

**IN THE GAUHATI HIGH COURT  
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM & ARUNACHAL PRADESH)**

**ITANAGAR PERMANENT BENCH**

**WP(C)203(AP)2011**

Shri A.C.Don, Son of late Tachi Don,  
Executive Engineer, Seppa Electrical  
Division, East Kameng District,  
Arunachal Pradesh.

**.....Petitioner**

**By Advocates:**

Mr. Pritam Taffo, B. Tapa,  
Ms. N. Dangen,

**-Versus-**

1. The State of Arunachal Pradesh represented  
by the Secretary to the Government of Arunachal Pradesh,  
Itanagar.
2. The Chief Engineer, Department of Power,  
Govt. of Arunachal Pradesh, Itanagar.
3. Er.Gyati Tada, Surveyor of Works (elect) office of  
Chief Engineer (elect) Western Zone, Itanagar.
4. Er. Modam Jini, Executive Engineer (Elect) Aalo,  
Electrical Division, West Siang District, Arunachal  
Pradesh.

**.....Respondents**

**By Advocates:**

Mr. Subu Tapin, Sr. Govt. Advocate  
Mr. Tony Pertin

**:::BEFORE:::**

**HON'BLE MRS. JUSTICE RUMI KUMARI PHUKAN**

**Dates of hearing : 14.3.2017**  
**Date of Judgment & Order : 21.04.2017**

**JUDGMENT & ORDER(CAV)**

Heard Mr. Pritam Taffo, learned counsel for the petitioner. Also heard Mr. Subu Tapin, learned Senior Government Advocate, for the State respondents, and Mr. Tony Pertin, learned counsel for private Respondents No. 3 and 4.

2. The petitioner herein is working as Executive Engineer (EE) in the Department of Power, Seppa, Electrical Division, in the Government of Arunachal Pradesh. As per service book his name is known as Tater Don but he changed his name to A.C.Don by way of affidavit and the same stands corrected accordingly in the service book. The petitioner was promoted to the post of Executive Engineer (hereinafter in short 'EE') in the pay scale of Rs.10,000/- to 15,200/- per month by order dated 5<sup>th</sup> May, 2003 as per recommendation of DPC.

3. The promotion of the present petitioner and others were challenged by some of their colleagues by way of Writ Petition (C) No. 248(AP)/2003 and connected series of petitions on the ground that the juniors to those persons were not called upon to appear before DPC and accordingly findings of DPC was challenged. The Court by its order dated 17.09.2004 dismissed the writ petitions by holding that the method of promotion to the post of EE is on merit-cum-seniority so merit will come first and therefore no illegality committed by DPC. Pursuant to the order of this Court a provisional seniority list of EE was published on 31.3.2009 wherein the petitioner was placed at serial no. 30 below three private respondents herein, who were quite junior to him from the seniority list of Assistant Engineers. The petitioner filed a representation before the respondent authorities stating that his seniority position ought to have been listed at serial no.27 and not at serial no.30 in view of the guideline by OM F No. 35034/7/97-Estt(1) New Delhi, February, 2002. According to this OM, practice of granting promotion in order of merit as per superior grading was to be done away and instead there should be a benchmark and the officers who reached the benchmark will be categorised as fit and promotion will be effected based on the seniority in the feeder grade. Thus, amongst officers who were declared fit they were no longer supersession based on merit adjudged during selection for promotion and the said OM was in force prior to holding Departmental Promotion Committee (hereinafter in short, DPC') dated 17.2.2003. Thus it has been submitted that without taking into account the case of the petitioner as per the OM mentioned above, the seniority of the petitioner has been wrongly placed and the provisional seniority list published on 2009 as well as final seniority list dated 19.5.2011 are bad in law.

4. It is the case of the petitioner that the DPC held on 2003 had recommended placing of promotes on the basis of outstanding, excellent and thereafter very good but the same was not come to the notice of any one. However the said

recommendation dated 17.2.2003 of the DPC no seniority was fixed and as the petitioner was amongst the successful candidate having benchmark of 'very good' and as such the seniority position of the petitioner in the feeder graded could not have been surpassed by the juniors to him. Accordingly it has been submitted that while issuing the final seniority list the respondent authorities has not followed the principle of natural justice which has violated the fundamental rights of the petitioner under Article 14 and 16 of the Constitution of India and the challenge has been made to the final seniority list issued by the respondent authorities, which has not followed the spirit of OM dated February, 2002 (as mentioned above).

5. The case of the petitioner has been challenged by the official respondent nos.1 and 2 as well as the private respondent nos. 3 and 4 by way of filing affidavit in oppositions. According to the respondent nos. 1 and 2, the seniority list was prepared in pursuance of the consolidated select list prepared in order of merit by the DPC held on 17.02.2003 which was upheld by this Court vide order dated 17.09.2004 in WP(C)248(AP)/2003 and connected matters and the revised guideline of DPC procedure was circulated on 18.01.2008 vide OM-15/2001. It has been categorically submitted that though the petitioner was appointed as Assistant Engineer (E) on 30.12.1987, the private respondents were appointed on 29.04.1988, but the DPC had followed the criteria of merit cum seniority while granting promotion and the select list was prepared in order of merit with outstanding at the top, excellent to the next and very good thereafter. Even this Court while passing the judgment (Annexure-3) has found no any illegality about the finding of DPC held on 17.2.2013. It has been submitted that the representation of the petitioner was thoroughly examined but could not be considered due to the findings of this Court in the earlier writ petition by which DPC was approved. It has been submitted that DPC was held prior to the revised guideline in the year 2008 vide OM No.15/2001 and DPC was held on 17.9.2004 and the respondent authority has finalised the seniority list pursuant to the DPC recommendation which was upheld by the High Court so there is no substance in the allegation that same has been issued by non-application of mind and violating the fundamental rights and principles of natural justice.

6. Similar is the stand of respondent nos. 3 and 4 who have been placed above the seniority list of the petitioner. It has been pointed out that the promotion order passed by DPC as mentioned above is a common order of promotion wherein the name

of the respondent no.3 appeared at serial no.1, the name of respondent no.4 appeared at serial no.3, and the name of petitioner appeared at serial no.4. Though the promotions order dated 5.5.2003 is a common order of promotion based on DPC dated 17.2.2003 it contained promotions based on year wise vacancies for the years 1998, 1999, 2000 and 2002. The name of petitioner, though senior to respondent nos. 3 and 4 in the cadre of Assistant Engineer appears below the name of private respondents in seriatim in the promotion order because for the year 1998 there are there are three vacancies out of which two were reserved for APST and one was reserved for general candidates. Against the two posts of APST the petitioner and respondent nos.3 and 4 and seven others were considered, but the petitioner was not found fit for the promotion against the post in the year 1998 vacancies and respondent nos. 3 and 4 were promoted in the said year. The petitioner was promoted against the post in the year 1999 vacancies. Accordingly the respondent nos. 3 and 4 became senior to the petitioner in the cadre of EE and the seniority position was correctly indicated in the seniority list.

7. It has been contended that DPC held on 17.2.2003 has considered the year-wise vacancy in accordance with Recruitment rules (RR) and general legal principles hold the field. As the promotions are made on the basis of recommendation of DPC, as per due procedure, the seniority of the officers assessed fit in the promoted grade shall be same as in the feeder grade from which they are promoted. Where, however a person is considered unfit for promotion and is superseded by his junior such person shall not, if he or she subsequently found suitable and promoted takes seniority in the higher grade over the junior person who had superseded him. Person appointed as a result of an earlier selection shall be senior to those appointed as a result of subsequent selection. In the present case, the petitioner was found unfit in the year 1998 while the matter was taken into consideration by the DPC but was found fit in the year 1999. Obviously, the seniority position of the petitioner cannot be above the private respondent nos.3 and 4.

8. I have considered the submissions of the learned counsel for the parties. According to the learned counsel for the petitioner the respondent authorities have published the seniority list in violation of the rules and natural justice and by violating the OM etc. whereby private respondents had been shown as senior to the petitioner illegally but the learned counsel for all the respondents have vehemently submitted

that the aforesaid seniority list has been published in conformity to the earlier recommendation of the DPC held on 2003, which was also upheld by the decision of this Court as mentioned above. It has been vehemently contended that the petitioner has filed the case by suppressing the necessary facts like decision of the DPC held by following RR and the petitioner cannot now rely upon the OM of 2002 as the said OM cannot be above the relevant RR as the relevant RR of the Arunachal Pradesh Power Engineering Service Rules, 1993 hold the field for all the recruitment and promotion etc and basing upon the same the DPC was conducted. All the subsequent publications of provisional as well as final seniority list by the respondent authority based upon the decision of the DPC which was upheld by this Court and as such there is no illegality or infirmity in the aforesaid final seniority list.

9. On the next, it is also contended on the part of the respondents that as the petitioner has not challenged the finding of DPC, which has already upheld by this Court, so any challenge to the seniority list published by the respondent authority on the basis of DPC does not arise at this stage.

10. I have carefully gone through the documents on records and relevant RR as well as findings of the DPC and the judgment delivered by this Court in the earlier Writ Petition as mentioned above, it is pertinent to mention here that petitioner herein was one of the respondents in the earlier case in WP(C) 249 (AP)/2003 (the series of cases mentioned earlier) where some of the Assistant Engineers as Petitioners challenged the promotion of the petitioner as EE by DPC dated 17.2.2003 and the petitioner contested the said case as respondent. In the impugned judgment and order, this Court has discussed all about the rule 10 and 13 of the aforesaid RR 1993 as well as the Rule 2(K) and also gone through the relevant files of the respondent authorities. The relevant observations and findings in the aforesaid judgment is quoted below-

".....In the present case there is no dispute at the Bar that Rule 10 govern the matter for promotion/recruitment to the post of Executive Engineer. There is also no dispute at the Bar that the respondents, who have been promoted, were all eligible for promotion and were within the zone of consideration. The constitution of the DPC is also not challenged.

On a combined reading of Rule 10 and 13, we find that the promotion to the post of Executive Engineer (E) is on the basis of the merit-cum-seniority/selection-cum-seniority and not on the basis of seniority-cum-merit.

The principles of merit-cum-seniority were stated by the Apex Court in the case of *Union of India Vs Mohan Lal Capoor, 1973 (2) SCC 836* in the following words:

*"When Regulation 5(2) says that the selection for inclusion in the list shall be based on merit and suitability in all respects with due regard to seniority, what it means is that for inclusion in the list, merit and suitability in all respects should be the governing consideration and that seniority should play only a secondary role. It is only when merit and suitability are roughly equal that seniority will be a determining factor, or if it is not fairly possible to make an assessment inter se of the merit and suitability- of two eligible candidates and come to a firm conclusion, seniority would tilt the scale. But, to say, as the High Court has done that seniority is the determining factor and that it is only if the senior is found unfit that the junior can be thought of for inclusion in the list is, with respect, not a correct reading of Regulation 5(2). I do not know what the High Court would have said had Regulation 5(2) said : "Selection for inclusion in the select list shall be based on seniority with due regard to merit and suitability". Would it have said that the interpretation to be put upon the hypothetical Sub-regulation (2) is the same as it put upon the actual Sub-regulation?"*

11. The matter was again considered by the Apex Court in the case of *Sarat Kr. Das & ors-vs- Biswanath Patnaik & ors, 1995 Supp (1) SCC 434*, the Apex Court explained thus:

*"In case of merit-cum-suitability, the seniority should have no role to play when the candidates were found to be meritorious and suitable for higher posts. Even a junior most man may steal a march over his seniors and jump the queue for accelerated promotion. This principle inculcates dedicated service, and accelerates ability and encourage merit to excel merit. The seniority would have its due place only where the merit and ability are approximately equal or where it is not possible to assess inter-se merit and the suitability of two equally eligible competing candidates who come very close in the order of merit and ability. Under those circumstances, the seniority will play its due role and calls it in aid for consideration. But in case where the relative merit and suitability or ability has been considered and evaluated, and found to be superior, then the seniority has no role to play. In our view the PSC has evolved correct procedure in grading the officers and the marks have been awarded according to the grading. It is seen that the four officers have come in the grading of 'B'. In*

*consequence, the PSC had adopted the seniority of the appellants and Panda in the lower cadre in recommending their cases for appointment in the order of merit."*

12. In the State of Arunachal Pradesh the Central Civil Services Rules are adopted and these are following in the matter of preparation of year-wise panels, methods of promotion etc.

13. Swami's Handboodk-2001 provides as follows:

**"Preparation of Yearwise Panels**

If the DPC meeting is not held in a year/years, though vacancies existed, the next DPC will prepare yearwise panels as under :-

(a) Actual number of vacancies which arise in each of the previous year(s) and those arising in the current year will be determined separately. For this purpose, yearwise break-up of the list should be submitted.

(b) Select panel for each year will be prepared separately with reference to the eligible candidate in the respective years and with reference to the service records upto the relevant period. In other words, the procedure which would have been followed had the DPC met in the relevant year should be followed. Candidates in the panel for the earlier year will be placed first, and so on, and the consolidated panel prepared.

**5. Method of promotion**

The methods followed for promotion are,

*(i) Selection –cum-seniority*

*(ii) Selection by merit, and*

*(iii) Non-selection or Seniority –cum-fitness method.*

**'Selection-cum-seniority' and 'Selection by Merit'**

*(i) Zone of consideration –The zone of consideration of eligible candidates with reference to the assessed vacancies, prescribed with extended zone for SCs/STs to ensure the promotion chances against the reserved quota for them as in table below:-*

<i>No of vacancies</i>	<i>Normal zone</i>	<i>Extended zone for consideration of SC/ST</i>
1	5	5
2	8	10
3	10	15
4	12	20
5 and above	Twice the number of vacancies +4	5 times the number of vacancies.

14. In the light of the above, let us examine as to how the selection was made by the DPC in the present case. The records of the DPC proceedings were produced before us by the learned Advocate general and we have perused the same. The records show that for the year 1998, there were, as many as, 3 vacancies for which the DPC consideration and found that two of them, Md. Mateen and Mr. Gyati Tada, have 'Excellent' and 'Outstanding' remarks and, accordingly, they were placed at Sl No.1 and 2 respectively. Likewise, Sri Modam Jini had 'Three Very Good' and 'Five Good' for the proceeding 8 years and he was placed at sl no.3. None of the other 7 persons, including the Writ Petitioners, Sri Chandan Singh, Sri M.S.Lote, Md. W.Rahman and Sri S K Mandal had attained the above 'bench mark' and, as such, they were not recommended or promotion against the vacancies of 1998. So far the petitioners, Sir Karik Tayeng, Katem Libang and Sri Latsum Khimun, are concerned they were not within the zone of consideration for the vacancies of 1998.

For the year 1999, there was only 1 vacancy, for which 5 names were considered and out of them Tater Don had 'Two Very Good' and 'Six Good' grading; whereas, Shri M.S.Lote and Chandan Singh had no 'very good' grading during the preceding 8 years and the other two, namely Sri R C Das and Md. W. Rahman had 'one Very Good' during each year. Accordingly, the name of Sri Tater Don, respondent No.14, was recommended.

XXX            XXXX        XXXX  
 XXX            XXXX        XXXX

We, thus, find that the promotion was considered by preparing yearwise panels and name of all the eligible candidates, thereafter, considering the merit and suitability and in view of the higher 'bench marks' obtained by the respondents as stated above, their names were recommended. We have examined the comparative statement and the relevant grading and the ACRs statement and find that the DPC

had acted fairly and there was transparency in the entire matter. We therefore, find no force in the submission that the proceedings of the DPC suffers from arbitrariness or that the DPC had discriminated the petitioners. As we know, the petitioners had right to be considered for promotion, and in the instant case their names were duly considered. But in view of the provisions of the Rules, which provides for selection on merit, more meritorious persons, although some of them were juniors, have been promoted. In the case of Bhusan Ch. Roy Medhi Vs Hemanta Kr. Mahanta & ors, 2003 (2) GLT 584 this Court held:

*"The rule being merit-cum-seniority, the Selection Committee was well within its right to recommend an eligible person for promotion on the basis of merit and seniority and not only on the basis of seniority. The Selection Committee proceeding also clarified that the petitioner's case has been considered by the selection committee and he was not found fit"*

In view of the settled position of law, as stated above, the petitioners can not claim promotion on the basis of seniority alone; when the Rules provides for selection on merit. The question of seniority would have arisen if the merit could have been found equal. But, not in a single instance, the petitioners were found equal on merit with the respondents, who are promoted.

15. Thus, all above findings in certain terms has upheld the legality of the aforesaid DPC and the same was never challenged by the present petitioner who was one of the respondents in the said case. All subsequent provisional and final seniority list has been published only on the basis of the aforesaid DPC and as such, the petitioner who was earlier categorised as junior to that of private respondent nos. 3 and 4 and as such his seniority position cannot now be challenged.

16. The petition being devoid of merit, the same stands dismissed.

17. No order as to costs.

**JUDGE**

*Nandi*