Seva (Anusuchit Jatiyon, Anusuchit Jan Jatiyon Aur Anya Pichhade Vargon Ke Liye Arakshan) Adhiniyam, 1994. By this Act, the Government only provided that State Government can by notification, provide roster-point promotion to the scheduled castes and scheduled tribes in the services. This Act came in 1994, but there was no consequential provision for providing the seniority, therefore, they further framed the rules, known as Madhya Pradesh Lok Seva (Anusuchit Jatiyon, Anusuchit Jan Jatiyon Aur Anya Pichhade Vargon Ke Liye Arakshan) Sanshodhan Adhiniyam, 2002, and this came into force by the notification issued on 13.5.2002 by the State Government. By amending Act of 1994, sub-Section 5-A was inserted in Section 5 of the main act of 1994 enabling the State Government to provide for consequential seniority in favour of scheduled castes and scheduled tribes by framing the rules or by issuing instructions and thereafter, consequently, Madhya Pradesh Public Services (Promotion) Rules, 2002 was framed enabling the benefit to scheduled castes and scheduled tribe candidates, who got promotion against the reserved post. Therefore, now, by virtue of the 77th and 85th constitutional amendment and consequential Act and rules framed by the State of Madhya Pradesh, it is possible to provide a proper seniority to the persons who have been promoted against scheduled caste and scheduled tribe quota- a seniority as a result of their appointment against reserved post of scheduled caste or scheduled tribe. But, this has all come into force from 2002 only.

9. But in the present case, the issue triggered in the year 1985 and these rules at that time were not in force. Neither the constitutional amendments had come into force nor were the rules. Neither the 77th constitutional amendment nor the 85th constitutional amendment had been made retrospective from 1985. It has been made retrospective with effect from 17.6.1995 only. The controversy dates back to 1985 when the general quota candidates were promoted in 1985

on the post of Executive Engineer and the appellant respondent was promoted in 1980. At that time, the circular of the Government of 1975 was in force and as per that circular of the Government, incumbent was not entitled to the seniority on account of his accelerated promotion against the reserved quota, as per the circular of 1975 as quoted above, he was only entitled to the accelerated promotion but not the seniority; therefore, in this view of the matter, we are of the opinion that the view taken by the Division Bench of High Court is correct and no interference is warranted in the present case. Consequently, all the appeals are dismissed. No order as to costs.

JUDIS