

DHARMENDRA PRASAD & ORS.

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v.

SUNIL KUMAR & ORS.

(Civil Appeal No. 9247 of 2019)

DECEMBER 06, 2019

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**[L. NAGESWARA RAO AND HEMANT GUPTA, JJ.]**

*Service Law:*

*Seniority – Determination of – Of the employees of a statutory body – Different appointment letters issued to different categories i.e. General, OBC, SC and ST at different time – Date of appointment of appellants (candidates higher in merit list) was later than the date of appointment of respondents (candidates who were lower in the merit list) – Later seniority list declared on the basis of the merit list – Seniority list was challenged before the Tribunal taking the plea that the list should be as per the date of appointment and not merit list – Application dismissed – In writ petition High Court held that seniority in terms of Regulation 23 has to be determined from the date of appointment – Appeal to Supreme Court – Held: Regulation 20 mandates that appointments have to be made, in order in which the candidates stand in the list prepared under Regulations 16(2), 17 or 18 – Regulation 23 has to be read in terms of Regulation 20 – Therefore, irrespective of date of appointment, the seniority has to be fixed as per the merit of the candidate – The seniority has also not been framed keeping in view the Government Order dated 31st August, 2001 as mandated to be followed by Regulation 6 – Seniority also could not have been fixed as per Uttarakhand Government Servant Seniority Service Rules, 2002 – Such Rules since were framed under proviso to Art. 309 of the Constitution, are not applicable to a statutory body unless adopted by such body – Uttar Pradesh Jal Board Subordinate Engineering Service Regulations, 1978 – Regulations 6,16(2),17,18,20 and 23 – Uttarakhand Government Servant Seniority Service Rules, 2002 – r. 5.*

**Disposing the appeals, the Court**

**HELD: 1. The admitted facts are that the appellants are higher in merit than the writ petitioners before the High Court**

- A but the writ petitioners were appointed earlier in point of time than the appellants who came to be appointed subsequently by the unique method of appointment resorted to by the Nigam. It is also an admitted fact that the result was declared by the Nigam of each category i.e. General, OBC, SC, ST as per their own merit. [Paras 9 and 10] [768-C; 769-F]
- B 2. Regulation 20 of the Uttar Pradesh Jal Board Subordinate Engineering Service Regulations, 1978 mandates the appointing authority to make the appointments from amongst the candidates in order in which they stand in the list prepared under Regulations 16(2), 17 or 18. Any appointment made by the employer, in contravention of the statutory Regulations cannot defeat the rights of the appellants only because they have not challenged the appointment of their juniors at an earlier point of time. Regulation 23 provides that seniority of persons appointed in any branch of service shall be made as per substantive appointment. The appointment in Regulation 23 has to be read in terms of Regulation 20 mandating the manner of appointment. Therefore, irrespective of the date of appointment, the seniority has to be fixed as per the merit of the candidates determined by the Selection Committee. [Para 17] [771-H; 772-A-B]
- C 3. However, Regulation 6 itself contemplated that reservation of candidates belonging to SC, ST, Backward Classes and the candidates of other categories shall be in accordance with the orders of the Government in force at the time of recruitment. In terms of such Regulations, the Government order dated 31st August, 2001 becomes applicable to determine the extent of reservation which includes the method of determining seniority as well. Apart from the statutory Regulation 6, even the approval of the State Government to fill up 88 posts specifically mentions that the reservation shall be made as per the 100 points roster as prescribed in the Circular dated 31st August, 2001. Admittedly, the seniority has not been framed keeping in view the roster circulated on 31st August, 2001. [Para 18] [772-C-E]
- D 4. The seniority cannot be fixed as per Rule 5 of the Uttarakhand Government Servant Seniority Service Rules, 2002.
- E Such Rules were not adopted to be applicable to the Nigam. The

**Rules were approved by the Board of the Nigam on 24th September, 2007 proposing that the provision shall be made in the proposed service regulations but the Rules were made applicable in the year 2011 only. Such Rules have been framed under the proviso to Article 309 of the Constitution and they are not applicable to a creation under a Statute. These Rules are applicable to government servants in respect of whose recruitment and condition of service Rules may be or have been made by the Government under the proviso to Article 309 of the Constitution. Since the employees of the Nigam are not government servants nor are their service conditions governed by Rules framed under the proviso to Article 309 of the Constitution, therefore, such Rules unless adopted by the Nigam cannot be extended to the employees of the Nigam. [Para 19] [772-E-H; 773-A]**

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**5. Therefore, the order of the High Court and that of the Tribunal are not sustainable in law as the seniority list has not been prepared in accordance with the roster circulated on 31st August, 2001 which is required to be mandatorily followed in terms of Regulation 6 as well with the approval of the State Government dated 3rd May, 2005 to fill up 88 posts. [Para 20] [773-B]**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 9247 E  
of 2019.

From the Judgment and Order dated 11.07.2018 of the High Court of Uttarakhand at Nainital in W.P. (S/B) No.17 of 2018

With

Civil Appeal No. 9248 of 2019. F

Raju Ramachandran, Nidhesh Gupta, Siddhartha Dave, Sr. Advs., Ms. Anitha Shenoy, Ms. Rashmi Nanda Kumar, Shankar Narayanan, D. S. Bora, Shoaib Ahmad Khan, Ms. K. V. Bharathi Upadhyaya, Anoop Kr. Srivastav, Abhishek Atrey, Ms. Divya Roy, Anis Ahmed Khan, Rohit Dandriyal, Satyajeet Kumar, Ms. Ankita Baluni, Siddharth Nair, Siddharth Gautam, Amritanshu Barthwal, Alok Singh, Brijendra Singh, Ms. Japneet Kaur, Ms. Pallavi Singh, Ms. Vriti Gujral, Ms. Nidhi Gupta, R. N. Pareek, Shishir Saxena, Ms. Jemtiben, Siddhant Krishna Dave, Ms. Saumya Gupta, Ashutosh Kumar Sharma, Ms. Vidyottmay, Vishal Mahajan, Shedman Ali, Shree Prakash Sinha, Piyush Kaushik, Advs. for the appearing parties.

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- A        The Judgment of the Court was delivered by  
**HEMANT GUPTA, J.**
- B        1. The order dated 11<sup>th</sup> July, 2018 passed by the Division Bench of the High Court of Uttarakhand at Nainital is the subject matter of challenge in the present appeals.
- C        2. The High Court vide impugned order has directed the Uttarakhand Pey Jal Nigam<sup>1</sup>, a creation of the Statute i.e. the Uttar Pradesh Water Works and Sewer Arrangement Act, 1975, to determine the seniority of the Junior Engineers strictly as per Regulation 23 of the Uttar Pradesh Jal Nigam Subordinate Engineering Service Regulations, 1978<sup>2</sup>. Regulation 23 contemplates that the seniority of a person appointed in any branch of service in any category of post shall be made as per the date of substantive appointment.
- D        3. An advertisement was issued by the Nigam on 29<sup>th</sup> November, 2004 for filling up of vacancies of 241 posts of Junior Engineer (Civil). This included 104 posts under General category, 52 posts under Other Backward Classes<sup>3</sup>, 70 posts under Scheduled Castes<sup>4</sup> and 15 posts under Scheduled Tribes<sup>5</sup>. Another 38 posts were advertised for Junior Engineer (Mechanical). The advertisement contemplated that the reserved posts shall be filled up as per the reservation policy of the Government of Uttarakhand. Further the horizontal reservation in each category for females, ex-servicemen, handicapped people and dependents of freedom fighters will be made as per the order of the Government of Uttarakhand dated 18<sup>th</sup> July, 2001.
- E        4. The State Government permitted the Nigam to make appointments to the posts of Junior Engineer and Assistant Engineer on 3<sup>rd</sup> May, 2005 (Annexure R3/4) and that the appointment of 34 posts of Assistant Engineer and 107 posts of Junior Engineer was to be made as per the prescribed roster after making calculations based upon the Government order dated 31<sup>st</sup> August, 2001. Such sanction was in respect of 88 posts of Junior Engineer (Civil).

<sup>1</sup> for short, ‘Nigam’

<sup>2</sup> for short, ‘Regulations’

<sup>3</sup> for short, ‘OBC’

<sup>4</sup> for short, ‘SC’

H        <sup>5</sup> for short, ‘ST’

5. Pursuant to the above said advertisement, the selection process was completed and a merit list on the basis of marks obtained in the written test and interview was published. The result was declared separately for the candidates belonging to different categories i.e. General category, OBC, SC and ST. Thereafter, five different sets of appointment orders were issued from May, 2005 till December, 2005, the first being issued on 13<sup>th</sup> May, 2005. The appointment orders were given to the candidates in each category proportionate to the quota reserved for the reserved category candidates. It is pertinent to note that one of the conditions in the letter of appointment was that the seniority will be determined later.

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6. Thereafter, a tentative seniority list was published on 14<sup>th</sup> September, 2010 based upon the merit list prepared on the basis of the marks obtained in the written test and interview. Objections were filed to such tentative seniority list. The final seniority list was published on 28<sup>th</sup> November, 2014 on the basis of the merit list prepared while declaring the result.

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7. The said seniority list became subject matter of challenge before the Uttarakhand Public Services Tribunal<sup>6</sup>. The learned Tribunal dismissed the petition vide order dated 10<sup>th</sup> October, 2017. Thereafter, a review petition was filed which was also dismissed on 23<sup>rd</sup> November, 2017. The aforementioned orders were made subject matter of challenge before the High Court. The High Court held that since there is no dispute about the dates of appointment of the candidates, the seniority has to be prepared in terms of Regulation 23 based upon dates of appointment rather than merit, as the rule to determine seniority is from the date of appointment. The High Court has allowed the writ petition with the following order:

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“35. The up-shot of the above discussion is that the writ petitioner is entitled to succeed. Accordingly, the writ petition is allowed; the order passed by the Tribunal in the Claim Petition, as also the order passed in the Review Petition, will stand set-aside; the Claim Petition of the petitioner will stand allowed; the final seniority list, which impugned before the Tribunal, will stand set-aside; and the order dated 03.11.2014 will also stand set aside. The fourth respondent will prepare a fresh seniority list in

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<sup>6</sup> for short, ‘Tribunal’

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- A accordance with law and the observations made in this judgment. We would add that, as it is pointed out that petitioner was appointed along with several others by a common order, in respect of the petitioner also, the same principle will apply, namely, that, in respect of those person, they will be governed by the approved list.”
- B 8. Resultantly, the candidates who rank higher in merit have approached this Court.
- C 9. The admitted facts are that the appellants before this Court are higher in merit than the writ petitioners before the High Court but the writ petitioners were appointed earlier in point of time than the appellants who came to be appointed subsequently by the unique method of appointment resorted to by the Nigam. The Regulations have been framed by the Nigam under the Statute establishing the same. Some of the relevant Regulations read as under:
- D “Regulation 6. Reservation for the candidates belonging to Scheduled Castes, Scheduled Tribes & Backward Castes and the candidates of other categories shall be in accordance with the orders of the Government in force at the time of the recruitment.
- xx                    xx                    xx
- E Regulation 16 (1) When appointment has to be done on availability of vacancies, Appointment Authority shall review all the applications received from the candidates and will inform the date of written competitive examination to such candidate/ candidates who are found suitable for recruitment under this Regulation. No candidates may be included in the written competitive examination unless he has got any authority or Admit Card from the Nigam.
- G (2) Appointment authority shall prepare a list of candidates in order of merit, as is evident from the written examination, and invite for interview those candidates who attains qualification as per standard fixed by the Nigam. Marks obtained by each candidate in the interview shall be added to the marks obtained in the written examination. Final position of a candidate shall be determined by the total marks obtained him, and thereafter list will be prepared. If two or more candidates obtain equal marks, then the candidate obtaining more marks in written examination
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will be placed higher in the merit list. If two or more candidates obtain equal marks in both written examination and interview, then a candidate having more marks in diploma examination will be placed higher in the merit list.

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Regulation 17 (1) The Appointing Authority shall recommend the list of candidates prepared by the Selection Committee for appointment. Vacancies, at present or likely to arise in future, will be filled by the candidates of this list.

(2) If the Appointing Authority is not in agreement with the recommendation of Selection Committee, then this matter shall be presented before the Nigam. The decision of the Nigam shall be final in this regard and the Appointment Authority will take action as directed by the Nigam.

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Regulation 20. On vacancies being created, Appointing Authority shall make appointment by taking names of candidates in the order in which they stand in the list prepared under Regulation 16(2) and 17 or 18.

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Regulation 23 (1) In this Regulation, seniority of person appointed in any branch of service in any category of post shall be made as per date of substantive appointment and where two or more persons are appointed on the same date, seniority will be determined by such order in which their names are arranged in the appointment order.”

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10. It is also an admitted fact that the result was declared by the Nigam of each category i.e. General, OBC, SC, ST as per their own merit.

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11. Regulation 6 contemplates that the reservation for the candidates belonging to SC, ST and Backward Classes and the candidates of other categories shall be in accordance with the orders of the Government in force at the time of the recruitment. The State Government while permitting the Nigam to make appointments to the posts of Junior Engineer on 3<sup>rd</sup> May, 2005 (Annexure R3/4), provided

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- A that the appointment of Junior Engineers will be made as per the prescribed roster after making calculations based upon the Government order dated 31<sup>st</sup> August, 2001. The relevant extract from the Government Order is as hereunder:
- B “(2) Appointment on total 34 posts of Assistant Engineer and total 107 posts of Junior Engineer will be made as per the prescribed roster after making calculation based on the G.O. no. 1454/Karmik-2-2001 dated 31.8.01. This will be strictly complied with.”
- C 12. The Circular dated 31<sup>st</sup> August, 2001 (Annexure R3/3) has a 100-point roster. As per the said Circular, the first post is to be filled up by a candidate belonging to the SC category and the last post, from amongst the 100-point roster, is to be made under the General category. The relevant clause from the said Circular reads as under:
- D “(1) In continuation of the G.O. no. 1144/Karmik-2/ 2001-53(1) dated 18 July, 2001 regarding implementing the reservation policy in Uttarakhand, I am directed to state that 19 per cent reservation for Scheduled Caste, 04 percent for Scheduled Tribe and 14 per cent for OBCs has been provide in direct recruitments.
- E (2) In order to ensure the aforesaid reservation, the following roster has been prepared...
- F (3) It is requested that the aforesaid Roster shall continuously be implemented in matters of direct requirements.”
- G 13. The stand of the State is that the Regulations are *pari materia* with the Uttarakhand Government Servant Seniority Service Rules, 2002 which prescribes that the seniority of persons appointed on the basis of the result of any one selection, shall be the same as it is shown in the merit list prepared by the Committee. Reliance is placed upon clause (9) of the appointment letter dated 13<sup>th</sup> May, 2005 which is to the effect that the seniority of the candidates to the post of Junior
- H G Engineer (Civil/Mechanical) will be decided later.
- I 14. On the other hand, the Nigam in its counter affidavit stated that as on 29<sup>th</sup> November, 2004, 241 vacancies of Junior Engineer (Civil) were advertised. The written examination was conducted on 26<sup>th</sup> December, 2004 and the candidates were called for the interview. The State Government approved 88 posts to be filled up as per the roster

mentioned in the Circular dated 31<sup>st</sup> August, 2001 and the appointment A orders were issued.

15. Mr. Raju Ramachandran, learned senior counsel for the appellants argued that the High Court has erred in law in upsetting the seniority list on the basis of Regulation 23 as the stand-alone provision. It is argued that Regulation 23 has to be read along with other B Regulations particularly Regulations 16, 17 and 20. The appointing authority is bound to make appointments by taking the name of candidates in the order in which they stand in the list prepared under Regulations 16(2) and 17 or 18. All the Regulations have to be read harmoniously and one Regulation cannot be read in isolation so as to defeat the merit prepared by the Selection Committee only on account C of the fortuitous circumstance of giving appointment to some of the candidates lower in the merit list at an early point of time. Since appointments could be made only in terms of the merit list, therefore, Regulation 23 has to be read along with Regulation 20. The mere fact D that some juniors have been appointed earlier in point of time will not make them steal march over the appellants who are higher in merit.

16. On the other hand, Mr. Nidhesh Gupta, learned senior counsel for the writ petitioners submits that the writ petitioners were appointed E admittedly at an early point of time than the appellants. The appellants have not raised any grievance at the time of the appointment of the candidates lower in merit on the alleged violation of Regulations 16, 17 F or 20. Therefore, the seniority has been rightly fixed from the date of appointment based upon Regulation 23 of the Regulations. It is also argued that the Government order dated 31<sup>st</sup> August, 2001 is an order to determine seniority as per the roster fixed in terms of Regulation 6. The letter dated 3<sup>rd</sup> May, 2005 by the State Government while granting G sanction to fill up 88 posts of Junior Engineer (Civil) specifically mentioned that reservation to the posts of Junior Engineer (Civil) shall be in accordance with roster in the Government order dated 31<sup>st</sup> August, 2001. Therefore, in any case, the seniority has to be fixed as per the roster prescribed in the letter dated 31<sup>st</sup> August, 2001.

17. We find that the method of giving appointment to the senior most person of each category is only a fortuitus circumstance as such appointments were made *dehors* the merit. Regulation 20 mandates the appointing authority to make the appointments from amongst the candidates in order in which they stand in the list prepared under H

- A Regulations 16(2), 17 or 18. Any appointment made by the Nigam in contravention of the statutory Regulations cannot defeat the rights of the appellants only because they have not challenged the appointment of their juniors at an earlier point of time. Regulation 23 provides that seniority of persons appointed in any branch of service shall be made as per substantive appointment. The appointment in Regulation 23 has to be read in terms of Regulation 20 mandating the manner of appointment. Therefore, irrespective of the date of appointment, the seniority has to be fixed as per the merit of the candidates determined by the Selection Committee.
- B 18. However, we find that Regulation 6 itself contemplated that reservation of candidates belonging to SC, ST, Backward Classes and the candidates of other categories shall be in accordance with the orders of the Government in force at the time of recruitment. In terms of such Regulations, the Government order dated 31<sup>st</sup> August, 2001 becomes applicable to determine the extent of reservation which includes the
- C method of determining seniority as well. Apart from the statutory Regulation 6, even the approval of the State Government to fill up 88 posts specifically mentions that the reservation shall be made as per the 100 points roster as prescribed in the Circular dated 31<sup>st</sup> August, 2001. Admittedly, the seniority has not been framed keeping in view the roster circulated on 31<sup>st</sup> August, 2001.
- E 19. We do not find any merit in the argument raised by the State that the seniority has to be fixed as per Rule 5 of the Uttarakhand Government Servant Seniority Service Rules, 2002. Such Rules were not adopted to be applicable to the Nigam. The Rules were approved by the Board of the Nigam on 24<sup>th</sup> September, 2007 proposing that the
- F provision shall be made in the proposed service regulations but the Rules were made applicable in the year 2011 only. Such is the finding recorded by the High Court which is not disputed by the appellants or by the writ petitioners. Such Rules have been framed under the proviso to Article 309 of the Constitution and they are not applicable to a creation
- G under a Statute. These Rules are applicable to government servants in respect of whose recruitment and condition of service Rules may be or have been made by the Government under the proviso to Article 309 of the Constitution. Since the employees of the Nigam are not government servants nor are their service conditions governed by Rules framed under the proviso to Article 309 of the Constitution, therefore,
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such Rules unless adopted by the Nigam cannot be extended to the A employees of the Nigam.

20. Therefore, we find that the order of the High Court and that of the Tribunal are not sustainable in law as the seniority list has not been prepared in accordance with the roster circulated on 31<sup>st</sup> August, 2001 which is required to be mandatorily followed in terms of Regulation B 6 as well with the approval of the State Government dated 3<sup>rd</sup> May, 2005 to fill up 88 posts.

21. Consequently, the seniority list finalised on 28<sup>th</sup> November, 2014 as also the order of the High Court dated 11<sup>th</sup> July, 2018 are set aside. Respondent No. 5 is directed to recast seniority of the candidates C in the order of merit by assigning their seniority as per the roster points given in Circular dated 31<sup>st</sup> August, 2001. With the said directions, the appeals stand disposed of.

Kalpana K. Tripathy

Appeals disposed of.