

# **IN THE GAUHATI HIGH COURT**

**(THE HIGH COURT OF ASSAM; NAGALAND; MIZORAM AND ARUNACHAL  
PRADESH)**

## **ITANAGAR PERMANENT BENCH (NAHARLAGUN)**

### **WA 22 (AP) 2018**

**1. Shri Rubu Opo,**

Son of Late RubuTana,  
O/o Chief Engineer(HPD), Western Zone,  
Department of Hydro Power Development,  
Itanagar, Arunachal Pradesh.

.....Appellant.

### **-VERSUS-**

- 1. The State of Arunachal Pradesh,** represented by its  
Secretary, Department of Power, Government of  
Arunachal Pradesh, Itanagar.
- 2. The Commissioner,** Power, Govt. of Arunachal  
Pradesh, Itanagar, Arunachal Pradesh.
- 3. The Secretary,** Department of Administrative  
Reforms, Itanagar, Arunachal Pradesh.
- 4. Shri Millo Pugang,** Superintending Engineer(EM),  
Office of the Chief Engineer (WZ), Itanagar, District:  
Papum Pare, Arunachal Pradesh.

.....Respondents.

### **By Advocates:**

For the Appellant : Mr. I. Choudhury, Senior Advocate,  
Mr. K. Tama, Advocate  
Mr. S. Biswakarma, Advocate  
Ms. T. Jini, Advocate

For the Respondents : Mr. D. Soki, Sr. G.A., A.P.  
Mr. P. K. Tiwari, Senior Advocate &  
Mr. A. R. Gogoi, Advocate

## **WA 23 (AP) 2018**

**1. Shri Rubu Opo,**

Son of Late RubuTana,  
O/o Chief Engineer(HPD), Western Zone,  
Department of Hydro Power Development,  
Itanagar, Arunachal Pradesh.

.....Appellant.

### **-VERSUS-**

**1. The State of Arunachal Pradesh,** represented by  
Commissioner,Power, Government of Arunachal  
Pradesh, Itanagar.

**2. Shri Millo Pugang,** Superintending Engineer(EM),  
Office of the Chief Engineer (WZ), Itanagar, District:  
Papum Pare, Arunachal Pradesh.

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Mr. K. Tama, Advocate  
Mr. S. Biswakarma, Advocate  
Ms. T. Jini, Advocate

For the Respondents : Mr. D. Soki, Sr. G.A., A.P.  
Mr. P. K. Tiwari, Senior Advocate &  
Mr. A. R. Gogoi, Advocate

## **WA 30 (AP) 2018**

### **1. Shri Rubu Opo,**

Son of Late RubuTana,  
O/o Chief Engineer(HPD), Western Zone,  
Department of Hydro Power Development,  
Itanagar, Arunachal Pradesh.

.....Appellant.

## **-VERSUS-**

**1. The State of Arunachal Pradesh,** represented by  
its Secretary, Department of Power, Government  
of Arunachal Pradesh, Itanagar.

**2. The Commissioner,** Power, Govt. of Arunachal  
Pradesh, Itanagar, Arunachal Pradesh.

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**4. Shri Millo Pugang,** Superintending Engineer(EM),  
Office of the Chief Engineer (WZ), Itanagar, District:  
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.....Respondents.

### **By Advocates:**

For the Appellant : Mr. I. Choudhury, Senior Advocate,  
Mr. S. Biswakarma, Advocate  
Mr. T. Jini, Advocate

For the Respondents : Mr. D. Soki, Sr. G.A., A.P.  
Mr. P. K. Tiwari, Senior Advocate &  
Mr. A. R. Gogoi, Advocate

**:::BEFORE:::**

**HON'BLE MR. JUSTICE MIR ALFAZ ALI  
HON'BLE MR. JUSTICE SANJAY KUMAR MEDHI**

Date of hearing : **29.01.2019 & 30.01.2019.**

Date of Judgment : **01.03.2019**

**JUDGMENT & ORDER (CAV)**

**(S. K. Medhi, Judge)**

**1.** The present Appeal has been filed challenging the common judgment and order dated 01.06.2018, passed in three writ petitions, namely, WP(C) 44 (AP)/2017, WP(C) 86 (AP)/2017 & WP(C) 573 (AP)/2017. By the said common judgment, the first writ petition, namely, WP(C) 44(AP)/2017, has been dismissed, whereby, the claim of the petitioner to be declared to be senior to the private respondent No. 4 has been negated and accordingly, the other impugned orders of reversion dated 19.12.2016 of the petitioner and the order dated 14.07.2017 of promotion of the private respondent No. 4 to the post of Superintending Engineer (E & M) have not been interfered. It is the petitioner in the first writ petition, who is also a party in the other writ petitions, have preferred the present appeal along with the two other appeals.

**2.** Heard Mr. I. Chowdhury, learned Senior Advocate for the appellant/writ petitioner, assisted by Mr. S. Biswakarma. Also heard Mr. D. Soki, learned Additional Senior Government Advocate, appearing on behalf of the State respondents and Mr. P. K. Tiwari, learned Senior Advocate for the respondent No. 4, assisted by Mr. A. R. Gogoi.

**3.** The brief facts connected with this appeal and the writ petitions can be put in a nutshell as follows:

**4.** The appellant/writ petitioner and the respondent No. 4 were working as Junior Engineers in the Department of Power, Government of Arunachal Pradesh on being appointed on 11.08.1992. In the selection so held for filling of that post, the petitioner was at Sl. No. 1 whereas the respondent No. 4 was at Sl. No. 9. Consequently, in the seniority list of Junior Engineers in the Power Department, the petitioner was held to be senior to the respondent No. 4.

**5.** Both the aforesaid incumbents were promoted to the next higher cadre of Assistant Engineer on 16.07.1997, on officiating basis, which was followed by an order of regular promotion dated 12.02.2001, so far as the petitioner was concerned. Subsequently, the respondent No. 4 was also regularly promoted on 15.07.2004. It is the case of the petitioner that in the final seniority list in the Department of Power, the writ petitioner/appellant was senior to the respondent No. 4 in the cadre of Assistant Engineer.

**6.** Some time in the year 2005, a new Department in the name of "Department of Hydro Power Development (in short 'DHPD')" was created and in absence of any Service Rules, the DHPD adopted the Rules of the Power Department, namely, the Arunachal Pradesh Power Engineering Service Rules, 1993. Rule-10 of the aforesaid Rules is in connection with recruitment of Executive Engineers. The said Rule lays down that an Assistant Engineer, who has completed at least 8 years of regular service in the said grade, is eligible to be promoted to the post of Executive Engineer. Rule-10(ii) provides that in absence of any eligible candidate to be promoted to the post of Executive Engineer, the post may be filled up by transfer on deputation from amongst persons who have been holding the post of Assistant Engineer at least for 6 years and that too with regular service.

**7.** The DHPD started a recruitment process for the post of Executive Engineer which involved recruitment on deputation from the cadre of Assistant Engineers in the Department of Power. It is the case of the appellants/writ petitioner that being interested, he had submitted his application. However, even before his application could be considered, the respondent No. 4 was appointed to the post of Executive Engineer in the Department of DHPD on 02.02.2009. However, after 25 days, the writ petitioner was also appointed as an Executive Engineer in the DHPD on 27.02.2009.

**8.** This is the case of the petitioner that the aforesaid deputation of the respective parties was not preceded by any selection and the same was done without following any objective criteria. The learned Senior counsel, Shri Choudhury therefore submits that such deputation was purely fortuitous. Subsequently, the petitioner/writ appellant as well as the respondent No.4 were absorbed on the same date i.e. 16.05.2012 in the Department of Hydro Power Development. In the said order of absorption, a condition was stipulated that the

absorption would take effect from the date of initial appointment. Aggrieved by such stipulation, the petitioner/writ appellant had instituted WP(C)44(AP)2017.

**9.** It is the further case of the petitioner that on 12.03.2001, one Shri Ninya Bagra was given regular promotion to the post of Assistant Engineer on 12.03.2001, who had filed a writ petition being WP(C)268(AP)2002 claiming such regular promotion from 11.08.1997. This Court allowed the said writ petition by directing to grant regular promotion to the incumbent Shri Ninya Bagra w.e.f. 11.08.2000. In the meantime, vide Memorandum dated 04.04.2005 issued by the Government of Arunachal Pradesh, it was provided that the Department of Hydro Power Development would adopt the Arunachal Pradesh Power Engineering Service Rules, 1993.

**10.** The narration as per the appellant further goes on stating that against the judgment passed in WP(C)268(AP)2002, Shri Ninya Bagra had preferred W.A. No.457/2003 which was allowed by a Division Bench of this Court by directing the grant of regular promotion to the incumbent w.e.f. 11.08.1997. In view of such direction, the learned Sr. counsel, Shri Choudhury has submitted that the respondent No.4 who was "sitting on the fence" had filed WP(C)188(AP)2017 seeking regularization of his services as Assistant Engineer w.e.f. 11.08.1997. The said writ petition was disposed of by this Court directing the State respondents to consider the case of the said respondent No.4 in accordance with law.

**11.** It has also been submitted that the judgment dated 13.11.2006 passed in W.A 457/2003 was the subject matter of challenge in an SLP and in which the Hon'ble Supreme Court, vide judgment and order dated 15.09.2009 has set aside the order of the Division Bench of this Court passed in W.A 457/2003. Thereafter, on 01.08.2011, the initial seniority list of Assistant Engineer in the Department of Power was published in which, the petitioner/writ appellant was placed against Sr. No.24 and the respondent No.4 was placed against Sr. No.29. Conferring of such seniority in the final gradation list was at the stage before the parties were finally absorbed. Thereafter, a provisional list of Executive Engineers was published on 17.09.2012 wherein the writ petitioner/appellant was placed at Sr. No.8 which was below the respondent No.4 who was placed against Sr. No.7. The writ petitioner/appellant accordingly submitted objections and upon examination of the same, the final seniority list was prepared in which, the position of the writ petitioner/appellant was rectified putting him above the respondent No.4. After

such finalization of the seniority list, vide order dated 19.12.2016, the writ petitioner/appellant was promoted to the post of Superintending Engineer on officiating basis.

**12.** It is the case projected by the petitioner that thereafter vide an order dated 02.01.2017, the final gradation list in the cadre of Executive Engineer was again reversed and the petitioner was brought below the respondent No.4. The said rectification has been stated to be done in pursuance of two Office Memoranda of the Govt. of India, dated 29.05.1986 and 27.03.2001. The learned Sr. counsel has submitted that neither of the aforesaid office Memoranda have ever been adopted by the Department and accordingly had no application and further, the records does not suggest that any representation was submitted by the respondent No.4 to bring in such change in the seniority list. The very action of issuing the aforesaid notification dated 02.01.2017 has been questioned leading the writ petitioner/appellant to file WP(C)16(AP) of 2017 whereby specific challenge has been made to the communication dated 02.01.2017. Thereafter, in view of certain more facts being revealed, the said writ petition was withdrawn with liberty leading to filing of the Writ Petition No.44(AP)2017, whereby apart from the Memorandum dated 02.01.2017, the order of absorption dated 16.05.2012 to the extent of such absorption to be made from the date of initial appointment are challenged.

**13.** On the other hand, the respondent No.4 had filed WP(C)86(AP)2017 challenging the order of officiating promotion of the writ petitioner/appellant dated 19.12.2016. During the pendency of the writ petition, vide order dated 14.07.2017, the writ petitioner/appellant was reverted from the post of Superintending Engineer to the post of Executive Engineer and on the same date, the respondent No.4 was promoted to the post of Executive Engineer.

**14.** The writ petitioner/appellant thereafter filed WP(C)573(AP) of 2017 challenging the order dated 14.07.2017, wherein an interim order was also passed by this Court. Against the aforesaid interim order dated 24.07.2017, the respondent No.4 had preferred a writ appeal being W.A. No.214 of 2017 wherein vide order dated 04.08.2017, the Hon'ble Division Bench had disposed of the appeal with a direction to decide the 3(three) pending writ petitions till which time, the order dated 24.07.2017 would remain stayed. Ultimately, when the writ petitions were heard, the Hon'ble Single Judge vide order dated 01.06.2018 had dismissed WP(C)44(AP)2017.

**15.** Shri I. Choudhury, learned Sr. counsel for the petitioner / appellant has submitted that the learned Single Judge did not at all consider the submissions of the writ petitioner and the grounds of challenge have not been discussed. The learned Sr. counsel further submits that there is no apparent connection between the ultimate findings and the facts narrated. Even otherwise, the learned Sr. counsel has submitted that this proceeding is a continuation of the writ petition wherein not only the judgment impugned can be tested but the relief sought for in the writ petition can also be granted.

**16.** On merits, the learned Sr. counsel for the appellant further submits that the writ petitioner/appellant has questioned the action of the respondent authorities in publishing the Notification dated 02.01.2017 whereby the final seniority of the respective parties have been altered to the detriment of the petitioner. The Sr. counsel has specifically argued that the impugned order dated 02.01.2017 is bad in law on 3 counts; (i) there is no scope at all for such alteration under the law, (ii) the same has been done in gross violation of the principle of natural justice as admittedly, no opportunity was granted to his client and (iii) almost 3(three) years had already elapsed from the final seniority list which was, in the meantime acted upon and therefore there was is no occasions to alter the same.

**17.** The challenge is also extended by submitting that the OM dated 29.05.1986 and 27.03.2001 which are said to be the basis of the impugned order dated 02.01.2017 are extraneous in nature which had no applicability in the instant case. In support of his submissions, the learned Sr. counsel relies upon the case of the Hon'ble Supreme Court, reported in **(2011) 8 SCC 115 [D. P. Das Vs. Union of India & Ors.]** and also **1992(supli) (1) SCC 272(Kesab Joshi)**. In aforesaid decisions, the Hon'ble Supreme Court has laid down that the length of service by fortuitous appointment cannot be taken into consideration and therefore, the period from 02.02.2009 to 15.07.2010 so far as the respondent No.4 is concerned should not be counted. Reliance also placed upon the judgment of this Court, reported in **2008 (4) GLT 7(Bivekanda Das) and (2004) 10 SCC 737(Sanjay Kumar Sinha(2) Vs. State of Bihar & Ors.)**, wherein it has been laid down that appointment made dehorn's rules are merely fortuitous in nature and no claim can be made from such appointment. The learned Sr. counsel submits that the impugned action in question is not done in bona fide exercise of



power and though the same has been said to be done on the representation of the respondent No.4, the records do not reveal that any such representation was submitted by the respondent No.4. Even the date of the representation has not been mentioned in any of the pleadings. Shri Choudhury, learned Sr. counsel accordingly prayed for interference in this matter by exercising the equitable jurisdiction of this Court.

**18.** Though the impugned order was primarily defended by the Government, it is the beneficiary, who is the respondent No.4 represented by senior counsel, Shri P. K. Tiwari who has taken the lead role in opposing the writ petition. Shri Tiwari, learned Sr. counsel in his usual flair has referred to the nature of challenge in WP(C)44(AP)2017. According to him, the first prayer is challenge to the Notification dated 02.01.2017 as well as 17.08.2015 with a corollary that the seniority of the petitioner should be restored. The second prayer as pointed out by the learned Sr. counsel is to correct the date of absorption of the petitioner and the third prayer is to deem that the deputation of the petitioner is prior to that of the respondent No.4. Shri Tiwari, learned Sr. counsel has referred to the writ petition filed by him namely, WP(C)86(AP)2017, whereby a counter challenge has been made to the order dated 19.12.2016 by which, the petitioner/writ appellant was promoted to the rank of Superintending Engineer. Shri Tiwari, learned Sr. counsel also challenges the constitution of the Board preceding such selection and promotion. The learned Sr. counsel for the respondent No.4 has also raised the point of violation on the principles of natural justice, as no opportunity to him was granted before altering the seniority position in the provisional seniority list.

**19.** Shri Tiwari, learned Sr. counsel has refuted that there was any flaw or short comings in the eligibility of his client and so far as the second prayer is concerned, namely, for correcting the Notification dated 16.05.2012 i.e. the date of absorption, no vested legal right has accrued upon the petitioner to substantiate such claim. Such issues are within the exclusive domain and discretion of the appellant and borrowing departments, which cannot be the subject matter of judicial scrutiny. It is also submitted that only in case of transfer vide deputation to an equivalent cadre, seniority in the parent department is counted. However, when the movement is from the lower cadre to a higher cadre, as in the instant case, seniority has to be re-counted from the date of appointment to the higher cadre. The learned Sr. counsel further submits that there is no legal right for

deputation and everything depends on the administrative exigency and prerogative.

**20.** To buttress the contentions, the learned Sr. counsel has relied upon the case of *Indu Shekhar Singh Vs State of U.P & Ors.*, reported in **(2006) 8 SCC 129** and *B. R Sinha*, reported in **(2005) 8 SCC 384**. Alternatively, the learned Sr. counsel for the respondent No.4 has submitted that seniority in the parent department has got no legal relevance and it is the only length of the services in the new department which will determine the seniority. As regards the ground of the petitioner on violation of the principle of natural justice, the learned Sr. counsel for the respondent No.4 by relying upon the decision rendered in the case of *Aligarh Muslim University & Ors. Vs. Mansoor Ali Khan*, reported in **(2000) 7 SCC 529** has submitted that when only one conclusion is available, compliance of the aforesaid principle become a useless formalities. The learned Sr. counsel also relies upon the following judgments; **Narendra Prasad Sinha**, reported in **(2001) 5 SCC 564**, *D. P. Das Vs. Union of India & Ors.*, reported in **(2011) 8 SCC 115** and *S. L. Kapoor Vs. Jagmohan & Ors.*, reported in **(1980) 4 SCC 379**.

**21.** The Senior Counsel Shri Tiwari finally submits that in view of the settled law, since the appellant has no legally enforceable right to get his past services in the lower cadre of Junior engineer/Assistant Engineer in the Department of Power, counted towards his seniority in the higher cadre of Executive Engineer in the Department of Hydro Power Development, it logically follows that his seniority over the respondent 4 in the Department of Power in such lower cadre cannot be a factor to make him senior to respondent 4 in the higher cadre of a different department. Hence, the reliefs sought for by the appellant are devoid of legal foundation and liable to be rejected. As regard the qualification, Shri Tiwari, the learned Sr. Counsel has submitted that so far as the respondent No.4 is concerned, he is eligible in all respects. The learned Sr. counsel argued that all these aspects have been duly taken into consideration by the Hon'ble Single Judge, who has rightly dismissed the petition and there is hardly any scope for interference.

**22.** Shri D. Soki, learned State counsel has appeared for the Government of Arunachal Pradesh. Referring to the affidavit of the Govt., more specifically, paragraph-21 thereof, the learned State counsel submits that there was full justification regarding the dates of the deputation of the petitioner vis-à-vis the

respondent No.4. For ready reference paragraph-21 of the affidavit-in-opposition of the State Govt. is quoted herein below:-

***“That with regards to the statement made in paragraph-24 of the writ petition, the answering respondent begs to state that petitioner applied for his candidature for deputation on 24.12.2008, and the case of respondent no.4 was processed with two U.O notes from Shri Nido Pavitra, then MLA Raga Assembly Constituency, and Shri Padi Richo, then Chairman APB&OCWWB. It is based on official records. However, regarding the order dated 02.01.2017 issued by the link officer, it is to state that the order passed is legal and in conformity with the business allocation rules. The order was issued after meticulous and elaborate examination, based on representation submitted by respondent No.4 after consultation with respondent No.3.”***

23. Justifying the impugned order dated 02.01.2017, the learned State counsel has submitted that the same is based on the principle laid down by the Hon'ble Supreme Court in the case of ***S.I. Rooplal & Anr. Vs. Lt. Governor***, reported in ***(2000) 1 SCC 644*** and therefore, mere mention of the two Office Memoranda of the Govt. of India will not make any difference to the case in hand. According to the learned Senior Counsel the Office Memoranda of the Government of India which were the subject matter of interpretation in ***S.I. Roopal v. Lieutenant Governor : (2000) 1 SCC 644*** provided for counting of past services in a parent Department for determination of a seniority in an equivalent cadre of a different department. Even dehors such Office Memorandums, the principle of law is well settled that if the rules permit, the past services rendered in the parent Department can be counted for determining seniority in an equivalent cadre of a different Department.

24. It is further submitted that in the case of ***K. Anjaiah v. Chandraiah, (1998) 3 SCC 218 (paragraph 7 at page 223-224) in Indu Shekhar Singh v. State of UP, (2006) 8 SCC 129 (paragraph 26 at page 142)*** where the Hon'ble Supreme Court restated the general principle that when persons from different sources are drafted to serve in a new service, their pre-existing length of service in a parent department should be respected and preserved in determining

the rank and seniority in the equivalent grade of the new service cadre subject to rules permitting the same or where special situation exists which would entitle the employee to enjoy such benefit of past service.

**25.** It is submitted on behalf of the respondent no. 4 that in the present case the situation is exactly the opposite. The appellant in the present case contends that his seniority over respondent 4 in the lower cadres of the parent department should be a factor in making him senior to respondent 4 in the higher cadre of the borrowing department regardless of the fact that respondent 4 has a greater length of service than the appellant in the higher cadre of borrowing department. The order dated 02.01.2017 while correcting the illegality in the earlier order dated 17.08.2015 relied on the Office Memorandums of the Government of India only for emphasizing the general principle that only past services rendered in a parent department could be counted towards determination of seniority in an equivalent grade of a borrowing department. There cannot be any change of this general principle even if the Office Memorandums are not referred to and omitted. Hence, reference made to the Office Memorandums could not have altered this general principle which was also explained in **K. Anjaiah** case and quoted with approval by the Hon'ble Supreme Court in **S.I. Roopal** case. It is therefore, submitted that the reference made to the Office Memorandums in the order dated 02.01.2017 could not have any material bearing on the legality of the order. Hence, the seniority of the appellant over respondent 4 in the lower cadres of Junior Engineer and Assistant Engineer in the Department of Power has no legal relevance for determination of his seniority in the higher cadre of Executive Engineer in the DHPD.

**26.** On the requirement of following the principles of natural justice, Shri Tiwari submits that since in WP© No. 86(AP)/2017, the respondent 4 prayed for a declaration in the nature of mandamus that the second seniority list circulated vide memo dated 02.01.2017 is valid and legal having been based on correct legal principles and after hearing the appellant, the learned Single Judge decided this issue in favour of respondent 4, the contention of the appellant that without providing an opportunity of hearing to him, the order dated 02.01.2017 was issued is no longer relevant at this stage. The denial of opportunity of hearing at the earlier stage to the appellant now stands cured by an opportunity of hearing provided to him by the Hon'ble Court in course of adjudication of WP© No.

86(AP)/2017. It is further submitted that reliance has been placed upon the case of **Union of India v. P.K. Roy ::1968 (2) SCR 186**, wherein at Page: 202 in a somewhat similar situation, the Hon'ble Court held thus:-

"It was argued by Mr. Asoke Sen that in regard to both these matters the respondents have a right of representation and the final gradation list should have been published after giving them a further opportunity to make a representation. Normally speaking, we should have thought that one opportunity for making a representation against the preliminary list published would have been sufficient to satisfy the requirements of law. But the extent and application of the doctrine of natural justice cannot be imprisoned with the straitjacket of a rigid formula. The application of the doctrine depends upon the nature of the jurisdiction conferred on the administrative authority, upon the character of the rights of the persons affected, the scheme and policy of the statute and other relevant circumstances disclosed in the particular case (See the decision of this Court in Shri Bhagwan and Anr. V. Ram Chand and Anr. (AIR 1965 SC 1767 at Page 1770). In view of the special circumstances of the present case we think that the respondents were entitled to an opportunity to make a representation with regard to the two points urged by Mr. Asoke Sen before the final gradation list was published. As no such opportunity was furnished to the respondents with regard to these two matters we hold that the combined final gradation list dated April 6, 1962, so far as category 6 is concerned, is ultra vires and illegal and that part of the notification alone must be quashed by grant of a writ in the nature of certiorari."

It is submitted that the principle of natural justice must be applied in a situation, wherein administrative order passed in favour of one party adversely affects another party. The first final seniority list determined the seniority in respect of two contesting parties, viz. appellant and the respondent 4, resulting in alteration of seniority assigned to the respondent 4 in the provisional seniority list to the detriment of the latter. Hence, it was incumbent on the decision making authority to hear the respondent 4 before finally deciding his seniority position of the appellant and the respondent 4.

**27.** Shri I. Choudhury, learned Sr. counsel for the petitioner in his re-joinder has submitted that apparently the length of the services of the respondent No.4 in the higher cadre was simply fortuitous and therefore cannot be the basis of

assigning seniority. The learned Sr. counsel relied upon the below mentioned case laws of the Hon'ble Supreme Court; (i) ***Tribhovandas Hribhai Tamboli Vs Gujarat Revenue Tribunal & Ors.***, reported in ***AIR 1991 SC 1538***, (ii) ***Commissioner of Income Tax & Ors. Vs. the Indo Mercantile Bank Ltd.***, reported in ***AIR 1959 SC 713***, (iii) ***Dashrath Rupsingh Rathod Vs. State of Maharashtra & Anr.***, reported in ***(2014) 9 SCC 129***, (iv) ***Dwarka Prasad Vs. Dwarka Das Saraf***, reported in ***(1976) 1 SCC 128***, (v) ***Narmada Bachao Andolan Vs. State of M. P & Ors.***, reported in ***(2011) 7 SCC 639*** and (vi) ***Keshav Joshi & Ors. Vs. Union of India & Ors.***, reported in ***1992(supli)(1) SCC 272***. It is contended on behalf of the petitioner that from any view of the matter, the judgment of the Hon'ble Single Judge is liable to be interfered with.

**28.** The rival contentions of the respective parties have been duly considered. The materials on record which are placed before us have also been duly examined.

**29.** Though the facts encompassing the present disputes appear to be cumbersome and lengthy, the issue involved can be culled down within a narrow compass. The issues which call for a determination is to (i) whether previous seniority of the petitioner in the parent department can be ignored, (ii) whether the deputation of the respondent No.4 to the new department namely, Hydro Power Development Department at a prior point of time(25 days) on deputation would confer a seniority on the respondent No.4 and (iii) whether after publication of final seniority list and in the parent department showing the petitioner to be higher than the respondent No.4 on seniority, the same could have been further altered.

**30.** To answer the aforesaid questions, one basic exercise needs to be done which is to see on what basis the absorption of the parties in this list was done in the HPD Department. In other words, whether any objective criteria was followed before such absorption and what was the condition attached to such absorption.

**31.** Neither the pleadings nor there is anything on records to suggest that the deputation from the parent department was done by following some objective criteria like selection etc. This fact has also to be viewed by the express condition, that deputation will not give a right to absorption. Therefore, in our opinion, though the respondent No.4 was deputed to the Department of Hydro Power Development as Executive Engineer 25(twenty five) days prior to the

appellant/writ petitioner, the said respondent No.4 would not steal a march over the petitioner as the earlier deputation is simply an outcome of exercise of discretion. It is settled principle of law that as and when discretion is to be exercised, the same has to be done in a judicious manner, which appeals to a reasonable mind. Therefore, from all angles, the seniority of the appellant/writ petitioner in the parent department was a relevant fact which ought to have been taken into consideration at the time of deputation and overlooking the same does not appear to be in consonance with law.

**32.** The submission made on behalf of the respondent that opportunity of hearing was required to be given to the said respondent before publishing the final gradation list appears to be farfetched. The requirement of law is to call for objections regarding placement in the provisional gradation list and by hearing the objections, if any, the final gradation list is prepared. No vested right accrues upon incumbent from a provisional gradation list which the nomenclature (provisional) itself makes it clear and therefore requirement of giving an opportunity to the respondent did not arise. Further, as stated above even accepting that the date of absorption is within the exclusive domain and discretion of the authorities, the consequent submission that such discretions are beyond the purview of judicial review cannot be accepted. The power to exercise discretion is essentially qualified by the applicant to act reasonably, fairly and without any arbitrariness. As stated above, in absence of any clear projection as to how the dates of deputation were fixed, the same transferring the Respondent No. 4 on deputation prior to the petitioner and make him senior to the petitioner.

**33.** In view of such findings, we are of the opinion that the appellant/writ petitioner has to be treated senior to the respondent No.4 in the new department namely, Department of Hydro Power Development (DHPD) and would consequently be entitled to the benefits. Accordingly, the impugned judgment dated 01.06.2018 is interfered with and the relief is granted to the petitioner/writ appellant to the extent indicated above.

**34.** This disposes of all the writ appeals.

*pura*

**JUDGE**

**JUDGE**