

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 670 OF 2008

U.P. POWER CORPORATION LTD. ... APPELLANT

VERSUS

AYODHYA PRASAD MISHRA & ANR. ... RESPONDENTS

J U D G M E N T

C.K. THAKKER, J.

1. The present appeal is filed by the Uttar Pradesh Power Corporation Limited, Lucknow against the judgment and order dated May 17, 2007 passed by the High Court of Judicature at Allahabad (Lucknow Bench) in Writ Petition No. 491(S/B) of 2007. By the said order, the Division Bench of the High Court held that criterion for promotion to the post of Superintending Engineer from the post of

Executive Engineer is **merit** i.e. selection and placement of an Executive Engineer in Category I prior to other officers placed in Category-II. A direction was issued by the Court to the Corporation to offer to the writ-petitioner first available vacancy of Superintending Engineer and to promote him to the said post.

2. To appreciate the points raised in the present appeal, few relevant facts may be noted.

3. The Uttar Pradesh Power Corporation ('Corporation' for short) (previously known as Uttar Pradesh State Electricity Board) is a 'Board' as defined in Clause (2) of Section 2 and constituted under Section 5 of the Electricity (Supply) Act, 1948 (hereinafter referred to as 'the Act'). It is thus an instrumentality of "State" within the meaning of Article 12 of the Constitution. For conditions of service of its employees, the Board, in exercise of power conferred by Clause (c) of Section 79 of the Act framed

'regulations' known as the Uttar Pradesh State Electricity Board Service of Engineers Regulations, 1970 (hereinafter referred to as 'the regulations'). The regulations are thus statutory in nature. They deal with appointment of Engineers, their promotion and other service conditions.

4. The regulations, *inter alia*, provide for appointment and promotion to the following posts;

- (i) Chief Engineer Level-I
- ↑
- (ii) Chief Engineer Level-II
- ↑
- (iii) Superintending Engineer**
- ↑
- (iv) Executive Engineer
- ↑
- (v) Assistant Engineer

5. The present appeal relates to appointment by promotion to the post of Superintending Engineer from the post of Executive Engineer. It was the case of writ petitioner (respondent No. 1) that he was

working as Executive Engineer and was eligible and qualified to be promoted as Superintending Engineer under the regulations. In accordance with the regulations, the case of the writ-petitioner was considered by the Departmental Promotion Committee (DPC), he was found fit and on the basis of marks obtained by him, he was placed in Category-I. It was his case that there were several posts of Superintending Engineer which were required to be filled in initially from Executive Engineers placed in Category-I and thereafter in the event of more vacancies being available, the cases of Executive Engineers placed in Category-II were to be considered. Unfortunately, however, according to the writ petitioner, though he was in Category-I and had secured maximum marks (191.3 out of 200), he was not promoted. The said action was illegal, unlawful and inconsistent with the regulations which constrained the writ-petitioner to approach the High Court by instituting a writ petition.

6. The High Court was convinced that the action of the Corporation was illegal and contrary to law. Accordingly, a direction was issued by the High Court to the Corporation to offer to the writ-petitioner first available vacancy of Superintending Engineer and to promote him on the said vacancy. That action is challenged by the Corporation in this Court by filing the present appeal.

7. On September 5, 2007, notice was issued by this Court and time was granted to file counter affidavit which was, thereafter, filed. By an order dated March 10, 2008, the Bench presided over by Hon'ble the Chief Justice of India directed the Registry to post the appeal for final hearing during the first part of summer vacation and accordingly the matter was placed for final hearing before us.

8. We have heard learned counsel for the parties.

9. Learned counsel for the Corporation contended that the order passed by the High

Court was illegal and contrary to law. He submitted that the action of not promoting the writ petitioner was in consonance with the statutory regulations framed by the Corporation. It was urged that under the regulations, promotions are to be given from the post of Executive Engineer to the post of Superintending Engineer. For that purpose, categories were to be fixed. It was stated that under the regulations, Executive Engineers placed in Categories I and II could be promoted to the promotional post of Superintending Engineer. Executive Engineers in Category III were not considered eligible for promotion. According to the counsel, once an Executive Engineer is considered eligible to the promotional post of Superintending Engineer either because his name is found in Category I or Category II, *inter se* seniority of such Executive Engineers was required to be maintained and promotion as Superintending

Engineer was to be given on the basis of such seniority.

10. It was not disputed by the counsel that the writ petitioner was placed in Category I as he had obtained maximum marks. He was, hence, eligible and qualified to be promoted as Superintending Engineer. But the case of the Corporation was that several other Executive Engineers were also found suitable and eligible who were placed in Category II. In view of the fact that they were senior to the writ-petitioner, their cases were considered before the case of the writ-petitioner as they were required to be promoted. Such action of the Corporation was legal and lawful and the writ-petitioner had no right to make grievance.

11. The High Court, by the impugned order held that considering the scheme of statutory regulations, it was clear that Executive Engineers who obtained more marks and placed in Category I would get priority in getting promotion as Superintending Engineer over those

Executive Engineers who were found eligible and qualified but because of less marks found their placement in Category II. Promotion to the post of the Superintending Engineer was to be made on '**merit**' and it was precisely for that reason that separate lists were to be prepared in three categories viz., Category I, Category II and Category III. Executive Engineers placed in Category III were held ineligible for promotion. The High Court, therefore, held that it was not open to the Corporation to ignore legal and legitimate claim of Executive Engineer placed in Category I by giving promotion to an Executive Engineer found eligible and qualified but placed in Category II. Executive Engineers of Category I must get precedence for promotion as Superintending Engineers over those Executive Engineers who were eligible and qualified to be promoted as Superintending Engineers but included in Category II.

12. The High Court held that in view of settled legal position, the writ petitioner was entitled to have offered promotion to the post of Superintending Engineer since he was placed in Category I of Executive Engineers. Though the writ petitioner had obtained highest number of marks, another Executive Engineer, namely, Surya Narain Bajpai also found place in Category I. In view of maintenance of *inter se* seniority, i.e. seniority in the same category (Category I), said Surya Narain Bajpai was treated as senior to the writ petitioner. He was, therefore, considered for promotion as Superintending Engineer. It may, however, be stated that by the time the High Court heard and decided the matter, Surya Narain Bajpai was already promoted as Superintending Engineer. The High Court, therefore, directed the Board to offer to the writ-petitioner the first post of Superintending Engineer which was to fall vacant in near future.

13. The High Court stated that Mr. Sandeep Dixit, learned counsel, appearing for the Corporation, stated that the Corporation had no objection in giving the first available vacancy of Superintending Engineer to the writ petitioner.

14. The learned counsel for the appellant-Corporation contended that the counsel appearing for the Corporation had no power or authority to make any concession on behalf of the Corporation and no order could have been made on 'so called' concession by the advocate for the Corporation. It was urged that even otherwise, it is well settled that there can be no concession on a question of law and, hence, even if such concession was made, it was of no avail. Since the writ petitioner had no right to get promotion, notwithstanding concession or statement by the counsel for the Corporation, neither mandamus could have been issued by the High Court nor direction could have been given

to the Corporation to offer first vacancy of Superintending Engineer to the writ petitioner.

15. The learned counsel for respondent NO.2-State supported the stand taken by the Corporation and submitted that the High Court was wrong in issuing the direction to the Corporation and the said order deserves to be set aside.

16. The learned counsel for the writ petitioner, on the other hand, supported the order passed by the High Court. The counsel raised a preliminary objection against the maintainability of the appeal. It was contended that the order impugned in the present appeal was a 'consent order' inasmuch as it was passed by the Court on concession made by the learned advocate appearing for the Corporation. No appeal lies against an order made by the Court with consent of parties. This Court, therefore, may decline to hear the appellant and dismiss the appeal on short ground.

17. The counsel, however, submitted that even on merits, no case has been made out by the Corporation against the direction issued by the High Court. It was submitted that the scheme of statutory regulations is abundantly clear and allows no interpretation other than the one accepted by the High Court. In accordance with the regulations, promotion from the post of Executive Engineer to the post of Superintending Engineer was to be given on **merit**. For the said purpose, cases of eligible Executive Engineers were to be considered and all Executive Engineers were to be placed in three categories. Promotion as Superintending Engineer was to be made initially from those Executive Engineers who were placed in Category I. In case of availability of more vacancies of Superintending Engineers, Executive Engineers from Category II were to be considered and promoted. Since the writ petitioner was in Category I, his case was to be considered before any Executive Engineer whose name was

included in Category II was to be considered. Since it was not done, the writ petitioner had to approach the High Court and the High Court rightly allowed his petition. No interference against the said order is called for and the appeal deserves to be dismissed.

18. From what is stated above, the only question which calls for our consideration is as to how promotion should be effected from the post of Executive Engineer to the post of Superintending Engineer. As already noted by us, in exercise of power under the Act, Regulations have been framed by the Board to which our attention has been invited by the learned counsel for the parties. Part I is 'General' and contains 'Title, Commencement of the Regulations and Definition of Various Terms'. Part II comprises of different Cadres and 'Strength of Service'. Part III specifies 'Source of Recruitment'. Regulation 5 declares that initial recruitment to the service shall

be made to the post of Assistant Engineer from three different cadres, viz.,

- (i) by appointment from amongst Trained Engineers (65.1/3%),
- (ii) by promotion from amongst members of Junior Engineers (33.1/3%), and
- (iii) by promotion from amongst the confirmed and qualified Computers (Selection Grade) (E/M) (1.13%).

19. Clause (2) of Regulation 5 reads;

- (2) Appointments to the other higher posts shall be made by promotion on the basis of selections which will be made in accordance with the procedure laid down in Appendix 'D'.

20. Regulation 6 provides for 'Reservation of Vacancies'. Part IV prescribes 'Qualifications'. Part V relates to 'Appointment, Probation and Confirmation'. Regulation 18 provides for appointment to the posts of Executive Engineer, Superintending Engineer, Chief Engineer (Level II) and Chief Engineer (Level I) and reads as under:

***Appointment to the posts of
Executive Engineer, Superintending***

***Engineer, Chief Engineer (Level-II)
and Chief Engineer (Level-I) .-***

(1) Appointment to the posts higher than that of Assistant Engineer shall be made by the Appointing Authority from the 'Select List' prepared in Rule 8(1) of Appendix 'D'. In making such appointment, the order in which the names of the officers appear in the Select list shall be followed.

21. Thus, under the scheme of Regulations of 1970, Regulations 5(2) and 18 have to be read with Appendix 'D'. Appendix D lays down procedure for selection to the post of Chief Engineer (Level I), Chief Engineer (Level II), Superintending Engineer and Executive Engineer. In the present case, we are concerned with selection to the post of Superintending Engineer. The relevant part of Appendix 'D' relating to Superintending Engineer is found in para 3 and paras 5 to 8.

22. Para 3 prescribes minimum service as Executive Engineer so as to enable such officer to be considered eligible for the promotional post of Superintending Engineer. Para 5

declares that for the selection to the post of Chief Engineer (Level I), Chief Engineer (Level II) and **Superintending Engineer**, there shall be a Selection Committee consisting of the members enumerated therein. Most important provision is found in para 6 which prescribes 'Criteria for Promotion'. It reads as under:

Criteria for Promotion

The selection to the post of Chief Engineer (L-1), Chief Engineer (L-II) and ***Superintending Engineer shall be made on the basis of Merit*** while promotion to the post of E.E. shall be based on seniority subject to rejection of the unfit.

(emphasis supplied)

23. Para 8 is equally important and requires 'Preparation of a list for selection and of selected candidates'. It reads thus;

Preparation of a list for selection and of selected candidates.

(1) The Selection Committee shall, keeping in view the criteria, on the basis of the selection to a particular post in the service, prepare a list of such officers as are adjudged by it to be most suitable for promotion to that post.

- (a) ***The list in case of selection for the post of Superintending Engineer and above shall be rearranged in order of seniority on the post from which the selection is made. The list in the case of selection to the post of Executive Engineer shall be prepared in order of seniority of the post of Assistant Engineer.***
- (b) The Chairman shall issue appointment orders in respect of Superintending Engineer, Executive Engineers (Special Grade), Executive Engineers, Sr. Asstt. Engineers, Sr. Asstt. Engineers (Special Grade) and Assistant Engineers.
- (c) The list of the officers selected for the posts above Superintending Engineer shall be placed before the Board for approval.
- (3) The list so prepared shall be reviewed and revised every year and fresh names added to it, if necessary.
- (4) If, in the process of selection, review or revision, it is proposed to supersede any officer of the post from which the selection is made, the Selection Committee shall record its reasons for the suppression. The reasons so recorded shall, however, not be communicated.
- (emphasis supplied)

24. Attention of the Court was also invited to an Office Memorandum dated July 11, 1996. The said O.M. reads as under:

Uttar Pradesh State Electricity Board,
Shakti Bhavan, 14, Ahoka Marg,
Lucknow.

No:-1327 - P &FP/SEB-29/96-14P&FP/87
Dated:-11th July 1996.

Office Memorandum

The Board has laid down the procedure, as per annexure, for granting promotions, to the posts of all the cadres, which are filled on the basis of recommendations of the Departmental Selection Committees, on the basis of criteria, "Merit" and "Seniority subject to rejection of unfit". The same shall come into force, with immediate effect.

By Order of the Board
Sd/- illegible
[Ranveer Singh]
Secretary.

25. The criteria for selection procedure for promotion were also mentioned in the Office Memorandum. The relevant part relating to selection to the post of Superintending

Engineer [as also Chief Engineer (Level I and II)], is reproduced hereunder;

[1] Where the criterion is 'Merit':-

Selection to the post of Chief Engineer [Level-I and II] and Superintending Engineer and posts equivalent thereto, shall be done, in accordance with this criterion.

[1] Eligibility:-

The Appointing Authority shall prepare separate eligibility lists of senior most candidates for each category i.e. General, Scheduled Castes and Scheduled Tribes, in the light of vacancies available for each of the said categories containing names as far as possible, three times the number of vacancies, subject to a minimum of eight,

Provided further that, if the appointment is to be made for vacancies, for more than one year, separate eligibility lists shall be prepared, in respect of each such year and such a case while preparing the eligibility lists, the number of candidates to be included, shall be as follows:-

(a) For the second year -

The number according to the said proportion plus the number of vacancies for the first year.

(b) For the third year -

The number according to the said proportion plus the number of vacancies for the first year and second year.

26. Categorization of candidates was to be made on the basis of marks obtained on combined entries. Para VII of the Office Memorandum reads;

[VII] The categorization of candidates on the basis of marks obtained:-

Category No.1

The candidates securing either 90% (ninety per cent) or 180 marks or more, shall be classified into category No.1. The earning of marks for this category shall be done on the basis of entries reckoned for a period of ten years. In case entries, for any period out of the said ten years, are not available then entries immediately preceding the said period, shall be taken into account but entry for as many years of the period under consideration shall be deemed to be omitted.

Category No.2

For the post of Chief Engineer (Level-1) and equivalent, officers securing seventy (70) per cent (that is 140 marks); for the post of Chief Engineer (Level-2) and equivalent, Officers securing Seventy (65) percent (that is 130 marks); and for the post of Superintending Engineer and equivalent officers securing seventy (60) percent (that is 120) marks shall be classified in the category-2.

Category No.3

Officers securing marks below the marks as laid down for category No.2 shall be classified in category No.3.

27. Thus, for the purpose of promotion to the post of Superintending Engineer, Executive Engineers are to be divided in the following three Categories on the basis of marks obtained;

Category	Marks obtained
(i) Category I	180 or more
(ii) Category II	120 to 179
(iii) Category III	Below 120

28. Finally, para VIII deals with 'Selection and Preparation of Select List', a step before a person is promoted to the higher

post on the basis of his placement in the list and reads;

[VIII] Selection and preparation of select list:-

- (a) The officers, classified in category No.3 as per provisions of clause (vii) supra, shall not be fit for selection to any post.
- (b) ***Subsequent to the classification/categorization of the candidates, in accordance with clause (vii) supra, firstly the officers of category-1 shall be selected according to their seniority. Thereafter, if need be, for remaining vacancies the officers of category-2 shall be selected.*** Thus, in this manner, the names of all such officers having been so selected, from within category Nos. 1 and 2, shall then be rearranged, according to their respective serials, in their original order of seniority and a select list be prepared accordingly, which shall be their inter-se seniority list. Appointment orders shall then be issued, in accordance with this seniority list. (emphasis supplied)

29. It is the case of the writ petitioner that he was Executive Engineer and was eligible to be considered for the promotional post of Superintending Engineer. On the basis of Confidential Reports and marks obtained by him,

he was placed in Category I. According to him, he had secured highest number of marks *i.e.* 191.3 out of 200 *i.e.* more than 180. He, however, conceded that Surya Narain Bajpai was senior to him (writ-petitioner) in the Cadre of Executive Engineers who was also found eligible and suitable and was placed in Category I. As per the rules of seniority, if two or more persons are placed in one and the same Category, they will retain their ***inter se*** seniority in such Category. In view of the said provision, though the writ petitioner was at the top in the merit list in Category I, Surya Narain Bajpai who was also in Category I, maintained his seniority over the seniority of the writ petitioner. The writ petitioner, therefore, could be promoted immediately after said Surya Narain Bajpai. But all other Executive Engineers who were placed in Category II could not be considered for the promotional post of Superintending Engineer before the Executive Engineers placed in Category I were

promoted as Superintending Engineers and the list got exhausted. It was irrespective of seniority in the cadre of Executive Engineer. The High Court upheld the said contention.

30. The learned counsel for the Corporation vehemently contended that under the scheme of promotion, Executive Engineers retained their seniority for the purpose of getting promotional post of Superintending Engineer irrespective of their placement in Category I or Category II. For that the counsel relied upon para 8(1)(a) referred to above, which, according to the counsel, protects seniority of all officers in the cadre of Executive Engineers.

31. We express our inability to agree with the learned counsel. In our judgment, the scheme of promotion is explicitly clear. Posts of Chief Engineer I and II as also of Superintending Engineer are considered as 'higher' posts and sole criterion for promotion to these posts is '**merit**'. Promotion to the

post of Executive Engineer from the post of Assistant Engineer, on the other hand, is based on 'seniority subject to rejection of unfit'. In other words, the test of promotion to the post of Superintending Engineer (as also Chief Engineer I and II) and to the post of Executive Engineer is different. Whereas in the former, it is the 'merit' (positive test) which is relevant and material, in the latter, it is 'seniority subject to rejection of unfit' (negative test), which is important. It is in the light of the 'positive test' that selection to the promotional post of Superintending Engineer was to be made and names of eligible and qualified Executive Engineers were to be placed in different Categories *i.e.* I, II (and III) on the basis of marks obtained by them. Executive Engineers who find place in Category I are considered 'most suitable' for the promotional post of Superintending Engineer. Once a person finds his placement in a particular Category (for instant Category I),

he retains his original seniority irrespective of marks obtained by him. In other words, after selection and placement of Executive Engineers in a particular category, there will be rearrangement on the basis of ***inter-se*** seniority. But the said exercise was to be undertaken only in the same category and not in the other category.

32. There is no doubt in our mind that if any Executive Engineer who has been placed in Category I and is available for the promotional post of Superintending Engineer, no Executive Engineer who is included in Category II can be considered for such promotion even if such Executive Engineer, who is in Category II, is senior to an Executive Engineer, who because of his marks and ranking, got entry and placement in Category I. To put it differently, Executive Engineers in Category I and Category II cannot be said to be similarly situated. They belong to different class. They, therefore, cannot be treated equally.

33. We have already dealt with the scheme of statutory regulations. Higher posts of Superintending Engineer and above (Chief Engineer Level 1 and Chief Engineer Level II) are to be filled in by way of promotion only on '**merit**'. Precisely for that reason, regulations provide for consideration of cases of Executive Engineers by Departmental Promotion Committee (DPC) and placement of such Executive Engineers either in Category I or Category II on the basis of marks obtained by them. In our considered opinion, placement of Executive Engineers in Category I and Category II is lawful, reasonable and rational.

34. It is well settled that Article 14 is designed to prevent discrimination. It seeks to prohibit a person or class of persons from being singled out from others similarly situated or circumstanced for the purpose of being specially subjected to discrimination by hostile legislation. It, however, does not

prohibit classification, if such classification is based on legal and relevant considerations.

35. Every classification, to be legal, valid and permissible, must fulfil the twin-test, namely,

(i) the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group; and

(ii) such differentia must have a rational relation to the object sought to be achieved by the statute or legislation in question.

36. In the present case, the sole criterion for promotion of an Executive Engineer to the post of Superintending Engineer is '**merit**'. The Regulations, therefore, contemplate preparation of different select lists and allotment of marks. An Executive

Engineer having 90% marks *i.e.* 180 or more out of 200 are to be placed in Category I, while Executive Engineer having 60% or more *i.e.* 120 or more (up to 179) are to be found in Category II. Such classification, in our considered opinion, is perfectly reasonable and wholly rational. The classification neither offends Article 14, nor Article 16 nor is otherwise unreasonable infringing Article 19 of the Constitution. We have, therefore, no hesitation in coming to the conclusion that Executive Engineers placed in Category I and Category II are '**unequals**'.

37. It is well-settled that equals cannot be treated unequally. But it is equally well settled that unequals cannot be treated equally. Treating of unequals as equals would as well offend the doctrine of equality enshrined in Articles 14 and 16 of the Constitution. The High Court was, therefore, right in holding that Executive Engineers placed in Category I must get priority and

preference for promotion to the post of Superintendent Engineer over Executive Engineers found in Category II. Acceptance of argument of the learned counsel for the appellant Corporation that all eligible Executive Engineers maintain their ***inter se*** seniority irrespective of their placement in different categories may result in regulations being declared arbitrary, irrational or unreasonable. A Court of law would interpret a provision which would help sustaining the validity of law by applying the doctrine of 'reasonable construction' than accepting the interpretation which may lead such provision unsustainable and ***ultra vires*** the Constitution. [Vide Olga Tellis v. Municipal Corporation, Bombay, (1985) 3 SCC 545; Japani Sahoo v. Chandra Sekhar Mohanty, (2007) 7 SCC 394]

38. It was also submitted by the learned counsel for the Corporation that the regulations have been interpreted, understood

and applied from the very beginning in the manner as suggested by the Corporation. All Executive Engineers retain their ***inter se*** seniority once their names are included in the select list either in Category I or Category II for promotion to the post of Superintending Engineer. Relying on *N. Suresh Nathan v. Union of India*, (1992) Supp 1 SCC 584 and *S.B. Bhattacharjee v. S.D. Majumdar & Ors.*, (2007) 6 SCR 743, it was submitted that normally, a Court would not disturb past practice consistently followed by the Department if the view taken or practice followed is also reasonable.

39. In our opinion, however, the above principle does not help the appellant-Corporation in the present case. As observed by us, under the Scheme of Regulations, 1970, promotion to the post of Superintending Engineer, Chief Engineer II and Chief Engineer I is based on '**merit**'. If it is so,

consideration of merit **alone** is relevant and material. It is, therefore, provided that once an Executive Engineer is considered eligible and fit for promotion and placed in a particular category (Category I or Category II), he will retain his **inter se** seniority in the said Category. But that will apply only to those Executive Engineers who are placed in one and the same Category and not in a different Category. An Executive Engineer of Category II cannot, under the scheme of regulations, claim promotion over an Executive Engineer placed in Category I. Such interpretation may **possibly** result in regulations being declared **ultra vires**. The High Court, in our opinion, rightly not accepted such interpretation and we see no infirmity therein.

40. There cannot be two opinions that a concession of law cannot bind a party. [Vide *B.S. Bajwa & Anr. v. State of Punjab & Ors.* (1998) 2 SCC 523; *Union of India v. Mohanlal*

Likumal Punjabi, (2004) 3 SCC 628; *Union of India & Anr. v. S.C. Parashar*, (2006) 3 SCC 167]. The learned counsel appearing for the writ petitioner also did not dispute this proposition. In our opinion, however, the so called 'concession' was not against law. On the contrary, it was in consonance with the scheme of statutory regulations as also consistent with the Constitution. We have, therefore, kept aside the 'so called' concession and have considered the question in the light of statutory regulations referred to above. Under the regulations, only one view is possible which has been taken by the High Court and to us, the said view is correct.

41. For the foregoing reasons, we see no substance in the appeal filed by the Corporation, the same deserves to be dismissed and is hereby dismissed.

42. The appeal is accordingly dismissed with costs quantified at Rs.25,000/-.

43. Ordered accordingly.

.....J.
(C.K. THAKKER)

.....J.
(LOKESHWAR SINGH PANTA)

NEW DELHI,
September 11, 2008.