

CASE NO.:
Appeal (civil) 5837 of 2007

PETITIONER:
R.K. MOBISANA SINGH

RESPONDENT:
KH. TEMBA SINGH & ORS.

DATE OF JUDGMENT: 12/12/2007

BENCH:
S.B. Sinha & Harjit Singh Bedi

JUDGMENT:
J U D G M E N T
[Arising out of SLP(C) No. 20724 of 2005]
WITH
CIVIL APPEAL NO. 5848 OF 2007
[Arising out of SLP(C) No. 20725 of 2005]

AND

CIVIL APPEAL NO. 5838 OF 2007
[Arising out of SLP(C) No. 16901 of 2006]

S.B. SINHA, J

1. Leave granted.

2. These appeals involving similar questions of law and fact were taken up for hearing together and are being disposed of by this common judgment. Appellant as also the private respondents hereto have been working as Assistant Engineers in the Public Works Department. The promotees are diploma holders, or degree holders in Engineering. They were holding the posts of S.O. Grade 1, whereas the direct recruits are Graduates in Engineering. Recruitment to the post of Assistant Engineer and/or promotion thereto, although is governed by the Public Works Department, Manipur Assistant Engineer (Civil/Mech) Surveyor of Works Recruitment Rules of 1969, 1975 and 1984 made under the proviso appended to Article 309 of the Constitution of India; there does not exist any Rule governing seniority and in particular inter se seniority amongst the direct recruits and the promotees.

3. In terms of the recruitment rules, whereas forty per cent of the posts are to be filled by direct recruitment from the open market, 60 per cent of the posts are to be filled up by promotion in the following sub-quota:-

i. 50% by selection from amongst the Engineering Degree holders who have rendered a minimum of 3 years regular service as S.O. Grade I as equivalent Post.

Provided that is sufficient number of Degree holders are not available, the vacancies may be filled up by Diploma holders with 8 years regular service as S.O. Grade-I.

ii. 50% by selection from amongst the Engineering Diploma Holders of 3 years course with 8 years regular service as S.O. Grade I or non Degree/non Diploma holders with 15 years outstanding record as S.O. Grade I.

4, Before embarking on the questions involved in these matters, we may notice the fact of the matter.

5. The Government of Manipur informed the Manipur Public Service Commission in regard to existence of 39 vacancies in the posts of Assistant Engineer (AE) on or about 18.4.1977. A request was made to convene Departmental Promotion Committee for filling up the said vacant posts. Some of the promotees, who were either the Graduates in Engineering or were diploma holders in Engineering were working as Section Officers (Grade-I). We would come to their respective dates of appointment a little later, but, at this stage, it may be noticed that in terms of the Recruitment Rules, in order to become eligible for promotion, three years' experience for the Graduates in Engineering and eight years' experience for the diploma holders in the posts of Section Officer (Grade-I) was necessary. They had been promoted on an ad hoc basis without following the procedure laid down under the Recruitment Rules. On or about 6.3.1979, the Government of Manipur sent a revised proposal for appointment to the post of Assistant Engineer (Civil/Mechanical) by promotion on regular basis. However, yet again on 22.6.1981, the Government of Manipur directed the Commission for convening a regular Departmental Promotion Committee for consideration of promotion to the post of Assistant Engineer (Civil/Mechanical) in the following terms :
"I am directed to send herewith a requisition in the MPSC Form No. 6 duly filled in for convening a regular DPC for consideration of promotion to the post of Assistant Engineer (Civil/Mech.). Required ACRs and Integrity certificates in respect of the eligible officers are being sent separately. You are requested kindly to examine the case for convening a DPC at an early date."

Kindly acknowledge the receipt of this letter.

Yours faithfully

Encl : As above

(R. Marulung)
Under Secretary to the Govt. of Manipur

6. Respondents were promoted as Assistant Engineers on an ad hoc basis. We may notice that the contesting respondent in SLP(C) No. 16901 of 2006 was promoted as Assistant Engineer on ad hoc basis against a permanent vacancy. He was appointed as Assistant Engineer on officiating basis with effect from the date of joining of the post on the recommendations of the Departmental Promotion Committee held on 18.7.1985 and 20.7.1985 in the 1985 vacancies, which was followed by an order dated 06.09.1986 regularizing his services from 20.09.1985.

7. Indisputably, a seniority list was published on 31.1.2000.

8. Ten writ petitions were filed by the promotees before the High Court raising a grievance that in the said seniority list, although they were shown as Assistant Engineers, having been appointed against the vacant posts in the promotee quota under clear vacancies which were available in 1981 itself, they were appointed on ad hoc basis. According to them, although they were promoted to the post of Junior Engineer on ad hoc basis in or about 1981, they had been shown as junior to direct recruits who were appointed in 1986.

9. A learned Single Judge of the High Court noticed that in some of the cases, regularization with retrospective effect had been directed to be given. It took note of the contention of the writ petitioners that they fulfilled the eligibility criteria for promotion, but since at the relevant time, the

Commission became defunct, they were promoted on ad hoc basis against the available vacancies made for the promotees. The learned Single Judge recorded that the counsel appearing on behalf of the State was not in a position to inform the court in regard to the vacancy position as was obtaining then and furthermore the statements made in the writ application in regard to promotion in excess of quota or grant of promotion in absence of availability of any vacancy having not been controverted, the same should be accepted to be correct. It was furthermore noticed that the minutes of the Review Committee were not made available to the Court and, therefore, it arrived at a conclusion that the Review Committee failed to discharge its duties, as a result whereof the impugned seniority list failed to demonstrate the correct seniority position drawn in accordance with law.

10. The learned Single Judge therefore, directed for preparation of a fresh seniority list. It was also directed that a Monitoring Committee be constituted to ascertain the availability of vacancies with reference to the years of appointment of the various promotees vis-à-vis, the direct recruits and to examine whether any of them encroached upon the quota meant for others. It was furthermore directed that in view of the failure on the part of the State Government to place the correct factual position to conduct a basic fact finding exercise in regard to availability of vacancies in respect of the quotas, if any, at the relevant point of time.

It was directed :

\02332. The Committee is to undertake the exercise having followed the following guidelines

a. The respective date of initial promotion on ad hoc basis of the petitioners be treated as substantive appointment as Assistant Engineer.

b. The Committee is to ascertain the availability of vacancy with reference to the year of appointment of the petitioners already done on ad hoc basis and also the appointment of private respondents and to examine whether any of them encroached the quota meant for others.

c. The promotees and direct recruitees shall be fitted against the available vacancies within their respective quotas.

d. In case, any excess promotion/direct appointment are found to be there, he or they should be adjusted against the vacancy made available subsequently.

e. In considering the availability of vacancy the Committee must count the vacancy simpliciter be it temporary vacancy or substantive vacancy in the post of Assistant Engineer.

f. After exhausting the fitment exercise the intra seniority viz., the seniority of the promotee themselves and the seniority of the direct recruitees themselves should be prepared separately.

g. Thereafter, having maintained ratio of 3:2 inter se seniority list is to be prepared, first 3 promotees would be listed thereafter 2 direct recruitees would be listed followed by 3 promotees 2 direct and so on. In case in any year it is found that only some promotions are made out, no direct recruitment, the promotees should be shown enbloc senior vis-à-vis in case any particular year it is found that the only direct recruitments were made and no

promotion, the direct recruits be shown enbloc senior.

h. To remove any confusion and doubt a draft inter se seniority be published first inviting claims and objections and personal hearing of the objector/claimant if any, be allowed and, thereafter, the final inter se seniority list be published. The said exercise must be completed within a period of 3 months from this day.

11. Eleven Writ Appeals were filed thereagainst; ten by the direct recruits and one by the State of Manipur which was marked as Writ Appeal No. 384 of 2003. It appears that the writ appeals came up before two Division Benches of the High Court in two batches. The judgment in the first batch was rendered by a Division Bench on 31.3.2004 in terms whereof the judgment of the learned Single Judge was affirmed. The Division Bench in those cases held that having regard to the fact that the orders of the High Court granting retrospective regularization to the promotees having not been challenged either by the direct recruits or by the State Government had attained finality. In the aforementioned premise, it was directed :
\02310. From the aforesaid, it is apparent to us, that for whatever reasons the orders passed by the High Court in the matter of regularization of the services of the promotee officers covered under the writ appeals, were not challenged by the State Government and has attained finality. The appellants also choose not to file appeals against those orders moved applications for review of those no to file applications for review of those orders as has been done in other cases. In the aforesaid circumstances, the promotee officers shall be taken to be regularly promoted from the date they have been regularized in the post of Assistant Engineers. In the matter of seniority, without there being any impediment under Rules, the seniority shall be counted in all circumstances from the date of regular appointment on the posts.\024

12. Indisputably, the review petitions filed thereagainst were dismissed.

13. However, the four remaining appeals came up for consideration before another Division Bench, (although the senior Judge in both the batches of Writ Appeals was common). In the second judgment which was pronounced on 24.8.2004, the Division Bench while allowing the appeal in part, upholding the final seniority list, found the directions of the learned Single Judge in regard to constitution of three member Monitoring Committee to make necessary corrections in the final list dated 31.1.2000 in accordance with law and more particularly following the general guidelines for promotion of 1982 and for determining seniority of 1959 and a proposition \024A\024 of the decision of this Court in the case of direct recruitment; to be improper. Both the aforementioned judgments of the Division Bench are now under challenge before us at the instance of the direct recruits and the post 1985 vacancies promotees respectively.

14. The question herein which arises for our consideration is as to whether the ad hoc promotions granted to the employees from the post of Section Officer (Grade-I) to the post of Assistant Engineer in the P.W.D. of Government of Manipur could have been directed to be regularized with retrospective effect so as to effect the inter se seniority between the direct recruits and the promotees. Two seniority lists were published; one in the year 1987 and another in 2000.

15. There are ten direct recruits before us. The details of their services are as under:-

\023A. Direct Recruits

2000 List

87 List

1

Temba Singh

Degree

holder

Direct

Recruit

Appointed

in 1985

At serial no.

33

2.

Rabindra Kumar

Singh

---do---

--do--

---do---

At serial no.

38

3.

Ch. Biren Singh

--do--

--do--

---do---

At serial no.

39

4.

G.Lungalin

--do--

--do--

Appointed

5.1.83

At serial no.

83

At serial no.

30

5.

L. Ingochouba

Singh

--do--

--do--

Appointed

in 1985

At serial no.

48

6.

M. Thaimon Singh

--do--

--do--

Appointed

in 1980

At serial no.

45

At serial no. 8

7.

Ksh. Birendra
Singh

--do--

--do--

--do--

At serial no.

49

At serial no.

10

8.

Kh. Irabot Singh

--do--

--do--

--do--

At serial no.

55

At serial no.

13

9.

Th. Thambalngou
Singh

--do--

--do--

--do--

At serial no.

63

At serial no.

17

10.

Pradeep Mukherjee

--do--

--do--

Appointed

15.1.81\024

At serial no.

77

At serial no.

26

16. There are five promotee Assistant Engineers whose seniority has been determined by the High Court, the details whereof are as under:-

SL.

No.

Name of the
promotee

Date of
appointment

Date of Ad hoc
appointment

Date of
regular/officiat
ing

appointment

Details of the
High Court

Order by which
regularized

Government orders of
regularization/Remarks

1.

Ch. Tiken

Singh

(Contesting

Respondent

No. 1 in

SLP Arising
out of W.A.
No. 393/03)
At serial no.
37 in the
seniority list
26.7.1980
Section
Officer
Grade I
DOB 1.9.57
15.10.1981 AE
on regular
basis on
recommendatio
n of DPC
20.9.1985
AE on regular
basis on
recommendati
on of DPC
Retrospective
regularization
from 26.7.1983
under the
relevant R.R.
vide order dated
5.4.1989 in C.R.
No. 392 of 1988

No order as to
retrospective
seniority
Government order
regularizing the
services w.e.f.
26.7.1983 explicitly
indicates seniority to
be determined later
2.

I. Lokendra
Singh
(Contesting
Respondent
No. 1 in
SLP Arising
out of W.A.
No. 255/01)

At serial no.
60 in the
seniority list
26.6.1980
Section
Officer
Grade I
DOB 1.3.53
15.10.1981
AE on ad hoc
basis
20.09.1985
AE on
Officiating
basis on
recommendati

on of DPC
Retrospective
regularization
from 26.6.1983
vide order dated
5.6.1990 in C.R.
No. 160 of 1990

No order as to
retrospective
seniority.

The Hon\022ble
High Court
relied on order
passed in CR.
No. 392 of 1988

Government order
regularizing the
services w.e.f.
26.6.1983 explicitly
indicates seniority to
be determined later

3.
L.
Surchandra
Singh
(Contesting
Respondent
No. 1 in
SLP Arising
out of W.A.
No. 387/03
& W.A. No.
384/03)
At serial no.
32 in the
seniority list
23.11.1976
Section
Officer
Grade I
DOB 1.3.50
9.7.1979
AE on ad hoc
basis
20.9.1985
AE on regular
basis on
recommendati
on of DPC
Retrospective
regularization
from date he
became eligible
vide order dated
13.9.1991 in
C.R. No. 399 of
1991

No order as to
retrospective
seniority.

The High Court
relied on order
passed in CR.
No. 160 of 1991.
The High Court
in its order
recorded that he
was not eligible
for promotion to
A.E.

Government order
regularizing the
services w.e.f.
23.11.1979 explicitly
indicates seniority to
be determined later

4.
W. Chaoba
Singh
(Contesting
Respondent
No. 2 in
SLP Arising
out of W.A.
No. 385/03)

At serial no.
56 of the
seniority list
06.01.1972
Section
Officer
Grade I

DOB 1.3.49
30.10.1976
AE on ad hoc
basis
20.9.1985
AE on regular
basis on
recommendati
on of DPC
Retrospective
regularization
from 30.10.1976
vide order dated
17.12.1991 in
C.R. No. 639 of
1991.
No order as to
retrospective
seniority.

The High Court
relied on order
passed in C.R.
No. 132/1990
wherein the
High Court had
granted
regularization

along with seniority. This order was challenged in a review petition by the Direct Recruits and the order has been modified to be extent that the seniority will be determined according to rules.

Government order regularizing the services w.e.f. 30.10.1976 explicitly indicates seniority to be determined later.

5.
S. Tejamani
Singh
(Contesting
Respondent
No. 1 in
SLP Arising
out of W.A.
No. 386/03)
At serial no.
35 of the
seniority list
23.11.1976
Section
Officer
Grade I
1.11.47
9.7.1979
AE on Ad hoc
basis
20.9.1985
AE on regular
basis on
recommendati
on of DPC
Retrospective
regularization
vide order dated
18.12.1991 in
C.R. No. 639 of
1991

No order as to
retrospective
seniority

The High Court
relied on order
passed in C.R.
No. 132/1990
wherein the high

court had
granted
regularization
along with
seniority. This
order was
challenged in a
review petition
by the Direct
Recruits and the
order has been
modified to the
extent that the
seniority will be
determined
according to
rules

Government order
regularizing the
services w.e.f.
9.7.1979 explicitly
indicates seniority to
be determined later

6.
Th.
Rupachandra
Singh
(Contesting
Respondent
No. 1 in SLP
Arising out
of W.A. No.
385/03)
At serial no.
59 of the
seniority list
28.10.1971
Section
Officer
Grade I
DOB
1.11.48
30.10.1976
AE on Ad hoc
basis
20.9.1985
AE on regular
basis on
recommendati
on of DPC
Retrospective
regularization
from vide order
dated 23.1.1992
in C.R. No.
2372 of 1990
No order as to
retrospective
seniority

Government order

regularizing the
services w.e.f.
30.10.1976 explicitly
indicates seniority to
be determined later.

17. There are four promotees whose claim to seniority has been rejected
by the High Court.

SL.

No.

Name of the
promotee

Date of

appointment

Date of Ad hoc

appointment

Date of

regular/officiat

ing

appointment

High Court

order by which

regularized

Violations

1.

R.K.

Mobisana

(Degree

holder)

(Petitioner

in SLP(C)

No. 20724

of 2005)

At serial no.

64 in the

seniority list

25.7.1980

Section

Officer

Grade I

(DOB

1.3.56)

6.5.1983

AE on ad hoc

basis

20.9.1985

AE on

officiating

basis on

recommendati

on of DPC

Retrospective

regularization

w.e.f. 26.7.1983

under the

relevant R.R.

vide order dated

3.3.2000 in

W.P.(C) No. 188

of 2000

High Court

order

specifically

states his regularisation shall be counted for the purpose of retrial or pensionary benefits and seniority to be determined according to rules.

Government order regularizing the services explicitly indicates it is for retrial and pensionary benefits. Seniority to be determined later

- Admittedly the promotion was dehors the R.R.s ; there was no selection process conducted by the DPC

- Became eligible for promotion only after three years from the date of appointment i.e. on 25.7.1983 but was promoted on ad hoc basis on 6.5.1983, much earlier to his eligibility date.

2.
M.
Hemantaku
mar
(Degree
holder)
(Petitioner
in SLP(C)
No. 20725
of 2005) At
serial
number 45
in seniority
list
25.7.1980
Section
Officer
Grade I
(DOB
1.3.53)
26.7.1983
AE on ad hoc
basis
20.09.1985
AE on regular

basis on
recommendati
on of DPC

- Admittedly the
promotion was de hors
the R.R.s.; there was
no selection process
conducted by the DPC
3.

Th.
Shantikuma
r Singh
(Degree
holder)
25.7.1980
Section
Officer
Grade I
6.5.1983
A.E. on Ad
hoc basis

-Admittedly the
promotion was de hors
the R.R.s; there was no
selection process
conducted by the DPC

- Became eligible for
promotion only after
three years from the
date of appointment
i.e. on 25.7.1983 but
was promoted on ad
hoc basis on 6.5.1983,
much earlier to his
eligibility date
4.

Mongjam
Budhi
Singh
(Diploma
Holder)
14.11.1969
Section
Officer
Grade I
25.2.1981
A.E. on Ad
hoc basis

- Admittedly the
promotion was de hors
the R.R.s; there was no
selection process
conducted by the DPC

18. Out of the aforementioned four persons, only R.K. Mobisana and N. Hemantakumar both of whom are degree holders are before us, but the other two promotees namely Th. Shantikumar Singh and Mongjam Budhi Singh have not filed any special leave petition.

19. Submissions of the aforementioned two appellants whose writ petitions have been dismissed and the other promotee respondents before us are as under :

(i) They having been promoted against vacancies arising in the year 1985 in the promotee quota and their services having been regularized with retrospective effect and not by way of stop gap employment, their seniority should be considered in the light of the proposition \021B\022 contained in the judgment of this Court in Direct Recruit Class II Engineering Officers\022 Association Vs. State of Maharashtra and Others [(1990) 2 SCC 715].

(ii) The recruitment rules having not contained any prohibition on grant of regularisation with retrospective effect and in any event the same being permissible inter alia, in terms of the decision of this Court in Suraj Prakash Gupta and Others Vs. State of J&K and Others [(2000) 7 SCC 561] , the first judgment of the High Court should not be interfered therewith. The promotees were therefore, entitled to seniority with effect from 26.7.1983 i.e. from the date from which their services were regularized with retrospective effect by orders passed in their favour by the Gauhati High Court, Imphal Bench from time to time.

(iii) So far as the second judgment of the Gauhati High Court is concerned, the same does not lay down the correct law being contrary to and inconsistent with the principles laid down by this Court in Direct Recruit (supra), State of West Bengal Vs. Aghore Nath Dey [(1993) 3 SCC 371] and Suraj Prakash (supra).

(iv) The learned Single Judge, in any event, having directed examination of the matter by a fact finding body upon proper application of mind and determination of seniority having regard to the decisions of this Court, the same deserves to be affirmed.

20. Mr. L.N. Rao, learned counsel appearing on behalf of the direct recruits, on the other hand, would submit that the promotees were not entitled to seniority from the date of their ad hoc promotion for the following reasons;

(i) Ad hoc promotions were found to have been made in violation of the Recruitment Rules.

(ii) The procedure prescribed for grant of regular promotion had not been followed.

(iii) Some of the promotees did not fulfil the requisite eligibility criteria prescribed by the rules.

(iv) The orders passed by the High Court directing regularisation with retrospective effect did not confer on them any consequential seniority.

(v) Some judgment of the High Court giving consequential seniority were reviewed in favour of the direct recruits.

(vi) There is no rule which enables the Government to give seniority with retrospective effect to the promotees.

(vii) The Direct Recruits cannot be found fault with for non questioning of the orders of regularization in favour of the promotees as they, in stricto sensu, did not have the locus standi therefor, until the decision to confer consequential seniority which adversely affected their rights was taken by the competent authority.

(viii) All High Court orders granting regularization were silent on seniority.

(ix) The consequent orders of the Government regularizing the services specifically stated that the seniority shall be determined later. This order was not challenged by the promotees.

(x) In three cases where the High Court granted seniority, review petitions were filed by the Direct recruits and the order was modified stating that the seniority will be determined according to rules and as these review orders have become final, any sub mission made contrary thereto should not be permitted to be raised.

(xi) Had there been any mention of seniority in any of the High Court

orders referred to in the judgment of the Division Bench, the Direct recruits could have challenged the same.

(xii) Their exists no rule which enabled the Government to grant seniority with retrospective effect.

21. These matters clearly demonstrate as to how complications arise in the matter of determination of inter se seniority because of absence of specific rules made in this behalf.

22. We may, however, at the outset notice that meeting of the Departmental Promotion Committee had not been convened in terms of the extant rules.

23. We have noticed hereinbefore that there are various recruitment Rules which are applicable in respect of recruitment or the promotions. We will take a brief survey of the said Rules which may be held to be applicable as orders of promotion have been passed on various days.

24. Under the Recruitment Rules, 1969, the method of recruitment prescribed for the post of A.E. is:

\023--50 % by direct recruitment from the open market and ;
--50 % by promotion from amongst the Section Officers
(Civil) who had rendered 2 years of regular service in the
grade after appointment on regular basis in case of
Degree holders and 5 years service in grade after
appointment on regular basis in cases of Diploma
holders.\024

25. Under the Recruitment Rules, 1975 the method of recruitment prescribed is:

\023-40% of the overall sanctioned strength by direct
recruitment.
-60% of the overall sanctioned strength by promotion.
This is to be filled up in the sub-quota as under:

(i) 50% sub-quota by selection from amongst the 3
years course Diploma holder
(Civil/Mechanical) with 8 years regular service
as S.O. Grade 1 or a post declared by the
Government to be equivalent post.

(ii) 40% sub-quota by selection from amongst the
graduate Engineer (Civil/Mechanical) who have
rendered 3 years regular service as S.O. Grade I
or in a post declared by the Government to be
equivalent.

(iii) 10% sub-quota by selection from amongst non
Graduate, non Diploma S.O. Grade I who has
rendered 12 years continuous regular service.\024

26. Under the Recruitment Rules, 1984, the method of recruitment prescribed is;

\023-40% by Direct recruitment from the open market.
-60% by promotion which is to be filled up under the following
sub quota:

i) 50% by selection from amongst the Engineering Degree
holders who have rendered a minimum of 3 years regular
service as S.O. Grade I as equivalent Post.

Provided that is sufficient number of Degree holders are
not available, the vacancies may be filled up by Diploma
holders with 8 years regular service as S.O. Grade-I.

ii) 50% by selection from amongst the Engineering Diploma Holders of 3 years course with 8 years regular service as S.O. Grade I or non Degree/non Diploma holders with 15 years outstanding record as S.O. Grade I.

27. However, admittedly there does not exist any rule for determination of inter se seniority.

They were governed by some office memorandums. An Office Memorandum was issued on 22.12.1959 providing for general principles for determination of seniority in the general services wherein inter alia it was stated;

\0235. Promotees: (i) The relative seniority of persons promoted to the various grades shall be determined in the order of their selection for such promotions;

Provided that where persons recruited initially on temporary basis are confirmed subsequently in an order different from the order of merit indicated at the time of their promotion, seniority shall follow the order of confirmation and not the original order of merit.

(ii) Where promotion to a grade are made from more than one grade the eligible persons shall be arranged in separate lists in the order of their relative seniority in their respective grades. Thereafter, the Departmental Promotion Committee shall select the persons for promotion from each list upon the prescribed quota and arrange all the candidates selected from different lists in a consolidated order of merit which will determine the seniority of the persons on promotion to the higher grade.

Note: If separate quotas for promotion have not already been prescribed in relevant recruitment rules, the Ministries/Departments may do so now, in consultation with the Commission wherever necessary.

6. Relative Seniority of Direct: Recruits and promotees. The relative seniority of direct recruits and of promotees shall be determined according to the rotation of vacancies between direct recruits and promotees which shall be based on the quotas of vacancies reserved for direct recruitment and promotion respectively in the Recruitment Rules.\024

28. The legal principles governing determination of inter se seniority is no longer res-integra. The question came up for consideration before a Constitution Bench of this Court in the Direct recruit (supra) wherein the following criteria were laid down;

\023(A) Once an incumbent is appointed to a post according to rule, his seniority has to be counted from the date of his appointment and not according to the date of his confirmation.

The corollary of the above rule is that where the initial appointment is only ad hoc and not according to rules and made as a stop-gap arrangement, the officiation in such post cannot be taken into account for considering the seniority.

(B) If the initial appointment is not made by following the procedure laid down by the rules but the appointee continues in the post uninterruptedly till the regularisation of his service in accordance with the rules, the period of officiating service will be counted.

(C) When appointments are made from more than one source, it is permissible to fix the ratio for recruitment from the different sources, and if rules are framed in this regard they must ordinarily be followed strictly.

(D) If it becomes impossible to adhere to the existing quota rule, it should be substituted by an appropriate rule to meet the needs of the situation. In case, however, the quota rule is not followed continuously for a number of years because it was impossible to do so the inference is irresistible that the quota rule had broken down.

(F) Where the rules permit the authorities to relax the provisions relating to the quota, ordinarily a presumption should be raised that there was such relaxation when there is a deviation from the quota rule.

(H) If the quota rule is prescribed by an executive instruction, and is not followed continuously for a number of years, the inference is that the executive instruction has ceased to remain operative.\024

29. Inter se seniority between the parties keeping in view the peculiar fact situation obtaining herein is required to be considered. Before applying the principles laid down therein to the fact of this case, we may notice a few other decisions of this Court.

30. In Suraj Prakash Gupta Vs State of J& K & Ors. [(2000) 7 SCC 561], the Rule which was applicable therein was as under:-

\02353. Then comes the rule of \023seniority\024. Seniority is to be determined by the \023date of first appointment\024 to such service, class or category or grade. It reads as follows:

\02324. Seniority \026 (1) The seniority of a person who is subject to these Rules has reference to the service, class, category and grade with reference to which the question has arisen. Such seniority shall be determined by the date of first appointment to such service, class, category or grade, as the case may be.

Note 1. \026

Interpretation \026 The words \021date of first appointment\022 occurring in the above Rule will mean the date of first substantive appointment, meaning thereby the date of permanent appointment or the date of first appointment on probation on a clear vacancy, confirmation in the latter case being subject to good work and conduct and/or passing of any examination or examinations and/or tests:

Provided that the inter se seniority of two or more persons appointed to the same service, class, category or grade simultaneously, will, notwithstanding the fact that they may assume the duties of their appointments on different dates by reason of being posted to different stations, be determined:

(a) in the case of those promoted by their relative seniority in the lower service, class, category or grade;

(b) in the case of those recruited direct (except those who do not join their duties when vacancies are offered to them) according to the positions attained by and assigned to them in order of merit at the time of

competitive examinations or on the basis of merit and ability and physical fitness etc., in case no such examination is held for the purpose of making selections;

(c) as between those promoted and recruited direct, by the order in which appointments have to be allocated for promotion and direct recruitment as prescribed by the Rules.

Note. -

*

*

*

It has to be noticed that the interpretation clause below Rule 24 is very wide and under that provision, seniority of a promotee depends on the date of the commencement of probation on a clear vacancy. Probation can be commenced in the case of a person promoted or recruited by transfer from the date of existence of a clear vacancy in the promotee/transfer quota and depending upon his eligibility, suitability based on ACRs.\024

Having regard to the said Rule in mind this Court surveyed the precedents one way or the other to hold;

\02371. The direct recruits have strongly relied upon the decision in V. Sreenivasa Reddy v. Govt. of A.P. 12 But this decision cannot be of any help to them. In that case Rule 10 and Rule 23 of the Andhra Pradesh State and Subordinate Service Rules were referred to. It was pointed that the promotees\022 temporary service under Rule 10 (i.e. service rendered in a post to which the officer was not appointed according to rules), could not be counted on facts, because there was no order of retrospective regularisation. In fact, this Court accepted that if regularised under Rule 23 of the A.P. Rules, the temporary appointees could have been regularised from an anterior date. (This Court then referred to certain rulings which said that direct recruits could not count ad hoc service rendered by them before their regular selection.) On facts, this Court held that the Government had relaxed the Rule regarding PSC consultation but had placed the promotees below the direct recruits and this need not be interfered with. This case far from supporting the direct recruits, supports the promotees.\024

Holding that decision of K. Siva Reddy Vs. State of A.P. [(1988) Supp. SCC 225] and Ramendra Singh Vs. Jagdish Prasad [1984 Supp SCC 142] were not applicable to the fact of that case it was opined; \02375. These rulings cannot be applied to the case of the promotees. In fact the principle laid down in these cases is consistent with the principles in service jurisprudence so far as the ad hoc service rendered by direct recruits before the date of their regular selection is concerned. Their service counts only from the date of regular appointment according to rules and any ad hoc/stopgap service rendered before regular selection cannot count for seniority.\024

31. The Court in paragraph 77 of the judgment noticed the decisions where promotees were held to be not entitled to seek regularisation of ad hoc services in certain situations. The Court summarized its finding in paragraph 79 in the following terms;

\02379. Summarising the position, we therefore hold that the ad hoc/stopgap service of the promotees cannot be treated as non est merely because PSC was not consulted

in respect of continuance of the ad hoc/stopgap service beyond six months. Such service is capable of being regularised under Rule 23 of the J&K (CCA) Rules, 1956 and rectified with retrospective effect from the date of occurrence of a clear vacancy in the promotion quota, subject to eligibility, fitness and other relevant factors. There is no \023rota\024 rule applicable. The \023quota\024 rule has not broken down. Excess promotees occupying direct recruitment posts have to be pushed down and adjusted in later vacancies within their quota, after due regularisation. Such service outside the promotee quota cannot count for seniority. Service of the promotees which is regularised with retrospective effect from the date of vacancies within the quota counts for seniority. However, any part of such ad hoc/stopgap or even regular service rendered while occupying the direct recruitment quota cannot be counted. Seniority of the promotees or transferees is to be fixed as per quota and from the date of commencement of probation/regular appointment as stated above. Seniority of direct recruits is from the date of substantive appointment. Seniority has to be worked out between direct recruits and promotees for each year. We decide Point 3 accordingly.

Point 4

Direct recruits cannot claim appointment from date of vacancy in quota before their selection\024

32. In M.K. Shanmugam and Anr. Vs. Union of India & Ors. [(2000) 4 SCC 476], direct recruitment and ad hoc appointment was distinguished stating :

\023...If the ad hoc selection is followed by regular selection, then the benefit of ad hoc service is not admissible if ad hoc appointment is in violation of the rules. If the ad hoc appointment has been made as a stopgap arrangement and where there was a procedural irregularity in making appointments according to rules and that irregularity was subsequently rectified, the principle to be applied in that case was stated once again. There is difficulty in the way of the appellants to fight out their case for seniority should be reckoned by reason of the length of the service whether ad hoc or otherwise inasmuch as they had not been recruited regularly. As stated earlier, the appellants were regularly found fit for promotion only in the year 1977 and if that period is reckoned their cases could not be considered as found by the Tribunal.\024

It was furthermore observed;

\023It is only in those cases where initially they had been recruited even though they have been appointed ad hoc the recruitment was subject to the same process as it had been done in the case of regular appointment and that the same was not a stopgap arrangement. That is not the position in the present cases at all. Therefore, we are of the view that the conclusions reached by the Tribunal appear to us to be correct and call for no interference. However, we make it clear, as noticed earlier, that while amending the Rules of Recruitment in 1984 all those who are already in service will be borne in mind in adjusting the seniority amongst the promotees inter se and suitable adjustments could be made and so far as the direct recruits are concerned, their cases will go by their quota rule and the view taken by the Tribunal in this regard cannot be taken exception of.\024

33. Suraj Prakash Gupta (supra) has been distinguished by this Court in Swapan Kumar Pal and Others Vs. Samitabhar Chakraborty and Others [(2001) 5 SCC 581] stating;
\0238. ...The next case relied upon by Mr.Rao is the case of Suraj Prakash Gupta v. State of J&K. In the aforesaid case, on consideration of the relevant rules governing the service conditions of the Assistant Engineers of the Jammu and Kashmir Government, the Court had observed that ad hoc or temporary service of a person, appointed by transfer as an Assistant Engineer or by promotion as an Assistant Executive Engineer can be regularized through the Public Service Commission and Departmental Promotion Committee from an anterior date in a clear vacancy in his quota, if he is eligible and found suitable for such transfer or promotion, as the case may be, and his seniority will count from that date. The aforesaid conclusion was drawn because of the provisions of Rule 23 and Rule 15 of the Jammu and Kashmir Rules but in the case in hand, there is no provision, which has been brought to our notice, which enables the appointing authority to regularise a promotion from an anterior date, though the suitability test is held at a later date. In the absence of any such provision in the Rules in question, the ratio of the aforesaid decision, on interpretation of the relevant rules of the Jammu and Kashmir Engineering Rules will have no application. (emphasis supplied)

34. To the similar effect is the decision of this Court in Md. Israil and Others Vs. State of W.B. and Others [2002] 2 SCC 306], noticing Suraj Prakash Gupta (supra) and Shanmugam (Supra) wherein it was opined that those decisions were rendered having regard to the peculiar rules which were governing the service conditions of the employees;

35. We may furthermore notice that this Court in D.N. Agrawal and Anr. Vs. State of Madhya Pradesh and Others [(1990) 2 SCC 553] has categorically held that ad hoc promotion without following the Recruitment Rules would not lead to any right for computation of seniority.

36. In Santosh Kumar Vs. G.R. Chawla [(2003) 10 SCC 513], this Court opined :

\02317. It was contended by the learned counsel for the appellants that in view of Rule 4, the appellants are required to be regularised first and thereafter, newly appointed direct recruits are required to be appointed/confirmed. This contention has no force. This contention has to be negated in view of the specific finding by the High Court that direct recruits were appointed either on 16-9-1982/17-9-1982 and the services of the appellants were regularised only on 22-9-1982.\024

37. Applying the principles of the aforementioned decisions to the facts of this case, we are of the opinion that although in terms of the office memorandum, no retrospective effect could be given to the order of regularisation passed in favour of the promotees, as in absence of any seniority rules operating in the field, the State was required to evolve a policy. It for its own reason did not do so.

38. The office memorandum of 1959 was applicable in a case of this nature. In some of the cases, promotion might have been given without following the rules. When promotion is given only in the exigency of situation without following the Rules, the period cannot be counted towards seniority.

39. If they had been given regularisation with retrospective effect, the

same by itself may not be a ground to apply the said order ipso facto for determining the inter se seniority. Seniority although is not a fundamental right but a civil right. Such a right of the direct recruits could not have been taken away without affording an opportunity of hearing to them.

40. It was obligatory on the part of the official respondents to take into consideration that the retrospective regularization could be granted only when there exists such a rule. If rules were not followed at the time of grant of promotion, question of grant of regularization with retrospective effect would not arise. Retrospective regularization whether in terms of the directions of the High Court or otherwise, thus, although could confer other service benefits to the officer concerned, but the same cannot be held to be of any assistance for reckoning seniority with retrospective effect.

41. It was for the DPC to recommend in regard thereto.

42. In some of the cases, evidently the procedure has not been followed. Therefore, the question of their acquiring seniority over the direct recruits does not arise.

43. The matter, therefore, requires a closure scrutiny by the State itself. As the function relating to determination of inter se seniority is that of the State, we do not approve constitution of a committee, as has been proposed by the learned Single Judge. It would, however, be open to the State to do so, if it so desires. The competent authority of the State is, therefore, directed to determine the inter se seniority of the parties in view of the principles enunciated hereinbefore and apply the same to the fact of each case. Such an exercise should be completed within a period of three months. These appeals are, therefore, disposed of with the aforementioned observations and directions with no order as to costs.