

**IN THE MAHARASHTRA ADMINISTRATIVE TRIBUNAL
MUMBAI BENCH**

ORIGINAL APPLICATION NO 269 OF 2016

DISTRICT : PUNE

Shri Sudhakar Baburao Nangnure,)
Working as Joint Director of)
Town Planning and Valuation,)
Maharashtra State, Pune.)
R/at 1-703, Raturang,)
Aranyeshwar Road,)
Near Lokesh Hotel, Pune 411 009.)...**Applicant**

Versus

1. The State of Maharashtra)
Through Principal Secretary,)
[UD-1], Urban Development)
Department, Mantralaya,)
Mumbai 400 032.)
2. The Additional Chief Secretary)
[Services], G.A.D,)
Mantralaya, Mumbai 400 032.)

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3. The Secretary in charge of)
Desk-16-B, G.A.D,)
Mantralaya, Mumbai 400 032.)
4. Shri N.R Shende,)
Joint Director of Town Planning)
Konkan Division, Konkan Bhavan)
Belapur, Navi Mumbai.)...**Respondents**

Shri M.R Patil with Ms Swati Manchekar, learned advocate for the Applicants.

Shri N.K.Rajpurohit, learned Chief Presenting Officer for the Respondents no 1 to 3.

Shri A.V Bandiwadekar, learned advocate for Respondent no. 4.

CORAM : Shri Rajiv Agarwal (Vice-Chairman)

Shri R.B. Malik (Member) (J)

DATE : 02.05.2016

PER : Shri Rajiv Agarwal (Vice-Chairman)

ORDER

1. Heard Shri M.R Patil with Ms Swati Manchekar, learned advocate for the Applicants, Shri N.K. Rajpurohit, learned Chief Presenting Officer for the

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Respondents no 1 to 3 and Shri A.V Bandiwadekar, learned advocate for Respondent no. 4.

2. This Original Application was heard by one of us sitting singly (Shri R.B Malik, Member-J) on 1.4.2016, and it was directed that the decision of the Respondents no 1 to 3 regarding appointment to the post of Director of Town Planning, falling vacant on 1.5.2016, will be subject to the outcome of this Original Application. The Applicant approached Hon'ble Bombay High Court against the said order by filing Writ Petition no 4112/2016. By order dated 7.4.2016, Hon'ble High Court directed that this Original Application be decided by this Tribunal to dispose of this Original Application "as expeditiously as possible and make an endeavor to dispose of the same by 30th April, 2016". The Applicant filed Misc Application no 170/2016 seeking condonation of delay of 199 days in filing the present Original Application, which was allowed by this Tribunal, by order dated 13.4.2016.

3. Learned Counsel for the Applicant argued that the Applicant belongs to open category and is at present, working as Joint Director of Town Planning since 8.7.2013 (words 'Town Planning' are not used hereafter). The Respondent no. 4, who belongs to Scheduled Caste (S.C) category was junior to him, in the cadre of Deputy Director as per the seniority list published on 14.2.2011.

After the Maharashtra State Public Services (Reservation for Scheduled Castes, Scheduled Tribes, Denotified Tribes [Vimukta Jatis], Nomadic Tribes, Special Backward Category and Other Backward Classes) Act, 2001 (hereinafter called the Reservation Act), came into force from 29.1.2004, reservation in promotion at all stages is provided for all Backward Classes except "Other Backward Classes"(OBC). For promotions, how the reservation will apply, is prescribed in G.R dated 18.10.1997 which has a 100 point roster. Another G.R dated 26.10.2004 provided that if a candidate belonging to a particular reservation category was not available, while the post was required to be filled from that category as per roster, it was to be kept vacant for three years and thereafter the post could be filled by temporarily dereserving it by promoting another person on the basis of seniority. By Circular dated 27.10.2008, the Respondent no. 2 clarified that for small cadres (less than 32) in first vacancy a candidate from S.C has to be appointed first, then S.T, VJ/NT and SBC candidates are to be considered, as per 100 point roster. If, however, from a particular reservation category no eligible candidate is available, the next roster point has to be used for small cadres. Learned Counsel for the Applicant argued that this Circular was not in consonance with section 6(1) of the Reservation Act, which provides that in case of non-availability of a Backward Class candidate, the vacancy shall be carried forward up to five years in

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case of direct recruitment and three years in case of promotion. This Circular dated 27.10.2008 was struck down by Hon'ble Bombay High Court (Aurangabad Bench) by order dated 9.5.2013 in W.P no 3077 of 20121. Learned Counsel for the Applicant argued that this Circular, which was illegal, cannot confer any legal rights to a person promoted under the provision of that circular, which was always in violation of section 6(1) of the Reservation Act.

4. Learned Counsel for the Applicant stated that the Respondents no 1 to 3 have been promoting candidates from only one category, viz. S.C for the post reserved for Backward Classes in the cadre of Joint Director. When the Reservation Act came into force on 29.1.2004, there were 2 posts of Joint Directors under the Directorate of Town Planning. Section 4 of the Reservation Act provides for 33% reservation in promotion. 1 post was accordingly reserved for Backward Classes after 29.1.2004. Till then there was reservation in promotion only up to first stage of Class-I, and no post of Joint Director was reserved. After the Reservation Act came into force, one reserved post of Joint Director has been filled in as follows:-

By promotion of Shri K.C Akode by order dated 25.11.2004.



This order clearly states that Shri Akode was promoted in the post reserved for Scheduled Caste. When Shri Akode was promoted as Director of Town Planning, the reserved post was filled by promoting Shri K.M. Shikhare, who also belonged to Scheduled Caste category. On retirement of Shri Shikhare, the post was filled by promotion of Shri N.R Shende, the Respondent no. 4, who also belongs to S.C category, on 11.8.2011. Learned Counsel for the Applicant argued that the promotion order of the Respondent no. 4 is issued on 20.5.2012, and he was given promotion with retrospective effect from 11.8.2011 (para 6.13C of O.A).

Learned Counsel for the Applicant argued that when Shri K.C Akode was promoted as Director, as he was promoted to the post of Joint Director from S.C category, the resultant vacancy in the post of Joint Director should have been filled from S.T category. If no suitable S.T category candidate was available, the post should have been kept vacant for 3 years as per Section 6(1) of the Reservation Act. Any promotion in the said vacancy given to a person from any reserved category other than S.T category cannot be called regular promotion and any such promotion should be treated as purely ad hoc and fortuitous without creating any right of seniority. The roster point for S.T was required to be carried forward till 30.11.2012 and thereafter for VJ-A category for next three years. During this period the post should have been

kept vacant, unless the Government decided to dereserve the post, in which case, the person should have been promoted on the basis of seniority. The Applicant, then would have been promoted ahead of the Respondent no. 4 as Joint Director. However, the post, on promotion of Shri Akode, was again filled up by promotion of Shri Shikhare, who belonged to S.C category and on his retirement by the Respondent no. 4, who also belongs to S.C categories. Learned Counsel for the Applicant stated that all such promotions, (after promotion of Shri Akode) have to be treated as fortuitous. Learned Counsel for the Applicant relied on the judgment of this Tribunal in O.A no 927/2012 dated 30.9.2013 wherein, it has been held that the post cannot be filled by promotion of candidates belonging to one particular reservation category, when the roster point for the category has been used and persons from other category are available.

5. Learned Counsel for the Applicant argued that the final seniority list for the cadre of Joint Director as on 1.1.2014 was first published on 28.8.2014. The Respondent no. 4 is shown above the Applicant. However, as the promotion of the Respondent no. 4 was as per provisions of Circular dated 27.10.2008, the Applicant reasonably believed that he could have no reason to raise any objection to the seniority list. The seniority list as on 1.1.2015 was published on 15.1.2016. In the meanwhile, the Applicant came to know that the

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Circular dated 27.10.2008 has been struck down by Hon'ble High Court in W.P no 3077 of 20121 by judgment dated 9.5.2013 and in O.A no 927/2012 this Tribunal has relied on the aforesaid judgment of Hon'ble High Court., he protested against the seniority list by representation dated 11.2.2016. As no reply to the representation was received, the present Original Application has been filed. Learned Counsel for the Applicant argued that the number of posts in the cadre of Joint Director was increased to 8 in the year 2013. 3 posts have become available for reservation. The Applicant's promotion at best can be regularized from 2013 when additional posts were created. The Applicant was also promoted as Joint Director on July 2013 and the Applicant would remain senior to the Respondent no. 4 in the cadre of Joint Director, if both were eligible for promotion as Joint Directors in 2013, as the Applicant was senior to the Respondent no. 4 in the cadre of Deputy Director.

6. Learned Counsel for the Applicant raised other issues regarding consequential seniority to S.C/S.T candidates as per Article 16(4A) of the Constitution. He argued that the Reservation Act does not provide for consequential seniority when a Backward Class candidate is promoted ahead of general candidates. He cited various judgments of Hon'ble Supreme Court that Article 16(4A) is an enabling provision and unless there

are specific provisions in the Act/Rules based on quantifiable data, such consequential promotion will not assumed to operate. He specially relied on the judgment of Hon'ble Supreme Court in the case of S. Panneer Selvam & others Vs. Government of Tamil Nadu and other in Civil Appeal Nos 6631-5532 of 2015, where Hon'ble Supreme Court has held that:-

“The consequential seniority for such reserved category promotees can be fixed only if there is express provision for such reserved category promotees in the State rules. In the absence of any specific provision or policy decision taken by the State Government for consequential seniority for reserved category accelerated promotees, there is question of automatic application of Article 16(4A) of the Constitution.”

This issue is examined subsequently.

7. Learned Chief Presenting Officer (C.P.O) argued on behalf of the Respondents no 1 to 3 that in para 10(b) of the Original Application, the Applicant has challenged final seniority list of Joint Directors as on 1.1.2015, published on 15.1.2016. He has, however, not challenged the final seniority list as on 1.1.2014, which was published on 28.8.2014. Learned C.P.O argued that the cause of action arose, when the Respondent no. 4

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was promoted as Joint Director in the reserved post on 11.8.2011. The Applicant has, however, not challenged the promotion order, and has not sought condonation of delay vis-à-vis that order. The Applicant is from open category and cannot challenge promotion of the Respondent no. 4 from reserved category. The Respondent no. 4 was promoted as Joint Director as per the provision of the Circular dated 27.10.2008. This circular was struck down by Hon'ble High Court by order dated 9.5.2013. The order of Hon'ble High Court does not state that all previous promotions will become invalid. As such all promotions prior to 9.5.2013 will have to be held as valid. Even if the stay granted to operation of Circular dated 27.10.2008 on 29.9.2011 by Hon'ble High Court is considered, the Respondent no. 4 was promoted on 11.8.2011 before that date. In 2011, there were only two posts of Joint Director and one was reserved for Backward Classes. As per Circular of 27.10.2008, if candidate as per roster point was not available, the post could be filled from the next roster point. In the present case, as no S.T, VJ-NT or SBC candidates were available, reserved post was filled by candidates belonging to S.C category.

8. Learned Chief Presenting Officer argued that the provisional seniority list of Joint Directors as on 1.1.2014 was published on 1.6.2014. It was finalized on 28.8.2014. First cause of action, therefore arose on

1.6.2014. The Applicant failed to challenge the provisional seniority list or the final seniority list published on 28.8.2014. The provisional seniority list as on 1.1.2015 was published on 13.1.2015. That was also not challenged by the Applicant. Learned Chief Presenting Officer argued that the Applicant cannot challenge the seniority as on 1.1.2015 without challenging the seniority as on 1.1.2014. Learned Chief Presenting Officer argued that the Respondent no. 4 was promoted as per G.R dated 27.10.2008. Section 16 of the Reservation Act empowers the Government to remove difficulties. For very small cadres, the Government has decided to remove difficulties in filling the reserved post. Learned Chief Presenting Officer argued that G.R dated 5.12.1994 will be applicable only if no candidate belonging to reserved category was available. Learned Chief Presenting Officer stated that the Respondent no. 4 was promoted on 11.8.2011 after following due procedure as per G.Rs of 20.10.2007 and 20.3.2003 while the Applicant was promoted on 2.7.2013. The Respondent no. 4 is, therefore, senior to the Applicant. Learned Chief Presenting Officer argued that G.R dated 20.3.2003 and the Maharashtra Civil Services (Regulation of Seniority) Rules, 1982 clearly provide for consequential seniority, when a backward class candidate get accelerated promotion over a general candidate. G.R dated 20.3.2003 is protected by section 5(2) of the Reservation Act. Learned Chief Presenting Officer stated that the

Reservation Act was struck down by this Tribunal by order dated 28.11.2014 in T.A no 1 & 2/2014. However, in Writ Petition no 2797/2015, Hon'ble High Court has stayed the order of this Tribunal on 20.3.2015. Learned C.P.O argued that G.R dated 27.3.1997 provided that a person from reserved category promoted out of turn will not get consequential seniority. However, by G.R dated 19.4.1997, this G.R dated 27.3.1997 was superseded. In G.R dated 20.10.1997, this position is reiterated. Learned Chief Presenting Officer concluded that there is a policy of consequential seniority in Maharashtra, which is reflected in various G.Rs and Maharashtra Civil Service (Regulation of Seniority) Rules, 1982. The Applicant cannot challenge seniority of the Respondent no. 4 on that count.

9. Learned Advocate Shri Bandiwadekar argued on behalf of Respondent no. 4 that Respondent no. 4 is entitled to get consequential seniority for his promotion in reserved post as per Article 16(4-A) of the Constitution. Hon'ble Supreme Court in the case of **M. NAGARAJ Vs. UNION OF INDIA & ORS (2006) 8 SCC 212** has upheld the validity of 77th, 81st, 82nd and 85th Constitutional Amendment Act. The Government of Maharashtra has enacted the Reservation Act which came into force from 29.1.2004. This Tribunal by order dated 28.11.2014 in T.A nos 1 & 2/20124 has struck down this Act. However, the order has been stayed by Bombay High Court on

25.3.2015 in W.P no 2797/2015. Learned Counsel for the Respondent no. 4 argued that the final seniority list of Joint Directors as on 1.1.2015 was published on 28.8.2014. There was earlier seniority lists as on 1.1.2013 and 1.1.2012, which the Applicant has not challenged. He has only challenged seniority list as on 1.1.2015. The Applicant is estopped from challenging earlier seniority list as he has acquiesced himself with the said seniority lists. The Applicant has legitimate expectation that he will be promoted to the next higher posts on the basis of his seniority in the cadre of Joint Director. The Applicant is not eligible to be considered for promotion to the post of Director which is falling vacant on 1.5.2016, as he does not have 3 years experience as Joint Director, required as per Recruitment Rules dated 1.8.2011. On this ground alone, this Original Application is not maintainable. Learned Counsel for the Respondent no. 4 stated that the claim of the Applicant that the Respondent no. 4 was promoted as Joint Director on the roster point of S.T is not correct. The Respondent no. 4 was promoted as Joint Director after following the prescribed procedure. The Respondent no. 4 was the only reserved category candidate in 2011, who was eligible to be promoted as Joint Director. He was, therefore, promoted. Other post of Joint Director was filled in by promotion of open category candidate earlier. Learned Counsel for the Respondent no. 4 contended that for a small cadre having only two posts, promotion

has to be given to the qualified reserved category candidate from any category when no other reserved category candidate is available. Government Circular dated 5.12.1994 is not applicable in such cases. Learned Counsel for the Respondent no. 4 stated that Government has issued a Booklet dealing with reservation, especially vis-à-vis small cadres. It is provided that if there is any difficulty in dealing with small cadres reservation, decision of G.A.D will be final. In the present case, G.A.D has upheld promotion of the Respondent no. 4 as Joint Director in the reserved post. Government Circular dated 27.10.2008 was in force when the Respondent no. 4 was promoted. It was invalidated subsequently by Hon'ble Bombay High Court. However, promotion before the judgment will not be affected. Learned Counsel for the Respondent no. 4 stated that the promotion of the Respondent no. 4 on 11.8.2011 was as per law and cannot be termed ad hoc or fortuitous. The promotion of Respondent no. 4 mentions that it was ad hoc only on account of pending Writ Petition no 8452 of 2011. Even the promotion order of the Applicant dated 3.7.2013 mentions that he was promoted on ad hoc basis. Learned Counsel for the Respondent no. 4 submitted that the judgment of Hon. Supreme Court in the case of **S. PANNER SELVAM** (supra) has no application in the present case, as the consequential seniority is provided in G.Rs and rules in

Maharashtra. Learned Counsel for the Respondent no. 4 relied on the following judgments:-

(1) **P. CHITHARANJAN MENON & ORS Vs. A. BALAKRISHNAN & ORS : (1997) 3 SCC 255.** It was held that a Writ Petition filed after undue delay in challenging seniority is liable to be dismissed.

(2) **AMARJIT SINGH & ORS Vs. DEVI RATAN & ORS : (2010) 1 SCC 417.** It has held that the seniority which is consequential to the promotion could not be challenged without challenging the promotion itself. Challenging the consequential order without challenging the basic order is not permissible.

(3) **UNION OF INDIA & ORS Vs. M.K SARKAR (2010) 2 SCC 59.** It was held that Government or Tribunal should not direct consideration or reconsideration of a dead or stale issue or dispute.

(4) **RAMESH CHAND SHARMA Vs. UDHAM SINGH KAMAL: (1999) 12 SPSC 1174.** It is held that the Respondent did not fulfil the condition of three years experience in the feeder cadre and therefore Appellant was selected. The Tribunal had no jurisdiction to admit and dispose of Original Application.

(5) **HARYANA STATE COOPERATIVE LAND DEVELOPMENT BANK Vs. NEELAM: 2005 (105) FLR 114.** It was held that procedural laws like estoppel, waiver and acquiescence are equally applicable to the industrial proceedings.

10. Learned Chief Presenting Officer has also relied on AMARJIT SINGH's case (supra). He also cited judgment of Hon'ble Supreme Court in **STATE OF MAHARASHTRA & ANOTHER Vs. DILIP V. JAMDAR (1989) 4 SCC 70**, where it has been held that settled position should not be unsettled.

11. The important issues which have been raised by the parties in this Original Application are as follows:-

(i) The Applicant has challenged seniority list of Joint Directors as on 1.1.2015. He has not challenged the seniority list as on 1.1.2014 and the promotion order of the Respondent no. 4 dated 11.8.2011. Is this Original Application maintainable?

(ii) The Respondent no. 4 was promoted as Joint Director as per instructions contained in G.R dated 27.10.2008 regarding reservation in small cadres. He was promoted by order dated 11.8.2011, before this G.R was struck down by Hon'ble High Court by order dated 9.5.2013. In the absence of any directions by Hon'ble

High Court, can the promotion dated 11.8.2011 be held invalid?

(iii) The Applicant claims that before G.R dated 27.10.2008 was issued, there was another G.R dated 5.12.1994 in the field, which permitted temporary dereservation. Whether the Applicant could have been entitled to get promotion, if G.R dated 5.12.1994 was not made inapplicable by G.R dated 27.10.2008?


(iv) Whether the consequential seniority rule is applicable in Maharashtra?

12. Both the Learned Chief Presenting Officer on behalf of the Respondents no 1 to 3 and Learned Advocate Shri Bandiwadekar have strongly pleaded that this Original Application is not maintainable as the Applicant has only challenged the final seniority list as on 1.1.2015 published on 15.1.2016 and not challenged the earlier seniority list as on 1.1.2014 which was published on 28.8.2014. The Applicant has also not challenged the promotion order of the Respondent no. 4 dated 11.8.2011, by virtue of which the Respondent no. 4 was promoted as Joint Director. The Respondent no. 4 has pleaded that earlier seniority lists as on 1.1.2013 and 1.1.2012 have also not been challenged by the Applicant. That contention is not serious as the Applicant was promoted as Joint Director on 2.7.2013, and he had

no occasion to challenge seniority list of Joint Director, before his promotion to that post. As regards not challenging the promotion order of the Respondent no. 4 dated 11.8.2011, the Applicant has taken a stand that he can challenge the seniority of the Respondent no. 4 without challenging his promotion, which was ad hoc and such ad hoc promotion cannot become regular if they are issued in violation of law. It was pleaded that the Respondent no. 4 was promoted as Joint Director by order dated 11.8.2011 in clear violation of Section 6(1) of the Reservation Act, and such promotion cannot be termed regular, and will not allow the Respondent no. 4 to claim seniority on the basis of that order. We find that Hon'ble Supreme Court in AMARJIT SINGH's case (supra) has held that:-

“The seniority which is consequential to the promotions could not be challenged without challenging the promotion. Challenging the consequential order without challenging the basic order is not permissible.”


On first reading of this judgment it appears that the Applicant was required to challenge the promotion order of 11.8.2011. However, on careful reading of the judgment of Supreme Court, it is clear that promotion in the above mentioned case were regular promotion. In case of fortuitous promotions, ratio of this judgment may



not apply. To give a couple of examples, in the case of Direct Recruit's case viz., **DIRECT RECRUIT, CLASS-II ENGINEERING OFFICERS ASSOCIATION Vs. STATE OF MAHARASHTRA & ORS : (1990) 2 SCC 715**, the direct recruits were claiming seniority over promotee engineers claiming that the promotions of promotees were fortuitous. The promotions of such promotees were not challenged. Hon'ble Supreme Court did not reject the case on this ground. Even in the case cited by the Applicant, though in the context of consequential seniority, viz. **S. PANNEER SELVAM's** case (supra), where the seniority lists have been challenged without challenging the promotions of S.C/S.T candidates. In the present case also, the Applicant has not challenged promotion of the Respondent no. 4, but has claimed that the Respondent no. 4 was junior to him as Deputy Director and cannot acquire seniority over him, as he could not have been given regular promotion in the vacancy reserved for S.T category and therefore, his promotion by order dated 11.8.2011 is fortuitous and does not confer any benefit of seniority. Without admitting that the promotion of the Respondent no. 4 was regular, but assuming it to be so, the Applicant has claimed that the Respondent no. 4 was not entitled to consequential seniority as the Reservation Act has no such provision. In our view, the Applicant can maintain this Original Application without challenging the promotion of the Applicant by order dated 11.8.2011.

13. The question now comes, whether he can challenge the seniority list as on 1.1.2015 without challenging the seniority list as on 1.1.2014. The Applicant had explained that he assumed that the Respondent no. 4 was given promotion as per G.R dated 27.10.2008 which was legal. When he came to know that this G.R was struck down by Hon'ble Bombay High Court, Aurangabad Bench by order dated 9.5.2013, in W.P no 3077/2011, and the subsequent judgment of this Tribunal dated 30.9.2013 in O.A 927/2012 he challenged the seniority list as on 1.1.2015 published on 15.1.2016. His representation is dated 11.2.2016. The explanation given by the Applicant appears to be plausible. We are inclined to accept it.

14. The Learned Counsel for the Applicant has relied on the judgment the Hon'ble Supreme Court in **RAMESH CHAND SHARMA's** case (supra). It is true that the Applicant was promoted as Joint Director on 2.7.2013 and has not completed 3 years in the post to qualify for promotion to the post of Director as per Recruitment Rules. However, on careful reading of the aforesaid judgment, it is clear that the judgment refers to 3 years delay in filing Original Application before Himachal Pradesh Administrative Tribunal. The order of the Tribunal was set aside on the ground of limitation. It was not examined on merits. This case is clearly distinguishable.



15. Learned Chief Presenting Officer has relied on the judgment in **JAMADAR's** case (supra). In that case, the Petitioners remained complacent for a long number of years. During that period, several other Class-II officers were promoted to Class-I. It was held that the benefits which had accrued to those persons cannot be disturbed. In the present case, no third party except the Applicant and the Respondent no. 4 is involved. The number of years is also small. The case is distinguishable. Even the Respondents no 1 to 3 have admitted that the promotions of the Respondent no. 4 and the Applicant as Joint Director are yet to be approved by M.P.S.C. The position is yet to be settled so there is no question of unsettling the settled things.

16. Learned Counsel for the Applicant has cited **SARKAR's** case (supra). In the present case, the Applicant has not submitted repeated representations. The case cannot be said to be stale or dead when seniority list as on 1.1.2015 is challenged. The case is distinguishable.

17. In **P. CHITTARANJAN MENON's** case (supra), the petition was filed after undue delay. We have already held that there is no undue delay in filing this Original Application. Settled position is not sought to be unsettled in the sense that the promotion of the Respondent no. 4

is yet not settled, as the approval of the Maharashtra Public Service Commission is yet to be received.

18. The case of **HARYANA STATE COOPERATIVE LAND DEVELOPMENT BANK's** case (supra) the judgment is in the context of Industrial proceedings. Here, the proceedings are in the context of the Reservation Act. The case is distinguishable.

19. Coming to the promotion of the Respondent no. 4 dated 11.8.2011, let us examine the legal position. Section 6(1) of the Reservation Act reads as follows:-

“6(1) If in respect of any recruitment year, any vacancy reserved for any category of persons under sub section (2) of Section 4 remains fulfilled, such vacancy shall be carried forward up to five years in case of direct recruitment and three years in case of promotion.”

The Government has issued circular dated 18.10.1997 which prescribes a 100 point roster for reservation in promotion. The first few points are given below:-

1. S.C
2. S.T
3. VJ(A)
4. NT(C)
5. Open

6. Open
7. NT(B)
- 8 – 10 Open
- 11 NT(D)
- 12 S.C
- 13-14 Open
- 15 S.B.C.

This G.R has been issued in the wake of judgment of Hon'ble Supreme Court in R.K. SABHARWAL's case and it is undisputably valid. For the small cadres, Government issued circular dated 27.10.2008. This Circular was challenged before the Hon'ble High Court (Aurangabad Bench) in W.P no 3077 of 2011. To understand the purport of this circular, para 6 of the judgment dated 9.5.2013 is reproduced below:-

“6. It is the contention of petitioner that in view of proviso to Section 6(1) of Maharashtra Act No.VIII of 2004, the aforesaid Government direction regarding filling up of the posts in case of non availability of backward category candidate, continues to operate. The Government of Maharashtra issued yet another Circular on 27th October, 2008. It is provided in paragraph 2 of the circular that there arises difficulty in filling up the posts by offering the posts by promotion in favour of backward class categories having small percentage of reservation. In case cadre strength of a particular category is less than 32 and in such eventuality, reserved post may not

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become available to few reserved categories. In order to overcome this difficulty, in the event of non availability of a candidate belonging to a particular reserved category, the post shall be offered to next roster point category within the reservation percentage. It is also prescribed that after filling up the post by offering reservation to the next roster category, if the post becomes available at a subsequent point of time, same shall revert back to the original roster point category and even after reverting back the post to the earlier roster point category, the candidate belonging to said prescribed category does not become available, the said post shall be offered in accordance with roster point to the next category. It is further prescribed that in such contingencies, the directives issued in Government Resolution dated 05.12.1994 shall not be observed and only in the event of non availability of an eligible candidate from any of the backward categories, the directives prescribed under Government Resolution dated 05.12.1994 shall be operated.”

In this connection, it will also be instructive to reproduce para 19 of the judgment:-

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“19. It is argued on behalf of the Respondents that promotional post remains unoccupied by operation


of Section 6(1) of the Act and in order to overcome the difficulty, the impugned circular is issued. The argument advanced by the Respondents is devoid of substance for the reason that the Government Resolution dated 05.12.1994 takes care of such contingencies. Paragraph no.2 of the Government Resolution of 1994 provides that in emergent situation, with the prior approval of General Administration Department, the post can be filled in for temporary duration by making appointment of a person from other categories. It is also provided that on availability of a candidate belonging to a particular reserved category, the order of promotion effected for temporary duration shall come to an end and the post shall have to be offered to the candidate belonging to a prescribed reserved category. Thus, in emergent situation, it is open for the State Government to fill in the vacant post by making appointment of an eligible candidate from amongst any other categories.”

Hon'ble High Court held that:-

“27. For the reasons recorded above, writ petition deserves to be allowed and same is accordingly allowed. The impugned circular dated 27.10.2008, issued by the Government of Maharashtra, through General


Administration Department, is quashed, being contrary to the provisions of Maharashtra Act No.VIII of 2004 as well as violative of provisions of Article 16(4A) and 16(4B) of the Constitution of India. It would be mandatory for the State Government to implement the provisions of Maharashtra Act No.VIII of 2004, strictly.”

All the Respondents are claiming that this judgment will operate prospectively, and promotion given before the date of this judgment will remain valid. It is argued that Hon'ble High Court has not invalidated promotion as per Circular dated 27.10.2008 before the date of judgment. We are unable to accept this argument. Hon'ble High Court has quashed this Circular dated 27.10.2008 as it was contrary to the provisions of the Reservation Act and Article 16(4A) and 16(4B) of the Constitution. The question of any particular promotion was not before Hon'ble High Court. There was no occasion for Hon'ble High Court to comment on that issue. Only the Constitutional validity of the Circular dated 27.10.2008 came to be decided. On the contrary it can be argued that Hon'ble High Court did not hold that promotion orders given earlier would not be disturbed. Any act done under the cover of this Circular which was ab-initio illegal, cannot acquire validity. The claim of the Respondents that promotion order of the Respondent no.



4 dated 11.8.2011 should not be examined on the touchstone of this judgment has to be rejected. The Applicant has not sought quashing of order dated 11.8.2011. He has only prayed that it may not confer any right of seniority on the Respondent no. 4, if it is found to have been issued in violation of provisions of the Reservation Act. It is clear that once Circular dated 27.10.2008 is out of the way, the promotion in the reserved post of Joint Director, should have been made following roster point as per G.R dated 18.10.1997. When Shri K.C Akode was promoted by order dated 25.11.2004 w.e.f 1.12.2004 as Joint Director in the reserved vacancy, the roster point no. 1 for S.C was consumed. When the post became vacant, on promotion of Shri Akode to the post of Director on 30.11.2009, the next roster point was for S.T category. As no suitable candidate from S.T category was available for promotion as Joint Director, as per section 6(1) of the Reservation Act, the post should have been kept vacant for 3 years up to 30.11.2012. However, the Respondents no 1 to 3 filled the post by promoting another S.C Officer Shri K.M. Shikhare, who retired on 31.7.2010. The Respondent no. 4 belonging to S.C category was promoted on 11.8.2011. The contention of the Applicant that the reserved post of Joint Director should have been kept vacant for three years and then action under G.R dated 5.12.1994 as has been upheld by Hon'ble Bombay High Court in the judgment dated 9.5.2013 in W.P no 3077/2011. (refer to

para 17 of the judgment quoted above). The claim of the Respondent no. 4 that a reserved post, even after it was kept vacant for three years, has to be filled by a backward class candidate cannot be accepted, in the light of interpretation of G.R dated 5.12.1994 by Hon'ble High Court. Earlier instructions of G.A.D in some booklet have to be ignored after G.R dated 5.12.1994 was issued. In fact, this G.R takes care of problems in filling posts in small cadres. The action of the Respondents no 1 to 3 can be said to have resulted in reserving one reserved post only for S.C category. If the Respondents no 1 to 3 have taken action as per G.R dated 5.12.1994, there was a good chance that the Applicant would have been promoted as Joint Director in 2012, as admittedly he was senior to the Respondent no. 4 in the cadre of Deputy Director. Learned Counsel for the Applicant has fairly concluded that the Respondent no. 3 could have been promoted as Joint Director when the number of posts in the cadre of Joint Director were increased from 2 to 8 and 3 posts came to be reserved. It is evident that the Respondent no. 4 was not promoted as Joint Director by order dated 11.8.2011 in accordance with the provisions of the Reservation Act. In fact, his promotion was in clear violation of section 6(1) of the Reservation Act. The contention of the Applicant that promotion of the Respondent no. 4 by order dated 11.8.2011 be treated as fortuitous and the date of his eligibility for regular promotion may be ascertained is quite reasonable.



In this connection, para 10 of the affidavit in reply filed on behalf of the Respondent nos 1 to 3 dated 17.4.2016 is reproduced:-

“10. With reference to Para 6.11, I say that Shri N.R Shende (Scheduled Caste) was promoted as Joint Director of Town Planning on 11.8.2011 after following due procedure and provisions of prevailing rules for promotion with the approval of General Administration Department, Establishment Board as well as Government. Though his promotion is on ad hoc basis and on regular post, it will be regularized with the approval of Maharashtra Public Service Commission. Even the applicant is also promoted on upgraded post of Joint Director of Town Planning on ad hoc basis vide Government Resolution dated 2.7.2013 and it also will be regularized with the approval of Maharashtra Public Service Commission.”

It appears that promotion of both the Applicant and the Respondent no. 4 have not been approved by Maharashtra Public Service Commission and to the extent cannot be considered to be regular.

20. The issue of G.R dated 5.12.1994 has already been discussed. Hon'ble High Court in the judgment dated 9.5.2013 in Writ Petition no 307/2011 in para 19

has held that if a reserved post cannot be filled for 3 years by promotion as the candidate from appropriate category as per roster point is not available, an eligible candidate from amongst any other categories can be promoted. Shri Akode from S.C category was promoted as Director on 30.11.2009. The resultant vacancy should have been kept vacant for 3 years up to 30.11.2012. Thereafter, it could be filled by promoting some other suitable person as per G.R dated 5.12.1994. Even if the Respondent no. 4 was promoted as per G.R dated 5.12.1994, that promotion would have been temporary till the appropriate category candidate was available. In this case, the Respondent no. 4 probably could have been adjusted against S.C vacancy in 2013, when number of posts of Joint Director was increased from 2 to 8. All these issues, however, will be required to be considered appropriately by a review D.P.C.

21. Learned Chief Presenting Officer has stated that Circular dated 27.10.2008 was issued in exercise of powers under the Reservation Act, whereby the State Government can remove difficulties. This contention has to be rejected on two counts. Firstly, Hon'ble High Court has held that difficulty in implementing provision of the Reservation Act has already been removed by G.R dated 05.12.2014. Secondly, in the guise of removing difficulties, express provision of section 6(1) of the Reservation Act cannot be allowed to be violated.

22. It is not necessary to consider the issue of the 'consequential seniority' in this Original Application as without considering that issue this Original Application can be decided.

23. Having regard to the aforesaid facts and circumstances of the case, this Original Application is allowed in the following terms:

The seniority list of the Joint Director of Town Planning as on 1.1.2015 published on 15.1.2016 is quashed and set aside. The Respondents no 1 to 3 will decide the date of regular promotion of the Respondent no. 4 by calling appropriate Review D.P.C and prepare a fresh seniority list of Joint Director of Town Planning expeditiously. There will be no order as to costs.

Sd/-
(R.B. Malik)
Member (J)

Sd/-
(Rajiv Agarwal)
Vice-Chairman

Place : Mumbai
Date : 02.05.2016
Dictation taken by : A.K. Nair.