

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

1. CWP No.21564 of 2012

Kulwant Kumar Kalsan ... Petitioner

Versus

State of Haryana and others ... Respondents

2. CWP No.22211 of 2011

Monika Malik and others ... Petitioners

Versus

State of Haryana and others ... Respondents

3. CWP No.20080 of 2012

Virender Singh Hooda and another ... Petitioners

Versus

State of Haryana and others ... Respondents

4. CWP No.7791 of 2012

Jai Krishan Abhir and others ... Petitioners

Versus

State of Haryana and others ... Respondents

**Reserved on: December 23, 2014
Date of Decision: April 01, 2015**

CORAM:- HON'BLE MR. JUSTICE RAJIV NARAIN RAINA

Present: Mr Puneet Bali, Sr. Advocate,
with Mr Vibhav Jain, Advocate,
for the petitioner in CWP No.21564 of 2012.

Mr K.K. Gupta, Advocate,
for the petitioners in CWP No.22211 of 2011.

Mr Gurminder Singh, Sr. Advocate,
with Mr R.P.S. Bara, Advocate,
(for the petitioners in CWP No.20080 of 2012)
(for respondents No.2 & 3 in CWP No.21564 of 2012 and
CWP No.22211 of 2011).

Dr Surya Prakash, Advocate,
for the petitioners in CWP No.7791 of 2012.

Mr Sharad Kumar Yadav, DAG, Haryana,
for the respondent State.

Mr Anupam Gupta, Sr. Advocate with
Mr Angel Sharma, Advocate,
Mr Gautam Pathania, Advocate &
Mr Bhavnik Mehta, Advocate,
for respondent Nos.4 to 6.
(in CWP No.22211 of 2011
and respondents Nos. 2 to 9 in CWP No.21564 of 2012).

Mr Satish Garg, Advocate,
for respondent No.8.
(in CWP No.22211 of 2011 and CWP No.21564 of 2012).

Mr Sunil Panwar, Advocate,
for respondent Nos.7, 9 & 10.
(in CWP No.22211 of 2011 & CWP No.21564 of 2012).

Mr. Girish Agnihotri, Sr. Advocate,
with Mr. Arvind Seth, Advocate,
for respondent Nos.2 to 5 in CWP No.20080 of 2012.

1. To be referred to the Reporters or not? **Yes.**
2. Whether the judgment should be reported in the Digest? **Yes.**
3. Whether reporters of local papers may be allowed to see the judgment?
Yes.

RAJIV NARAIN RAINA, J.

1. This order will dispose of [1] CWP No.21564 of 2012, [2] CWP

No.22211 of 2011, [3] CWP No.20080 of 2012 [Virender Singh Hooda & Anr. v. State of Haryana and Another] and [4] CWP No.7791 of 2012 as common questions of law and fact are involved in this group of cases which can conveniently be disposed by a common judgment. The facts are taken from the CWP No.21564 of 2012 which by consent has been treated as the lead petition.

2. This set of four cases is about disputes as to assignment of inter se seniority of officers in Haryana Civil Services (Executive Branch) [for short 'HCS(EB)' or 'HCS'], the premier State Civil Service in three cycles of direct recruitment. A final seniority list has been drawn and settled by the Chief Secretary, Haryana in the year 2006 which places the aggrieved petitioner/s in cases 1, 2 & 4 below the respective private respondents although they were appointed to service earlier and which final action of the respondent State is impugned in the petitions 1, 2 & 4 and the third filed for other reasons. The crucible of the challenge to the seniority list presents serious complexities which require careful resolution of the controversies involved in these cases, save and limited to the issue of inter se seniority among members of the service. The stakes are high. Promotions to the IAS in the Haryana cadre depend much on the seniority list. Vacancies are available in the promotional cadre but inter se rights to seniority positions lie in the burning cauldron of these cases.

3. The Court has had the advantage of many a stimulating debate on the issues involved, hearing very fine arguments crafted, moulded and addressed by both the learned senior counsel, Mr Puneet Bali for the petitioners with his usual cutting edge and crisp arguments and the erudite

submissions of Mr Anupam Gupta on the length, breadth and width of the case spread over many months, who largely detached from the facts of the case, explained the rubrics of service law in its chapter and verse on what appears at first flush rather simple, that is, Seniority. Of the evolution of administrative law in British India from the first effort at rule making in the 1850s till past the Government of India Act, 1915-1919, the Government of India Act, 1935, and the Constitution of India, 1950, the origin and birth of Public Service Commissions in the 19th Century ever lifting such a prosaic topic to great heights, for which I will remain thankful for the valuable assistance rendered, the insights gained and the lessons learnt in the course of one case. Most of which words I cannot even attempt to put down on paper but would try, but the essence of which I will ever keep in mind to instruct me, not just in this, but in future cases as well involving issues of seniority and service law.

4. Mr Anupam Gupta traces the history of drafting of service rules defining conditions and terms of employment firstly under the East India Company and then the transition to British Government in India. He refers to Professor C.L. Anand's "Constitutional Law and History of Government of India, Government of India Act, 1935 and the Constitution of India", in Chapter IX dealing with Public Civil Services including the highest service i.e. Covenanted Civil Service ("CCS") under the East India Company when by Charter Act of the year 1793 (33 Geo. III C. 52, Sec. 56) all important offices below the rank and degree of members of Council, were reserved to the CCS recruited in England and promotions were made dependant on seniority. The CCS was replaced by the

designation "Imperial Civil Service" transformed later into the "Indian Civil Service", commonly known as the steel frame of India. Till 1853 appointments were made by the Directors of the Company, and so long as the nomination system lasted no Indian was appointed to the CCS.

5. The Charter Act of 1853 abolished the system of nomination and CCS was for the first time thrown open to general competition. The following year regulations were made by a Committee under the presidency of Lord Macaulay, [who gave the world the Indian Penal Code, 1860] for holding of competitive examinations for recruitment to public service. The maximum age of candidates was fixed at 23 [which were reduced in 1860 to 22, in 1866 to 21 and 1879 to 19]. Though seemingly the racial bar was obliterated but in fact as the examination was only held in England the doors remained closed to Indians. The Act of 1858 which transferred the Government of British India from the Company to the Crown, reaffirmed the system established under the Charter Act of 1853 and empowered the Secretary of State in Council, with the advice and assistance of the Commissioners appointed by the Crown, to make regulations for the admission of persons to the Civil Service of India. The proclamation of Queen Victoria gave a fresh assurance for the association of Indians, irrespective of race and creed, with the work of administration. It was announced by Her Majesty:-

"We hold ourselves bound to the natives of our Indian territories by the same obligations of duty which bind us to all our other subjects and those obligations, by the blessing of the Almighty God, we shall faithfully and conscientiously fulfil.

"And it is our further will that, so far as may be, our

subjects, of whatever race or creed, be freely and impartially admitted to offices in our service, the duties of which they may be qualified by their education, ability and integrity, duly to discharge."

6. By a statute of 1861 the CCS virtually monopolised and controlled all superior posts in judicial and executive administration from the top to the bottom of the scale excepting those of the Viceroy, some members of the Executive Council, and the Governorships of Presidencies. In 1870, for the first time, a native Indian was admitted to the Civil Service as against 825 Europeans in that service who was Satyendranath Tagore, selected in 1863 and retired from the ICS in 1897. He was the elder brother of Gurudev Sir Rabindranath Tagore.

7. The CCS would later become the Indian Civil Service [ICS]. The post was created and inherited under Section XXXII of the Government of India Act, 1858. The CCS/ICS formed the *corps d'elite*. By the proclamation of 1858 [Government of India Act] certain inferior posts were transferred to a local service to be separately recruited in each province and to be designated the "Provincial Service". The members of the statutory Civil Service or statutory civilians appointed under the Act of 1870 could not hold the higher appointments that were open to the members of ICS but under the new system the Provincial Civil Service was born, which was to be composed mainly of Indians, was an inferior body whose members could not rise to higher posts than those of District & Sessions Judges or District Magistrates and Collectors. These offices were formerly open to the members of ICS only, but under the new arrangements a proportion of these posts were listed and reserved for the

Provincial Service. Recruitment to the Punjab Civil Service (Executive Branch) was arranged and conducted by the erstwhile Punjab & North-West Frontier Province Joint Public Service Commission at Peshawar, the predecessor-in-interest of the present day Punjab Public Service Commission, Patiala.

8. The Macaulay Committee orchestrated in British India the beginning of “modern civil service in 1854 and recommended that the patronage based system of the East India Company should be replaced by a permanent civil service based on a merit based system through competitive entry examinations”. As Macaulay’s Report recommended, “Henceforth, an appointment to the civil service of the Company will not be a matter of favour but a matter of right. He who obtains such an appointment will owe it solely to his own abilities and industry”. The Report made it clear that only the best and the brightest would do for the Indian Civil Service (ICS). The Report stated, “It is undoubtedly desirable that the civil servants of the Company should have received the best, the most finished education that the native country affords”. The Report insisted that the civil servants of the Company should have taken the first degree in arts at Oxford or Cambridge Universities.”... “[2.1.2] After 1855, recruitment to the ICS came to be based totally on merit. The report of the Civil Service Commissioners pointed out that of those who entered the ICS between 1855 and 1878, more than two-thirds were university men, equipped with a liberal and finished education. Initially, the ICS sought its recruits from Oxford and Cambridge and relaxations came later. It was thus an elite service. Subsequently, it opened its doors to Indians to

compete in India and from 1922 onwards the Indian Civil Service Examination began to be held in India." [cf. 10Th, Second Administrative Reforms Commission Report].

9. The challenge in these cases is to and in defence of the final seniority list of HCS (EB) framed on December 12, 2006 drawn by the Chief Secretary, Haryana and the further impugned order dated April 16, 2010 granting seniority to respondents 10 to 12 [in CWP No.21564 of 2012] as well, in addition to respondents 2 to 9 over and above the petitioner/s, as will be discussed in greater detail in the course of this order.

The first and foremost question is: What is seniority?

10. Seniority is not a fundamental right, it is merely a civil right, declared the Supreme Court in **Bimlesh Tanwar v. State of Haryana**, (2003) 5 SCC 604 affirming its past dicta. There is no fundamental right to a particular seniority or of chances of promotion, cf. **Union of India v. Dr. S. Krishna Murthy**, (1989) 4 SCC 689. It is only when promotion/appointment is based on equal opportunity and seniority is attached to such promotion does it become a facet of Article 16 (1) and therefore a fundamental right in Part III of the Constitution of India, cf. **Ajit Singh Janjua (II) v. State of Punjab**, (1999) 7 SCC 209. For a facet of promotion being a fundamental right to be considered against an available vacancy, if eligible, in Armed Forces and denied, for relief, see **Major General H.M.Singh v. Union of India & Anr.**; (2014) 3 SCC 670. Seniority is relatable only to service jurisprudence, cf. **UP Power Corp. Ltd. v. Rajesh Kumar**, (2012) 7 SCC 1. Then once again, seniority

or *inter se* seniority is not a fundamental right but a civil right, cf. **State of Uttaranchal v. Madan Mohan Joshi**, (2008) 6 SCC 797.

11. Seniority is relevant to and has value mostly in cases of promotion, otherwise it is deadwood. There are exceptions but as a general rule seniority has become the hallmark of mediocrity. It is mostly the dead tissue of the living intellect striving for perfection and recognition of pure merit in the workplace. Maturing or matured rights to promotion when denied, clouded, or prevented cause some of the bitterest battles in service law disputes on the writ side of the Court. These are the axioms of service law on which the system works.

12. The learned senior counsel for respondents 2 to 9, Mr Anupam Gupta submits in his opening sentence that seniority is not a constitutional issue. It cannot be elevated to the level of a constitutional value. The word 'seniority' was inserted for the first time in the Constitution by the (Eighty-Fifth Amendment) Act, 2001 inserting Article 16 (4A) in the Constitution retrospectively from June 17, 1995 to remove the base of the ruling of a Coram of 9 Hon'ble Judges of the Supreme Court in **Indira Sawhney v. Union of India**, AIR 1993 SC 477 delivered on 16th November 1992 holding that reservation in appointments or posts under Article 16 (4) were confined to initial appointments but not in matters of promotion. However, the Supreme Court gave a moratorium period of 5 years for the old system to continue after which the reservation apparatus in promotions was ordered to be disbanded for a new order to emerge. Parliament ordained otherwise by enacting The Constitution (Seventy-seventh Amendment) Act, 1995 providing for continued reservation in promotion to members of

the scheduled castes to tide over the boundary fixed in *Indira Sawhney*. The 85th Amendment introduced the words 'with consequential seniority' in newly introduced Article 16 (4A) to remove the basis of *Ajit Singh I* (1996) and *Ajit Singh II* (1999) cases.

13. He takes the court firstly to ***M. Nagaraj and others v. Union of India and others***, (2006) 8 SCC 212 in which the 85th amendment was challenged by anti-reservationists as being unconstitutional and violative of the basic structure of the Constitution. The amendment was upheld subject to certain limitations with respect to collection and quantification of data to support continued reservation. This case does not concern those rights and the judgment is relied upon only to understand what seniority means in its signification and to put the concept of seniority in its correct perspective as it is the foundation of the spinal issues raised in the present cases, which is all about seniority in the HCS (EB). He selects ***M.Nagaraj*** as his opening gambit because it expounds the law on this drab and mundane subject with beautiful colours as never seen before and for the far-reaching principles of law evolved in the judgment by Hon'ble S.H.Kapadia, J [as his Lordship then was] speaking for the Constitution Bench in a Coram of 7 Hon'ble Judges of the Supreme Court on reservation law in a challenge brought to the constitutional validity of the 85th Amendment to the Constitution of India [COI] granting seniority rights to the reserved category candidates in promotion to higher posts based on reserved roster points conferring accelerated seniority to them by introducing Article 16 (4A) which right without fetters was undone in *Ajit Singh I* (1996) and *Ajit Singh II* (1999) cases declaring that reservation in

promotion will not bring with it the desired right to accelerated seniority by underpinning that right with the 'catch up' rule devised by Court as a counter balance to the rights of the general category candidates. Alas Parliament and Court have been at loggerheads on the issue. The recent manifestation in the ongoing battle is the introduction of the 117th Constitutional Amendment Bill, 2012 and the passing of it in the Rajya Sabha in trying to remove the basis of *M. Nagaraj* by fiction on quantifiable data collection and its perceived pitfalls. It has not yet passed into the law and remains on the anvil.

14. We are not concerned here with that challenge or to the subject matter of the judgment in *M.Nagaraj* or with the law of reservation, except to the extent indicated regarding expounding the treatment of the concept of seniority. The concern is what the Court said about seniority as a foundational cornerstone of the edifice on which the amendment stood and in the understanding of the place seniority merits in service law jurisprudence and in its scheme of things, in order to appreciate the niceties of this case on the competing claims of the warring parties, as to who is senior to whom in the cadre of the HCS (EB). The stage is vital as promotions are due to the IAS from the State Civil Service and inter se seniority has become the *raison d'être* of this case and the bone of contention.

15. The senior counsel, Mr Anupam Gupta laments that the Bar on the service law side from where we have come has inherited many misgivings of what the concept of seniority and other service law principles really is all about and the Bar have long associated it with

constitutional law practice which sadly is a misreading of the Constitution, the *suprema lex*, the document on which other laws are tested for their survival. He quotes from ***M. Nagaraj*** and especially a lucid passage from its text to create a background canvas for a fuller understanding of the case which ultimately will rest in its conclusions on the interpretation and application of the three basic judgments of the Supreme Court covering substantial ground i.e. **Virender S. Hooda and others v. State of Haryana and another**, (1999) 3 SCC 696 [for short "*Hooda-1*"], **Sandeep Singh v. State of Haryana and another**, (2002) 10 SCC 549 [for short "*Sandeep Singh*"] and **Virender Singh Hooda and others vs. State of Haryana and another**, (2004) 12 SCC 588 [for short "*Hooda-2*"] cases except for what remains to be argued in this case directly with respect to seniority. And this cycle of litigation can be nicknamed as *Hooda-3* in the making and in the sequential order of the major strains of litigation fought from this Court to the Supreme Court, which include at least twice back and forth, while still the issue of seniority burns the hearts and souls of the members of the premier State Civil Service in their anticipated run up to the Indian Administrative Service, the *corps d'elite*. Those three cases deal with appointments in the HCS cadre in a piquant situation but with still no absolute clarity on the subject of the inter se seniority to be assigned in the context of the governing rules of service known as **The Punjab Civil Service (Executive Branch) Rules, 1930**, as inherited and applicable to the State of Haryana and which were substantively amended on October 01, 1992 by the Haryana Government by shifting the original principle of seniority based on occurrence of

vacancies to the dates of appointment to service. This was a paradigm shift of the axis, discarding the old seniority principle and making it inapplicable. The first extract from **M. Nagaraj** chosen by Mr Gupta reads:-

“...Constitution is not an ephemeral legal document embodying a set of legal rules for the passing hour. It sets out principles for an expanding future and is intended to endure for ages to come and consequently to be adapted to the various crisis of human affairs. Therefore, a purposive rather than a strict literal approach to the interpretation should be adopted. A Constitutional provision must be construed not in a narrow and constricted sense but in a wide and liberal manner so as to anticipate and take account of changing conditions and purposes so that constitutional provision does not get fossilized but remains flexible enough to meet the newly emerging problems and challenges. This principle of interpretation is particularly apposite to the interpretation of fundamental rights. It is a fallacy to regard fundamental rights as a gift from the State to its citizens.”

16. The learned senior counsel then reads three further crucial extracts from **M. Nagaraj** to emphasise his point that seniority is not a constitutional value or a constitutional issue or constitutional practice and is a product of a lesser right in civil administrative law or service jurisprudence based on rules of service governing conditions of service and where there are none then by usage, past practice, administrative precedents and in absence of all of which, then on the principles of justice, equity and good conscience. He culls these out from the aforesaid judgment passages to explode the myth of constitutional practice and to kick-start the debate, though the observations were made in the context of accelerated promotions of reserve category candidates on reserve roster

points and the application of the 'catch-up' rule, which issue does not arise in these cases, but all the same, the essence of which verdict on the question of seniority is relevant in the understanding of what lies ahead and what 'seniority' means in its broad terms and what one would make of it in these cases. To quote:-

(1) " The key issue which arises for determination is whether the above "catch-up" rule and the concept of "consequential seniority" are constitutional requirements of Article 16 and of equality, so as to be beyond the constitutional amendatory process. In other words, whether obliteration of the "catch-up" rule or insertion of the concept of "consequential seniority code", would violate the basic structure of the equality code enshrined in Articles 14, 15 and 16."

Then;

"...we are of the view that the concept of 'catch-up' rule and 'consequential seniority' are judicially evolved concepts to control the extent of reservation. The source of these concepts is in service jurisprudence. These concepts cannot be elevated to the status of an axiom like secularism, constitutional sovereignty etc. It cannot be said that by insertion of the concept of 'consequential seniority' the structure of Article 16(1) stands destroyed or abrogated. It cannot be said that 'equality code' under Article 14, 15 and 16 is violated by deletion of the 'catch-up' rule. These concepts are based on practices. However, such practices cannot be elevated to the status of a constitutional principle so as to be beyond the amending power of the Parliament. Principles of service jurisprudence are different from constitutional limitations. Therefore, in our view neither the 'catch-up' rule nor the concept of 'consequential seniority' are implicit in clauses (1) and (4) of Article 16 as correctly held in Virpal Singh Chauhan, [AIR 1996 SC 448]"

Then again;

"...the concept of the 'catch-up' rule and 'consequential seniority' are not constitutional requirements. They are not implicit in clauses (1) and (4) of Article 16. They are not constitutional limitations. They are concepts derived from service jurisprudence. They are not constitutional principles. They are not axioms like, secularism, federalism etc. Obliteration of these concepts or insertion of these concepts do not change the equality code indicated by Articles 14, 15 and 16 of the Constitution."

17. Without any hesitation I would agree with what the learned senior counsel Mr Anupam Gupta here suggests. I am no longer mystified or enamoured by the term 'seniority' and would follow the broad principles on which it is based and expounded by the three sides in order to try and resolve the vexed questions involved in these bunch of cases which have no easy or ready answers or instant solutions, except by interpretative processes applied to past precedents, which the respondents say amply cover the ground in their favour and the petitioners stoutly deny insofar as *Hooda-1* case [1999] is concerned, while mostly basing their arguments on the strength of statutory law and the applicable rules of service and a range of legal principles pressed in understanding or distinguishing case law or culling out their ratios since unquestionably what is binding without doubt is the ratio of a decision on its facts and what is actually decided but not what may follow by necessary implication.

18. In this case the Court is called upon to resolve rather complex issues relating to appointments in State Civil service and consequential seniority flowing therefrom arising *inter se* with respect to three cycles of direct recruit batches of the HCS officers, parties to the present proceedings, inducted to HCS or Allied services through three successive

combined recruitment processes initiated in 1989, 1992 and 1994 by the Haryana Public Service Commission on requisitions forwarded to it by the State Government which led to appointments in 1992, 1996 and 1999 respectively within the advertised vacancies except what forms subject matter of *Hooda-1* case and claims arising therefrom. Indisputably, the respondents [and petitioners in CWP No. 20080 of 2012] came to be appointed beyond advertised vacancies but arising within 6 months of the date of recommendations of the Commission through court orders on the strength of two Government circular letters dated March 22, 1957 [Punjab] and May 26, 1972 [Haryana] applied in *Hooda-1* for the first time as would be discussed later in greater detail.

19. The petitioners in cases 1, 2 & 4 are from the 1992 advertisement [batch maturing in 1996 on appointments made], 1996 and 1999 and are the ones who hold cadre posts following their joining on selection and appointments directly to HCS offered within the advertised vacancies and became members of the service before the respondents were appointed by court orders much later after 7 years in the aftermath of several layers of litigation fought by them starting from the initial defeat in this court in the first unsuccessful round in **Virender Singh Hooda v. State of Punjab** [1994], ending in the Supreme Court in *Hooda-1* and *Sandeep Singh* cases, and five years later in *Hooda-2*, the latter in challenge to the vires of **The Haryana Civil Services (Executive Branch) and Allied Services and Other Services Common/Combined Examination Act, 2002** [Haryana Act No.4 of 2002] which legislative enactment in First Proviso to Section 4 (3) had dispensed with the services

of all appointees beyond advertised vacancies in HCS, including all other candidates appointed to various services under the State beyond the advertised vacancies in cases of recruitments made by combined competitive examinations held after August 29, 1989 by retrospectively removing the base of *Hooda-1*, *Sandeep Singh* and *Sujan Singh* cases through legislative action brought through the State Assembly. The retroactive date chosen by the legislature is significant since the first disputed cycle for appointment to HCS(EB) was initiated by public advertisement dated August 30, 1989 calling applications from eligible and qualified persons.

20. The respondents are erstwhile Allied service officers who could not make it on merit against the 7 vacancies advertised to HCS under the 1989 advertisement and had to settle for lower services either as Excise & Taxation Officers or Tehsildars etc. in the same examination and merit list prepared by the Haryana Public Service Commission (for short 'the Commission') for various posts. They found their way to HCS through long drawn out litigation spearheaded by pioneer Virender Singh Hooda (for short 'VSH') in his first solo flight in CWP 6057 of 1994 which was shot down by the 1st Division Bench of this Court on May 12, 1994 and in the second round with Amarjit Singh Mann and Dinesh Kumar Yadav in toe; [the trio having remained unsuccessful in finding berths in HCS placed at merit positions 8, 10 and 12 respectively beyond the 7 advertised vacancies which were duly filled and those remain beyond the scope of the present case]; in CWP 2557 of 1996 dismissed on April 01, 1997 by the Division Bench in a judgment authored by G.S.Singhvi, J. during His

Lordship's judgeship in this Court. They were, however, successful in the third round of litigation in CA 2286 of 1999 which gave birth to legendary *Hooda-1* decision of the Supreme Court.

Introductory Facts

21. It would serve the purposes of this order to briefly say that there are three groups of HCS Officers involved in these four cases all of whom were directly recruited in three separate batches for Register-B on selection by the Haryana Public Service Commission [or short "the Commission"] through HCS (EB) and Allied Services Examinations in three relevant advertised cycles in 1989, 1992 and 1996 either in HCS or in Allied services. Group-A are the respondents or 'Hooda group'. Group-B are the competitors or 'Kalsan group' *vis-à-vis* seniority as against those from the 1989 advertisement calling applications for 7 vacancies in HCS (EB) from amongst the general category, the remaining in the lower services. Group-A were candidates who had applied under the advertisement issued on August 30, 1989 by the Commission, the result of which was declared on June 19, 1992. Seven posts were advertised in the HCS as said before. They were accordingly filled. Those seven candidates presently serve in HCS and are non-petitioners and indisputably senior to the parties in this bunch of cases and have nothing do with this *lis*.

22. The respondents were led by VSH who was at 8th place in the select list [1992] and had been inducted into the Allied Services as Excise and Taxation Officers etc. The remaining respondents 2 to 9 were below him in merit and were selected and appointed in Allied Services like VSH but all through court orders came to HCS. The remaining respondents,

other than VSH, are eight in number. In total, they are nine such who were candidates under the 1989 advertisement beyond the 7 advertised vacancies for HCS in the general category.

23. The State Government initiated a fresh recruitment process in 1992 by sending a requisition to the Commission to make recommendations against 12 vacancies advertised in the HCS, 9 of which were in the general category while Group-A were serving in services lower than HCS according to the result declared by the Commission. The Commission published an advertisement in the print media which appeared on November 24, 1992 in newspapers. It may be noted that within five months of the declaration of results of Group-A, nine vacancies in HCS which had arisen meanwhile formed part of the recruitment process initiated on November 24, 1992, the result of which process was declared after much delay on March 16, 1996 the examination of which was conducted in 1993. The sole petitioner in the main petition belongs to Group-B just as the other petitioners in his Group-B who were appointed to service on June 25, 1997 by direct recruitment from Register-B of the Punjab Civil Services (Executive Branch) Rules, 1930 as applicable to the State of Haryana and amended from time to time.

24. The 3rd recruitment process was initiated on May 24, 1996, the result of which was declared on April 28, 1999 and appointments followed. This is Group-C candidates. They were directly appointed before the decision in *Hooda-1* was pronounced by the Supreme Court.

25. These Group-C Officers were appointed in June 1999 except one Mr Mukul Kumar who was appointed on June 22, 2000. In short, Group-A

were appointed in 1992 while Group-B and Group-C were appointed in 1997 and 1999 to HCS respectively against advertisements issued in 1989, 1992 and 1996. The delays in the direct recruitment processes are a bane of administration which leads to many avoidable complications, in and out of Court and is much criticized by one and all. Delay in direct recruitment in year-wise scenario in initiating and concluding the process of appointments, is Government and the Commission at their worst, says the learned senior counsel Mr Anupam Gupta without mincing words and I think he is absolutely right.

The initial litigation, and how it was sparked off in 1994.

26. The two decade old litigation history of the present cases starts with VSH approaching this Court in CWP No.6057 of 1994. He made twofold prayers. He prayed for a writ of certiorari quashing the notification dated March 09, 1992 issued by the Government of Haryana notifying vacancies for direct recruitment in HCS (EB) & Allied Services and forwarding its requisition to the Commission which initiated direct recruitment process by way of special recruitment under proviso to Rule 5 which would have diminished his claimed right to reallocation from Allied to HCS main. The second prayer was for a mandamus to the respondents to appoint the petitioner to the HCS from the date when the candidates who appeared along with him were selected and appointed to HCS. He was then serving as an Excise and Taxation Officer in Allied services in the Government of Haryana. The petition came up for hearing before the Division Bench of this Court on May 12, 1994. It was dismissed by passing the following order:-

"Heard counsel for petitioner.

No relief can be granted. Rejected."

27. Aggrieved by the order, VHS carried a Special Leave Petition to the Supreme Court. The SLP was dismissed on October 30, 1995. However, liberty was granted to VSH and two impleaded parties to file a proper writ petition before the High Court where he may base his claim on the Punjab Government Circular dated March 22, 1957, which was not relied upon before the Division Bench, but was produced before the Supreme Court urging that vacancies arising within six months of the date of the recommendations of the Commission were required to be filled from the select list and the nine vacancies advertised in 1992 were additional vacancies for which requisition could not be sent without satisfying claims from the previous list in terms of the circular. In addition, he relied on the Haryana Government Circular dated May 26, 1972 which clarified the 1957 joint Punjab Circular though not specifically, but broadly, which said as much. These two circulars are the fulcrum of the case of candidates in Group-A (respondents 2 to 9) who did not make it on merit within the 7 general vacancies advertised in 1989 but were next below in merit and had qualified the Allied services in Haryana and were appointed either as Tehsildars or ETOs and were serving in lower services. I sent for the original file of CWP No.6057 of 1994 and from there discover that neither the 1957 circular nor the 1972 circular were mentioned or annexed with the petition. They are neither mentioned in the index nor in the body of the petition. All that was attached with the petition was the notification dated March 9, 1992 notifying 30 vacancies by way of special recruitment under

proviso to rule 5. A letter dated January 7, 1992 from the Chief Secretary, Haryana for obtaining concurrence of the Commission to fill up 30 vacancies of HCS was attached besides a letter dated August 8, 1992 intimating to the petitioner that he was not selected for appointment as VSH had not come in merit for the category opted i.e. HCS (EB). It was this letter which had brought VSH to Court. It would strike one, that the recruitment process for Register-B initiated on November 24, 1992 [Group B] was not mentioned by VSH in CWP No.6057 of 1994. Nor any direct claim was made against those vacancies advertised for direct recruitment. It may have to be accepted that VSH did not then feel aggrieved by the selection process initiated in November 1992 but had confined his prayers to the vacancies advertised through Special Recruitment on March 9, 1992 against which he could possibly have no locus standi to challenge since the March 1992 process was a special recruitment for 30 vacancies from a different source introduced in 1971 in rule 5 by adding a proviso to the recruitment rule 5. The petition was filed in the setting that at that point of time the cadre strength of HCS (EB) was 240 and the existing cadre strength was 129 and, therefore, there was a shortfall of 111 posts. It was asserted in the petition that there were 23 vacant posts for the year 1985 and 1989 including 12 posts to be filled from Register-B which were lying unfilled in the year 1989 against which VSH etc. had competed in the 1991 combined examination but could not make it within the zone of 7 vacancies for general category candidates. It is, therefore, a monumental misstatement made by VSH etc. before the Supreme Court when it passed the order dated October 13, 1995 wherein the Supreme Court was factually

misled to record *“Precisely, for the said purpose, in the writ petition, the said circulars... [cf. 1957 and 1972]... were annexed but unfortunately the prayer (b) was not couched specifically for such relief and the High Court presumably proceeded on the footing that prayer (b) was ancillary to prayer (a) and accordingly dismissed the writ petition. He [Mr Satish Chandra, Senior Advocate] has submitted that for challenging the said selection in March, 1992 on the ground of malafide the said circulars of 1957 and 1972 were not required to be relied upon.”* It was on this submission that a prayer was made for amending the writ petition before the High Court which was declined with the specific words that the appellant should not be permitted to amend the writ petition, so that such contention is considered in the writ petition out of which the appeal arose. In this manner, it was kept open to the appellant to file a proper writ petition before the High Court by confining to the new case of getting appointment on the basis of this earlier selection in the context of the circulars. It was directed that if such a writ is filed the same may be considered in accordance with law. There is a note in the original record of CWP No.6057 of 1994 that being a motion case the annexures stand destroyed. This note is dated February 7, 2000.

28. In the second round of litigation VSH was joined by Amarjit Singh Mann and Dinesh Singh Yadav, respondents in the present petition. Together they filed CWP No.2557 of 1996 before this Court. They prayed for a direction to the respondents to appoint them to HCS(EB) from the date persons were selected in the year 1992 and were appointed against the 1989 advertisement. They staked their claim on 9 general vacancies which

were advertised on November 24, 1992 after only about 5 months of the date the recommendations were made by the Commission of the 1989 process. They felt that in case the next cycle of recruitments came to fruition and posts were filled they would stand deprived of consideration for appointment on the strength of the circulars of 1957 and 1972. That was the obvious reason which brought the writ petition for adjudication.

29. The writ petition was dismissed by the Division Bench on April 01, 1997 after contest by a detailed judgment. The appointments of Group-B officers followed the dismissal. They were appointed on June 25, 1997. This Court held that the petitioners had joined in Allied Services without protest. They kept silent for four years which period was unexplained by over three years and eight months and this disentitled at least petitioner Nos.2 and 3 [Mann and Yadav] from relief as they made a belated approach to Court, if not VSH. On merits, the Court held after noticing several judgments of the Supreme Court and the High Court that the claim was not against vacancies remaining unfilled due to non-joining of selected candidates but were claimed against posts/vacancies which became available after the initiation of the process of recruitment which had to be thrown open for fresh recruitment to satisfy standards of equal opportunity to those who became eligible meanwhile. The Court delved into the rules of service which envisaged recruitment from different sources for which there was a roster prescribed drawn from four different registers. Offering appointments to the petitioners would disturb and violate the ratio of recruitment from different sources and the Court found no rationale or justification in issuing directions as prayed for. On the

policy instructions of March 22, 1957 the Court was of opinion that they gave no vested right in favour of existing employees to be appointed against a post or vacancy. The instructions were held as enabling the Commission to recommend additional names to Government for purposes of appointment but not obligatory or mandatory. They carried no command to act in a particular manner as the petitioners asserted. In this way, the instructions were read down to conform to the law laid down in various judgments noticed in the judgment which requires no recantation here. The Court found that there were no waiting lists alive to operate and if there were, they did not create an indefeasible right to appointment.

30. Whether the instructions dated March 22, 1957 were mandatory in nature or enabling provisions became subject matter of the Special Leave Petition which was carried to the Supreme Court by the aggrieved appellants against the order of the Division Bench dismissing the case. This was the 4th round of litigation and the second time in the Supreme Court.

31. The deliberations before the Supreme Court in the appeal carried by Messrs VSH, Amarjit Singh Mann and Dinesh Singh Yadav, the last two of whom by impleadment, led to the judgment in *Hooda-1* rendered on April 13, 1999. The litigating trio were successful. The appeals were allowed.

32. In the view of the Supreme Court, the Policy Circulars of 1957 and 1972 were not enabling provisions but were obligatory on the State and the Commission and were to be adhered to and the vacancies which had arisen within six months from the recommendations of the

Commission were to be filled from the select list-1992. The Supreme Court held that when vacancies arise within a period of six months from the date of previous selection, the circulars are attracted and hence the view of the High Court that vacancies which arose after the selection process commenced has no relevance and is contrary to the declared policy of the Government in the matter to fill up such posts from the 'waiting list'. It was further held in para.4 of the judgment that the view taken by the High Court that the administrative instructions cannot be enforced by the appellants against the vacancies which become available after the initiation of the process of recruitment would be looking at the matter from a narrow and wrong angle; when a policy has been declared by the State as to the manner of filling up the post and "that the policy is declared in terms of rules and instructions" issued by the Public Service Commission from time to time, when so long as these instructions are not contrary to the rules, the respondents ought to follow the same.

33. The Supreme Court in *Hooda-1* directed the State to consider appointing the three appellants to HCS. The operative part of the order reads:-

"In respect of the vacancies which arise after the expiry of six months it is necessary to send the requisition to the Commission. It is also made clear that if the Commission makes recommendations regarding a post to the department and additional vacancies occur in the department within a period of six months on the receipt of the recommendations, then the vacancies which occur later on can be filled in from amongst the additional candidates recommended by the Commission. It is urged on behalf of the appellants that letter dated January 7, 1992 indicated that the cadre strength in the Haryana Civil Service

(Executive Branch) was 440 and the officers filling these posts were around 129 and there was shortfall of 111 and 23 posts had to be filled up by direct recruitment. Thus 12 posts for direct recruitment were vacant when the advertisement for recruitment was made which was held in 1991. Therefore, the appellants case ought to have been considered when some of the vacancies arose by reason of non-appointment of some of the candidates. Therefore, the Government ought to have considered the case of the appellants as per the rank obtained by them and the appellants had to be appointed if they came within the range of selection. Thus when these vacancies arise within the period of six months from the date of previous selection the circulars are attracted and hence the view of the High Court that vacancies arose after selection process commenced has no relevance and is contrary to the declared policy of the Government in the matter to fill up such posts from the waiting list.

The view taken by the High Court that the administrative instructions cannot be enforced by the appellant and that vacancies became available after the initiation of the process of recruitment would be looking at the matter from a narrow and wrong angle. When a policy has been declared by the State as to the manner of filling up the post and that policy is declared in terms of rules and instructions issued to the Public Service Commission from time to time and so long as these instructions are not contrary to the rules, the respondents ought to follow the same.

Therefore, we have no hesitation in directing the respondents to consider the cases of the appellants for appointment to posts of Haryana Public Service (Executive Branch). However, it is made clear that the appellants shall be fitted to the post ranking below to those who had been selected along with the appellants at the time of recruitment made pursuant to result declared on June 19, 1992. The appellants will be fitted in appropriate posts and they will accord appropriate scale of pay by giving them

the benefit of increments, if any, but they will not be entitled to any monetary benefits for the period for which they have been kept out of employment. Let such action be taken by the Government expeditiously but not later than a period of three months."

34. The judgment was implemented with respect to appointment and the three appellants were inducted to HCS in December 1999 and joined service. This was the end of the 1st chapter of the litigation.

35. The success of the trio in *Hooda-1* led to a flurry of petitions filed in this Court by those who were lower in merit than VHS but were within striking distance of the 9 vacancies which had arisen within six months of the date of recommendations of the Commission of Group-A on June 22, 1992 and had been occupied by Group-B officers in the meanwhile, that is, 1997 from Register -B.

36. In this chain of litigation sparked off by *Hooda-1* was CWP No.17792 of 1999 filed by Ajay Malik which was followed by CWP No. 5037 of 2000 filed by Arvind Malhan, the decision of which case is reported in *Arvind Malhan v. State of Haryana & Ors.*, 2001(1) RSJ 236. These stragglers claimed parity of treatment with the trio led by appellants in *Hooda-1*. The question before this Court was of discrimination and of parity of treatment relying on the judgment of the Supreme Court. Both the writs were allowed by the Division Bench in a common judgment rendered on September 08, 2000. The operative directions issued were as follows:-

"Keeping in view these factors, necessarily the petition must be allowed. It is directed that the respondents will consider the cases of the petitioners for appointment to the post of Haryana Civil Service (Executive Branch). They would be ranked as per their seniority in the merit list in

pursuance of the result declared on 19.6.1992. They would be given appropriate posts and be accorded appropriate pay scales by giving them the benefit of the increments but they shall not be entitled to the arrears. The directions should be complied within three months."

37. Following suit, respondents Sujan Singh, Pushpender Singh and Pardeep Godara filed a joint petition bearing CWP No.10397 of 1999 claiming the same relief. This petition was allowed on January 30, 2001 by the Division Bench comprising of the Hon'ble Judges who had passed the order in *Ajay Malik* and *Arvind Malhan* cases. Then came Ashok Kumar Garg serving in Allied Services who filed CWP No.2157 of 2000. The prayer for appointment was conceded by the State as the matter was stated to be covered by the judgments in *Sujan Singh's* case. The Court saw no reason to differ with the view taken. The petition was allowed on February 07, 2002 and the petitioner was held entitled to the same relief as was granted by the Division Bench in the aforesaid case. It was noted in the order that SLP No.13859 of 2001 preferred against the judgment of this Court in *Sujan Singh's* case was dismissed by the Supreme Court on October 12, 2001 in *limine*. The decision of the Division Bench has attained finality. It may be noted that the second decision rendered by the same Hon'ble Division Bench of this Court in CWP No.10397 of 1999 filed by Messrs Sujan Singh, Pushipinder Singh & Pardeep Godara were decided on January 30, 2001 and the following directions were issued:

"In view of the observations made above, this petition is allowed. The respondents are directed to consider the case of the petitioners, for appointment to the post of HCS (EB) and they would be ranked as per their seniority in the merit list on the basis of the result declared on 19.6.1992. The petitioners

shall also be given appropriate posts and appropriate scales of pay by giving the benefit of increments but they shall not be entitled to the arrears. Needful shall be done within three months of the receipt of a certified copy of this order.”

As a result of this litigation, the petitioners in the aforesaid writ petitions were appointed, three on March 06, 2002 one in December 2004 and Arvind Malhan on January 03, 2005. The nine posts which were advertised in Group-B were overwritten by members of Group-A officers, notwithstanding that the members of Group-B were appointed before them all in June 1997 and had become members of the service governed by The Punjab Civil Services (Executive Branch) Rules, 1930, as applicable to the State of Haryana.

The remarkable case of Sandeep Singh.

38. Sandeep Singh applied under the November 1992 advertisement and belongs to what is referred in this order as Group-B officers and had made it to Allied services at merit position 12 being short of merit to make to the 12 advertised vacancies in HCS (EB), 9 general and 3 reserved. He was a topper in Allied services just like VSH was. He had similarly relied on the Circulars of 1957 and 1972 to claim anticipated and additional vacancies in HCS by filing CWP 6897 of 1996 on account of several posts having fallen vacant after the recommendations of the Commission and within 6 months thereof. Sandeep Singh was accompanied by three other appellants whose writ petitions had been dismissed by the High Court in separate petitions. This Court found that in the advertisement of the Commission, it was mentioned that the number of posts have been tentatively fixed and the vacancies may change. The time gap being

extraordinarily long spanning from the recruitment process stretching from 1992 to 1996 obviously then several vacancies arose by the very nature of things and in the inevitable march of the cadre onward. Sandeep Singh and company had approached the High Court claiming that vacancies existed before the date of interview and it would be meet and proper for the State Government to make appointments to the service in respect of those vacancies from the very selection and the fresh examination can be held only in respect of the vacancies available subsequent thereto. The High Court did not accept the contentions of the petitioners that the case was covered by *Hooda-1*. In appeal the Supreme Court did not agree and set aside the order of the Division Bench of this Court dated November 3, 1998. The Supreme Court made it clear in Civil Appeal No. 7422 of 1999 [*Sandeep Singh & Anr[Lalit Kumar]. v. State of Haryana*] decided on November 9, 2000 that if any other person who had appeared at the said examination and who had not approached the Court till then will not be entitled to file any such application for getting the relief in question so far as examination of the year 1996 [1992 advertisement] is concerned [Group-B]. If not to miss the point, Messrs Jagdish Sharma and Mahavir Singh became parties before the Supreme Court in Civil Appeal No. 7422 of 1999 by I.A. Nos. 2 and 3. It may be noted and is of some importance that in Sandeep Singh's case the circular of the Haryana Government of October 28, 1993 was pressed into service by the State of Haryana for the first time to urge that in the face of these new instructions the relief could neither be claimed nor granted. But the Court was informed that the State of Haryana had filed a review application in *Hooda-1* by appending the

circular of 1993 and the Review Application had been rejected by the Supreme Court. The Supreme Court expressed its view in para.3 in *Sandeep Singh* case that in its opinion, even on first principle, it appeals to the Court to commend that the vacancies available in any particular service till the date of interview at least should be filled up from the very same examination unless there is any statutory embargo for the same. In *Sandeep Singh's* case, the Supreme Court held that no statutory embargo was pointed out to the Court and, therefore, *Hooda-1* was applied and a direction was issued for consideration of appointing Sandeep Singh to HCS but the benefit of the order was made to run prospectively. Thus, Sandeep Singh could claim benefits only from November 09, 2000 when the order was passed by the Supreme Court in his case. It may be mentioned that four appeals were decided in *Sandeep Singh* case. More on *Sandeep Singh* case is kept for later, in the context of a clarificatory order passed by the Supreme Court on February 9, 2010, but till after the entire history is unfolded, except for references to it wherever found necessary in the sequential narration of events.

In passing, an additional fact, re Special Recruitment.

39. It deserves a passing mention and to reiterate that between the recruitment processes of Group-B and Group-C, the State Government tried to make Special Recruitment to HCS in 1994 under proviso to rule 5 of the 1930 rules through notification dated March 3, 1992 [challenged by VSH in his first round in 1994] which was in the nature of direct recruitment but has really no bearing on this case except that recruitment through proviso to rule 5 has received adverse comment in *Hooda-2* in

para. 73 which reads:- “When Rule requires examination to be held in the month of January, it is implicit that the entire process upto the appointment shall be completed as soon as possible thereafter and not later than the end of the year so that when the examination is held in the month of January of the next year, the entire selection process of the next year, the entire selection process of the previous advertisement is over. Another aspect required to be noticed is about special recruitment under proviso to Rule 5 in the exigencies of service. In such mode of appointments, the compromise with, in so far as merits of the candidates is concerned, cannot be ruled out. Mr Rao appearing for State of Haryana has informed us that in the recent years resort to special recruitment was made only in the year 1997. That was challenged and quashed by the judgment of Punjab and Haryana High court which has attained finality. Ordinarily if steps under the rules are taken in time as above indicated there would hardly be an occasion to resort to special recruitment avoiding unnecessary litigation of aforesaid nature which led to the setting aside of the special recruitment of 1997. This is yet another aspect which is required to be borne in mind by the State Government.”

The instructions involved/issued under Article 162, COI.

40. As the lighthouse of the case in *Hooda-1* and the subsequent cases shone from the instructions of the Punjab Government dated March 22, 1957, the Haryana Government circular dated May 26, 1972 and the circular dated October 28, 1993 on which both the learned senior counsel have dwelt at great length, each reading it according to his interpretation and in their subtle nuances, and thus they deserve to be reproduced, one

next to the other, so that the case can be better understood after they are read. Firstly, the Punjab Government executive instructions of 1957 are reproduced in *extenso*:-

"Circular dated 22.03.1957

Copy of U.O. Circular No. 1673-G-II-56 dated March 22, 1957 from Chief Secretary to Government, Punjab, to all Administrative Secretaries to Government. Punjab.

Subject: Procedure to be observed by Administrative Department of the Punjab Government in their dealing with the Punjab Public Service Commission.

Will the Administrative Secretaries to Government Punjab, kindly refer to the procedure noted above as subject, circulated with Punjab Government letter No.814-GS-37/3237-3 dated June, 1937, and subsequent correspondence contained in Punjab Government letter No.4596/1178-GS-37/9276 dated the 10th September, 1937 and letter No.475 P.Sc.37, dated the 12th July, 1937 and from the Secretary, Punjab and North West Frontier Province, Joint Public Service Commission, reproduced on page 29 to 35 of the booklet entitled "Regulation and Instructions Governing the work of the Provincial Public Service Commission in the Punjab".

2. In paragraph 5 of the Public Service Commission letter No.475 P.S.C.37, dated the 12th July, 1937, at page 35, a time limit of 6 months has been prescribed for filling up, out of the names recommended by the Public Service Commission, additional vacancies which were not intimated to the Public Service Commission when inviting recommendations. After the expiry of six months a fresh reference to the Public Service Commission will be necessary to fill up an additional vacancy not intimated to the Commission earlier. Government have noticed that there is no uniformity regarding the observance of this time limit. They desire that the procedure outlined above should be

rightly adhered to. The time limit of six months will not, however, apply to a case where a candidate had declined to accept the post offered to him against a vacancy which was intimated to the Public Service Commission. Such a vacancy can be filled up even after the expiry of six months out of the approved list of candidates initially received from the Commission."

Next:-

"Circular dated 26.05.1972

No. 2311-GSE-72/15727 dated the 26th May, 1972. Subject: Appointment of candidates out of the waiting list prepared by the Haryana Public Service Commission/Haryana Subordinate Services Selection Board.

I am directed to invite your attention to the composite Punjab Govt. Circular letter No.I673-GII-66 dated 22nd March, 1957 (copy enclosed) and to say that according to the instruction contained in the circular referred to such vacancies as arise within six months of the receipt of the recommendations of the Public Service Commission have necessarily to be filled in out of the waiting list maintained by the Commission. In respect of the vacancies which arise after the expiry of a period of six months it is necessary to send a requisition to the Commission. It is, however, not clear as to how this time limit of six months is to be counted. In this connection, it may be mentioned that in the past Commission used to recommend names which were double the number of vacancies intimated in the Commission at the time of sending the requisition by the department but such a practice does not exist now. The Government have re-examined the instructions issued in the composite Punjab on the above subject with a view to bring them up-to-date and it has been decided that they should be revised as under:-

(a) At the time of making their recommendations to the concerned department for

the posts to be filled in through direct appointment in Haryana Public Service Commission/Haryana Subordinate Services Selection Board will also intimate to the department whether waiting list for filling the additional vacancies occurring thereafter is available with them or not. If the number of additional qualified candidates be less than five then two recommendations only to the extent of the number of qualified candidates will be made by the Commission/ Board.

(b) If the Commission/Board make recommendations regarding a post to the department and additional vacancies occur in that department within a period of six months of the receipt of these recommendations then the vacancies which occur later on can be filled in from amongst the five additional candidates/recommended by the Commission/Board. In case the number of vacancies which occur subsequently exceeds five then it will be necessary to obtain more names from the waiting list maintained by the Commission/Board. The date on which the department makes a reference to the Commission/Board will be relevant in regard to the prescribed limit of six months from making appointments after obtaining additional names from the waiting list maintained by the Commission/Board within period of six months of the receipt of the original recommendations of the Commission/Board but the information regarding additional names is received after the expiry of a period of six months even then the regular appointments can be made out of the additional names recommended by the Commission/Board. If the Commission/Board have not made any recommendations regarding filling up of any post by direct recruitment during the past period or if

had made any recommendations but these were made earlier than the period of last six months then it will not be necessary for the department to ask for the additional names but out of the waiting list prepared by the Commission/Board

(c) In those cases where the Commission/Board have been asked to send additional names out of the waiting list, but the Commission/ Board fails to make their recommendations regarding additional names within a period of 15 days then the department will be competent, in such situation; to make appointments against such vacancies on ad hoc basis.

(d) Additional vacancies which have been referred to above will be those vacancies which have occurred within a period of six months of the receipt of original recommendations of the Commission/Board and these vacancies will not include such vacancies which have actually not occurred within a period of six months but there is possibility to their occurrence in future.

2. It may also be clarified in this connection that if a letter of appointment is issued to a candidate on the basis of the recommendations made by the Commission/Board against the vacancy which was intimated by the department to the Commission/Board and the candidate refuses to join the appointment, then in such cases the time limit of six months will not be applicable and in such a contingency, vacancy can be filled up even after the expiry of six months from the five additional names referred to above or from the waiting list prepared by the Commission/Board.

3. I am to request that in future, action may be taken in accordance with the above instructions."

41. At this stage, it would be useful to quote the text of the instructions dated October 28, 1993 issued by the Haryana Government

upon which much help has been placed and emphasis laid by Mr Bali and especially its para. 5 on the question of combined examinations through written examination followed by interview just as HCS is:-

"Subject: Appointment of the candidates out of the waiting list prepared by the Haryana Public Service Commission/Subordinate Services Selection Board.

Sir,

I am directed to invite your attention to the composite Punjab Government Circular letter No. 1673-G-II-56, dated 22-3-1955, No. 2311/1 GS 1-32/15727, dated 20.5.1972, No.5024-1 GS 1-72/26877, dated 8.9.72 and the instructions issued by the government from time to time in this regard and to say that the matter with regard to the time limit of the waiting list of the candidates selected by the Haryana Public Service Commission and how to make appointments from that list, was under consideration of the Government for some time. After consideration, it has been decided to modify these instructions are under:

- 1. Like Subordinate Services Selection Board, the Haryana Public Service Commission shall also prepare a waiting list other than the original list i.e. for 25 vacancies 25%, for 25 to 50 vacancies 15% and for more than 50 vacancies 10% and minimum waiting list of 2 candidates will be prepared and along with the original list, the waiting list will also be sent to the department. The Haryana Public Service Commission in its recommendation shall also make it clear the candidates included in the original list and how many candidates are in the waiting list.*
- 2. The original list of the Haryana Public Service Commission shall be valid for 6 months only and all the departments shall complete the process of filling up of the vacancies from the original list within 6 months, after 6 months and validity of the original list would come to an end.*
- 3. The waiting list of Haryana Public Service Commission shall be valid up to 6 months*

after expiry of the original list, meaning thereby its validity would be for one year.

4. *The appointments from the waiting list would be made only when the original list is exhausted and from the waiting list only those vacancies would be filled up which became available within 6 months of the receipt of the list. For the vacancies which became available after six months, fresh requisition letter shall be sent to the Public Service Commission.*

5. *For the past some time it came to the notice of the Government that where the selection is made for several services by way of combined examination/interview and due to some reasons the vacancy of one service could not be filled or due to some reason it again become available, then the candidates of other services make their claim and for that also approach the Courts. Because in such cases, there is combined merit list, thus, if it is done then the whole list is required to be amended. Therefore, these instructions would not be applicable where the selection is made through written examination and interviews, whether for one service or combined services. In such cases, no waiting list shall be prepared and in case any other vacancy is made available other than the vacancies intimated to the Haryana Public Service Commission at the time of interview or the vacancy could not be filled from the list sent by the Haryana Public Service Commission, then the same would be carry forward for the next recruitment. These instructions would also not be applicable where there is specific provision in the rules."*[emphasis added]

While we are on the subject of the instructions it would be useful to say a few words on the question of holding of combined examinations for recruitment to similar posts/services. Till the year 1959

the concept of combined examinations in Punjab for recruitment to *inter alia* the Punjab Civil Service was not born. Admittance to the service was through a single competitive examination under the Punjab Civil Service (Executive Branch) Rules, 1930 held in accordance with the scheme laid down in Appendix I to these rules. The issue of conducting a combined examination was, however, under consideration of the Punjab Government for a long time but had not materialized till it was introduced on 15th/18th April, 1959 when the practice obtaining in the Union Public Service Commission was by analogy proposed and approved by the Punjab Government in consultation with the Commission to hold combined examinations for various posts in a group. The new dispensation was issued through Government Letter No.533-GII-59/11327 dated 15th/18th April, 1959. For the purpose, the Commission divided 40 categories of posts into 10 groups with Group-I consisting of 10 posts, the first of which was PCS (Executive Branch). The relevant extract of this Circular Letter addressed to all the Heads of the Department in the Punjab reads as follows:-

“Subject.- Holding of Combined Examinations for Recruitment to similar posts/services.

I am directed to address you on the subject noted above and to say that on the analogy of the practice obtaining in the Union Public Service Commission and some other State Public Service Commissions a proposal for the holding of combined examinations for recruitment to similar posts/services under the Punjab Government had been under the consideration of Government for a long time. A scheme has now been approved under which the Punjab Public Service Commission will hold combined examinations for various posts. For this purpose the Commission have divided

about 40 Categories of posts into the following 10 groups :-

<i>Name of Group</i>	<i>Name of post included in the group</i>
<i>Group I ..</i>	<i>1. P.C.S. (Executive Branch). 2. Excise and Taxation Officers. 3. Assistant Excise and Taxation Officers. 4. Tehsildars. 5. Block Development Officers. 6. Assistant Registrars, Co-operative Societies, Punjab. 7. Secretaries of Municipalities and District Boards. 8. Assistant Employment Officers. 9. Lady Organiser, Public Relations Departments. 10. District Public Relations Officers. 11. Public Relations Officer, Capital Administration. 12. Assistant Public Relations Officers in the Public Relations Department.</i>
<i>Group II to Group X</i>	<i>xxxx</i>

The posts in each group have been placed in the order of their superiority and will be offered to the successful candidates in the order of their positions in the merit lists, keeping in view the preference given by them.”... xxx.”

Punjab Government reviewed the whole scheme vide Circular Letter dated 15th/18th April, 1959 and a subsequent letter dated March 11, 1960 after getting feedback from various departments and in consultation with the Commission will hold the combined examinations to various posts shown in the recast groups. In the recast groups, posts mentioned at Sr. Nos.5, 7, 9 to 12 in the 1959 Circular were excluded from Group-I while the post of Excise and Taxation Inspector was included at Sr. No.7.

The fresh list consisted of total 7 posts of which 6 were in the 1959 Circular with the addition of Excise and Taxation Inspector. Para.2 of the 1962 Circular as recast reads as follows:-

“2. The posts in each group have not been arranged in the order of their superiority and will be offered to the qualified candidates in the order of their positions in the merit lists, keeping in view the preference given by them.”

It is, therefore, quite apparent that when the Executive Instructions dated March 22, 1957 were issued recruitment to the Punjab Civil Service (Executive Branch) was through a single post examination and not by way of a combined competitive examination including various services in Group I. The new scheme was introduced by the Circular Letter dated 15th/18th April, 1959 whereafter clubbed examinations became the order of the day. The reason for use of the negative word “not” is not forthcoming but can be easily imagined as not to make lower services in Group I *infra dig* or beneath one's dignity, by removing any glint of one-upmanship. Both these circulars make no mention of the instructions dated March 22, 1957. The effect of the 1959 Circular in its relationship with the 1957 Circular have not been brought to the notice of the Court in any of the judgments under consideration.

42. It was the case of Haryana Government in *Sandeep Singh* case that where selection to services was by way of combined examination and interview and due to some reasons the vacancy of one service could not be filled or due to some reason it again became available, then the candidates of other services would often make their claim and for that purpose even approached Courts. Because in such cases, there is combined merit list,

thus, if it is done then the whole list is required to be amended. Therefore, these instructions spelled that where the selection is made through written examination and interviews, whether from one service or combined services, in such cases, no waiting list shall be prepared and in case any other vacancy is made available other than the vacancies intimated to the Commission at the time of interview or the vacancy could not be filled from the list sent by the Commission, then the same would be carried forward for the next recruitment. These instructions would also not be applicable where there is specific provision in the rules. Meaning thereby, the Government decided to exclude selections based on examination/interview in tacit recognition of the principle enunciated in **Hoshiar Singh vs. State of Haryana**, (1993) Supp 4 SCC 377 that only such posts are to be filled as are advertised. However, faced with the rejection of its review application based on the 1993 instructions it appears that the Haryana Government desired to step in and to remove the base of previous judgments by applying the principles laid down by the Supreme Court in *Hoshiar Singh* case and for these rectificatory, corrective and remedial purposes enacted '**The Haryana Civil Services [Executive Branch] and Allied Services and Other Services Common/Combined Examination Act, 2002 [Haryana Act No.4 of 2002]**' which was promulgated after it received the assent of the Governor of Haryana on March 27, 2002. Section 1[2] made the operation of the Act retrospective from August 29, 1989, that is, one day before the advertisement was issued for Group-A on August 30, 1989. The Act was made to cover recommendations made by the Commission after that date, except for

Section-5 which was brought into force at once. The Objects and Reasons of the Act are notable and read as follows:-

"STATEMENT OF OBJECTS AND REASONS

Hon'ble Supreme Court, in Virender Singh Hooda case [(1999) 3 SCC 696] held that in the light of government circular letter dated 22-3-1957 and 26-5-1972 all those vacancies which had occurred in Haryana Civil Service (Executive Branch) up to the period of six months from the date of recommendations made by the Haryana Public Service Commission were required to be filled out of the same selection. Thereafter, the Hon'ble Supreme Court in its judgment dated 9-11-2000 in Sandeep Singh v. State of Haryana [(2002) 10 SCC 549] relating to Haryana Civil Service (Executive Branch) and Allied Services Examination, 1993, has inter alia held that even on first principle, it appeals to us to commend that the vacancies available in any particular service till the date of interview at least should be filled in from the very same examination unless there is any statutory embargo for the same.

There is another set of decisions by the Hon'ble Supreme Court starting with Hoshier Singh v. State of Haryana [1993 Supp (4) SCC 377] in which it has been held that appointments beyond the advertised posts cannot be made as it deprives the candidates who were not eligible at the time of original advertisement but have acquired eligibility subsequently, of the opportunity to compete for public employment against such additional posts which did not form part of the original advertisement. The Hon'ble Supreme Court found such appointments to be violative of Articles 14 and 16 of the Constitution of India. This view has been followed by the Apex Court in several subsequent decisions. However, in Virender Singh Hooda case [(1999) 3 SCC 696] or in Sandeep Singh case [(2002) 10 SCC 549] no argument was advanced before the Apex Court based on the judgment in Hoshier Singh

case[1993 supp(4) SCC 377] and other similar cases.

The judgments in cases of Virender Singh Hooda [(1999) 3 SCC 696], Sandeep Singh [(2002) 10 SCC 549] and Sujan Singh, etc. have thus created multiplicity of litigation inasmuch as various candidates who were originally selected for one of the allied services are claiming appointment to Haryana Civil Service (Executive Branch) or some other Allied Service. Also the Haryana Public Service Commission calls candidates for interview equivalent to thrice the number of advertised vacancies. In case subsequent vacancies are clubbed with the advertised vacancies at a later stage, it would lead to more litigation even from those who were not called for interview but otherwise would have been eligible for being called for interview had the subsequent vacancies been clubbed initially. Further, as a result of abovementioned judgments of the Hon'ble Supreme Court, two sets of candidates have got appointments against one post.

This has brought about total uncertainty at such a late stage in the selection for Haryana Civil Service (Executive Branch) and Allied Service made by the Haryana Public Service Commission. Considerations like efficiency and availability of equal opportunity to candidates who become eligible for taking up subsequent examinations have been kept in view. Since the entire problem has arisen as a result of recruitments made pursuant to the advertisement dated 30-1989, hence this Bill has been proposed w.e.f. 29-8-1989."

43. Resultantly, the State removed the base of *Hooda-1, Sandeep Singh* and *Sujan Singh* cases by the legislative enactment.
44. Section 3 repealed the instructions dated June 1937, September 10, 1937, March 22, 1957, May 26, 1972, October 28, 1993, February 27, 1998 and March 28, 2001. Section 4[1] of the Act barred appointment

beyond the number of advertised vacancies. Sub-Section [2] of Section 4 contains a non-obstante clause and declares that notwithstanding anything to the contrary contained in any judgment, order, decree or decision of a court of law, Act, rule, regulation or executive instructions, no candidate from the date of commencement of this Act, shall, on the basis of his merit or placement in a Common/Combined Examination, have right to seek appointment to Haryana Civil Services [Executive Branch] and Allied Services or Other Services beyond the number of advertised posts. Sub-Section 3 of Section 4 denuded power of the State ever to make appointments beyond the advertised vacancies strictly applying the ratio of *Hoshiar Singh* case and laid down that it would no longer be competent to offer appointment to a candidate placed in the waiting list with respect to Common/Combined Examinations for a post for which his name was not recommended by the Commission.

45. A death blow was struck on all appointments in all departments made beyond advertised vacancies retrospectively from August 29, 1989 i.e. one day prior to the appointments of the 1992 batch (1989 advertisement) by the proviso to Section 4 [3] with its far reaching consequences which are best read in their legislative language verbatim:-

"Provided that if a candidate has been appointed or offered appointment over and above advertised posts for any reason, the services of such candidate shall be dispensed with. However, he shall be entitled to be appointed to the service/post, if any, for which his name was originally recommended by the Commission:"

46. The second proviso to Section 4 [3] saved their salaries from being regurgitated. The excess appointees would revert to their previous

posts on right of lien. With this Act, the curtains were drawn. The base of the ruling in *Hooda-1* was removed from its foundation. The respondents' services were dispensed with. This led to the second war after many battles won till the passing of the Act and a few thereafter claiming retrospective parity.

47. The Act was challenged directly in the Supreme Court under Article 32 of the Constitution of India by VSH and others in connected SLPs/Civil Appeals in re.: Writ Petitions (C) No.215 of 2002 with Nos.216-18, 224, 383, 537 and 588 of 2002, 307, 317, 319-20 of 2001, 127 and 114 of 2003, CAs Nos.3937-38 of 2001, 8385-93 of 2002 and SLP (C) No.22709 of 2004 (CC No.1416 of 2004) filed by the aggrieved ex HCS Officers who had lost their superior jobs. This resulted in *Hooda-2* decision which has far reaching consequences on the present matter. This judgment was read and re-read by both the learned senior counsel extensively during the course of hearings and a great many arguments have been addressed on the law laid down, each interpreting the judgment in his own way to cull out its rationes decidendi and the subtle nuances in the interconnecting reasoning the Court gave in reaching to its conclusions on the multiple facts presented in the backdrop of the enactment of 2002 which reversed the tidal wave of judicial precedents in the wisdom of the legislature to annul.

The decision in Virender Singh Hooda and others vs. State of Haryana and another, (2004) 12 SCC 588 [*Hooda-2*]

48. The Supreme Court in *Hooda-2* had the benefit of two of its earlier decisions in *Hooda-1* and *Sandeep Singh* cases. The questions that fell for determination were framed in para.19 which read as follows:-

"19. The questions that fall for determination are:

(1) Whether the Act, to the extent of its retrospectivity, is ultra vires as it amounts to usurpation of judicial power by the legislature or it removes the basis of decisions in Hooda [(1999) 3 SCC 696] and Sandeep Singh [(2002) 10 SCC 549] cases?

(2) Is the Act violative of Articles 14 and 16 of the Constitution?"

49. In answer to the questions, the Supreme Court re-examined the 1957 and 1972 circulars in fresh light. The first question consists of two sub questions. The first part was answered in the affirmative in para. 73. Retrospectivity was held ultra vires to the extent it dispensed with services. Part 2 of question (1) and question (2) were answered in the negative. There was a fourth question framed in para. 22 as one of the facets of the first question that were whether a writ of mandamus can be made ineffective by an Act of the legislature. The ratio of the case has to be culled out from the binding reasoning of the Court in answering these four questions in the present context of seniority to be assigned to Group-A officers. Part 1 of question 1 and the fourth facet in para. 22 are what these petitions are concerned with, and the question of seniority must necessarily have to be answered by a combined reading of all the judgments passed in the matter of appointments in the light of *Hooda-2* as will be discussed at the appropriate place in this order.

50. It seems to me that the court must first acquaint itself with the law laid down in *Hooda-2* to take stock of the situation by dealing with what binds in its many major and minor premises and multiplicity of ratios. The relevant paragraphs of the judgment have been read out by both the learned senior counsel in support of their respective cases. Both

depending on one angle or the other, making the task a somewhat difficult one, but rather interesting.

51. In para.32 the Supreme Court at the outset declared and held, on the construction of the rules of 1930 governing the service did not contemplate waiting lists beyond advertised vacancies, observing as follows:-

"32. Rules do not contemplate any waiting list for the filling up of vacancies in excess of the number determined by initiating the recruitment process. Hooda decision [(1999) 3 SCC 696] is based on the aforesaid two circulars. We, as already stated, are concerned with the question whether the basis of that decision has been removed by the impugned legislation. We cannot go into the question of correctness of the said decision." (emphasis added)

52. The Court held that the legislature has power to enact laws with retrospective effect but has no power to change a judgment of a court of law either retrospectively or prospectively. The Constitution clearly defines the limits of legislative power and judicial power. None can encroach upon the field covered by the other. The laws made by the legislature have to conform to the constitutional provisions. It was contended by VHS that the *rights created as a result of issue of writ of mandamus cannot be taken away by enacting laws with retrospective effect*. To the contrary, Haryana contended that the power of the legislature to enact laws with retrospective effect includes the power to take away vested rights including those which may be created by issue of writs. The Court revisited *Hoshier Singh's* case by noticing its facts but made no significant comment on its binding ratio in relation to the case but found

significantly that the ruling was not noticed in *Hooda-1*.

53. The State of Haryana presented its predicament before the Supreme Court resulting from *Hooda-1* and *Sandeep Singh* cases and emphasized that in the light of the interpretation of the two judgments, problems occurred due to the long gap of years between one advertisement and the other, where a large number of other persons attained eligibility who would be deprived of an opportunity to compete for the posts advertised subsequently, besides there being absence of waiting list provision in the statutory rules of service, 1930 and in order to overcome these difficulties the legislature stepped in, repealed the circulars with effect from August 29, 1989 by clarifying the position for the future and the Supreme Court observed that larger public interest demanded the grant of opportunity to all eligible candidates. This observation in para.43 is significant as the Supreme Court recognized the view point of the State as commendable with reference to the rights of candidates becoming eligible meanwhile. Meaning thereby, they ought not to be deprived of that opportunity. It appears to this court that the philosophy of *Hoshiar Singh* case was impregnated with larger public interest in mind without really saying so but which was manifested by the State in the Objects and Reasons for bringing the impugned legislation depending largely on the principles enunciated in *Hoshiar Singh* case, which case was unquestionably the progenitor of the principle laid down for the first time by the Supreme Court that only advertised vacancies could be filled and no more, by applying equal opportunity principle in Article 16. Rights of others to be considered for public appointments were equally fundamental

in nature and could not be transgressed without due authority of law.

54. In para.44 of *Hooda-2* the Court noted that there were three categories of employees before it. (i) Those who had already been appointed in implementation of the decision in *Hooda-1* and *Sandeep Singh* cases; (ii) those, though not so appointed, but have judgments of the High Court in their favour claiming parity with *Hooda* and *Sandeep Singh* cases, and claim right to appointment but would be deprived of it if the validity of the Act is upheld and the basis of the judgment of the High Court is upturned; (iii) those, who would be covered by law laid down in *Hooda-1* on interpretation and applicability of the two circulars of 1957 and 1972, in case the Act is quashed to the extent of its retrospective applicability, and on that basis would be entitled to be considered for appointments. Besides, there was another set of litigants before the Supreme Court in *Hooda-2* and these were cases filed by candidates who had taken the competitive examinations conducted meanwhile by the Commission and had been appointed to the advertised posts on account of their positions in the merit list and thus were supporting the stand of the State Government contending that the Act is a valid piece of legislation. This was the 4th class of cases decided by the common judgment in *Hooda-2*.

55. In para.46 the Supreme Court recognized the equally well settled legal position that the legislature cannot by a bare declaration, without anything more, directly overrule, reverse or override a judicial decision; it may, at any time in exercise of the plenary power conferred on it by the Constitution render a judicial decision ineffective by enacting a valid law

on the topic within its legislative field, fundamentally altering or changing with retrospective, curative or neutralising effect the conditions on which such decisions are based.

56. In para.48 the Supreme Court observed that the legislature can change the basis on which a decision was given by the Court and thus change the law in general, which will affect a class of persons and events at large. Legislature cannot, however, set aside an individual decision inter parties and affect their rights and liabilities alone. Such an act on the part of the legislature amounts to exercising the judicial power by the State and to function as an appellate court or tribunal, which is against the concept of separation of powers.

57. In para.49 the Court observed as follows:-

"49. When a particular rule or the Act is interpreted by a court of law in a specified manner and the law-making authority forms the opinion that such an interpretation would adversely affect the rights of the parties and would be grossly iniquitous and accordingly a new set of rules or laws is enacted, it is very often challenged on the ground that the legislature has usurped the judicial power. In such a case the court has a delicate function to examine the new set of laws enacted by the legislature and to find out whether in fact the legislature has exercised the legislative power by merely declaring an earlier judicial decision to be invalid and ineffective or the legislature has altered and changed the character of the legislation which ultimately may render the judicial decision ineffective (S.S. Bola v. B.D. Sardana [(1997) 8 SCC 522]."

58. The power to amend the law with retrospective effect is subject to several judicially recognized limitations, one of which being that the retrospectivity must be reasonable and not excessive or harsh, otherwise it

runs the risk of being struck down as unconstitutional and another being that where the legislation is introduced to overcome a judicial decision, the power cannot be used to subvert the decision without removing the statutory basis thereof. In this proposition, the Supreme Court followed its earlier dicta in **National Agricultural Coop. Marketing Federation of India Ltd. vs. Union of India**, (2003) 5 SCC 23 and in this context observed that there could be no quarrel with the aforesaid proposition. However, in case, the Court came to the conclusion that the retrospectivities are unreasonable, harsh or excessive or the basis of *Hooda-1* has not been removed in *Hooda-2*, the decision would have been different. This is a significant observation. The major ratio of *Hooda-2* emerges from the centre stage observations in paragraphs 67 and 68 which unlock many chambers from where alone relief may come or be denied to the parties. The vital passages read as follows:-

*"67. The result of the aforesaid discussions is that retrospectivity in the Act cannot be held to be ultra vires except to a limited extent which we will presently indicate. It is not a case of usurpation of judicial power by the legislature. The legislature has removed the basis of the decision in Hooda [(1999) 3 SCC 696] and Sandeep Singh [(2002) 10 SCC 549] cases by repealing the circulars. The Act is also not violative of Articles 14 and 16 of the Constitution. **The candidates have right to posts that are advertised and not the ones which arise later for which a separate advertisement is issued. A valid law, retrospective or prospective, enacted by the legislature cannot be declared ultra vires on the ground that it would nullify the benefit which otherwise would have been available as a result of applicability and interpretation placed by a superior court. A mandamus issued can be nullified by the legislature so long as the law enacted by it does not***

contravene constitutional provisions and usurp the judicial power and only removes the basis of the issue of the mandamus.

68. Despite the aforesaid conclusion, the Act [proviso to Section 4(3)] to the extent it takes away the appointments already made, some of the petitioners had been appointed much before the enforcement of the Act (ten in number as noticed hereinbefore) in implementation of this Court's decision, would be unreasonable, harsh, arbitrary and violative of Article 14 of the Constitution. The law does not permit the legislature to take back what has been granted in implementation of the court's decision. Such a course is impermissible."

59. The next major ratio lies in para.70 where the Supreme Court while dealing with its earlier dicta in the Constitution Bench verdict in **Chairman, Rly. Board vs. C.R. Rangadhamaiah**, (1997) 6 SCC 623 put certain words by supply of emphasis in italics which have wide ramifications on the issue of seniority raised in the present cases and the entire paragraph requires to be reproduced to understand how finally the ratio of the previous judgment weighed in the mind of the Supreme Court. Para.70 reads in extenso as follows:-

"70. In Chairman, Rly. Board v. C.R. Rangadhamaiah [(1997) 6 SCC 623] the Constitution Bench while holding that the rule which operates in future so as to govern future rights of those already in service cannot be assailed on the ground of retroactivity as being violative of Articles 14 and 16 of the Constitution, observed that a rule which seeks to reverse from an anterior date a benefit which has been granted or availed of e.g. promotion or pay scale, can be assailed as being violative of Articles 14 and 16 of the Constitution to the extent it operates retrospectively. (emphasis supplied) In the said decision, the respondent railway employees belonging to the category of running staff had retired from service on 1-1-1973 and their pensionary

benefits were to be calculated on the basis of “average emoluments”. The “running allowance” up to maximum of 75% was taken as part of “average emoluments” for determination of pension and gratuity of the employees. By letter dated 22-3-1976, the percentage of “running allowance” was reduced from 75% to 45% retrospectively w.e.f. 1-4-1976. This was quashed by the Central Administrative Tribunal which order became final since it was not further challenged. The Railway Board, however, issued statutory notification dated 5-12-1988 in which the existing percentage of “running allowance” which forms part of “average emoluments” was reduced to 45% w.e.f. 1-1-1973. The said notification was quashed by the Central Administrative Tribunal to the extent it reduced the rate retrospectively on the ground that it was violative of Article 14 of the Constitution. The decision of the Tribunal was upheld to the extent it had the effect of reducing the amount of pensionary benefits of the employees but, at the same time, it was held that rule which operates in future so as to govern future rights of those already in service cannot be assailed on the ground of retroactivity as being violative of Articles 14 and 16 of the Constitution. The Constitution Bench also made reference to the case of Triloki Nath Khosa [(1974) 1 SCC 19]. In Triloki Nath case[(1974) 1 SCC 19] rules had been framed altering the criteria of eligibility for promotion from the post of Assistant Engineer to the post of Executive Engineer and the same was challenged on the ground of retrospectivity by the Assistant Engineers who were in service on the date of making these rules. Rejecting the said contention, it was held that the impugned rules do not recall a promotion already made or reduce a pay scale already granted. (emphasis supplied) It was also observed that the rule cannot first be assumed to be retrospective and then be struck down for the reason that it violates the guarantee of equal opportunity by extending its arms over the past. If the rules governing conditions of service cannot ever operate to the prejudice of those who are already in service, the age of superannuation should have remained

immutable and schemes of compulsory retirements in public interest ought to have floundered on the rock of retroactivity. But such is not the implication of service rules nor is it their true description to say that because they affect existing employees they are retrospective."

60. The paragraphs that follow are fundamental to the understanding of the case in the context of the claims set up by the three Groups-A, B & C in the present matters which have been read extensively by both the learned senior counsel many times over to hammer their respective cases. They are therefore reproduced:-

*"71. Before concluding, we may note that the facts of CAs Nos. 3937-38 of 2001 are somewhat different and peculiar. These appeals have been filed by the State Government challenging the impugned judgment of the High Court granting relief to the two respondents who belong to 1989 batch. The respondents in these two appeals, Ajay Malik and Arvind Malhan in 1989 merit list prepared by the Commission are at Serial Nos. 9 and 11 respectively. Virender Singh Hooda, Amarjit Singh Mann and Dinesh Singh Yadav who were appointed to posts in the Executive Branch as noticed hereinbefore were on the merit list at Serial Nos. 8, 10 and 12 respectively. These three were appointed on 3-12-1989 in compliance with the decision in Hooda case [(1999) 3 SCC 696] dated 13-4-1989. **We have held that the appointment given to these three cannot be taken back.** It would be iniquitous to deny relief to Ajay Malik and Arvind Malhan when it has been granted to other candidates who are lower in merit position than these two respondents. In this view despite the conclusion as aforesaid on the question of law, the direction contained in the impugned judgment of the High Court does not call for any interference qua the respondents in these appeals.*

72. On the aforesaid analogy, IA No. 4 of 2004 in Writ Petition No. 215 of 2002 filed by Jagdish Sharma and Mahavir Singh is allowed since the applicants are higher

in merit than Lalit Kumar and Virender Lather aforesaid and also satisfy condition placed in Sandeep Singh case [(2002) 10 SCC 549] by this Court. They are thus entitled to be given similar treatment as Ajay Malik and Arvind Malhan in view of the peculiar facts of their case. In this view, the direction of the High Court in judgment dated 3-7-2004 in CWP No. 7281 of 2000 also does not call for any interference.

73. Before parting with the case, it deserves to be noticed that to a large extent the State Government itself was responsible for the difficulties because of long gap of number of years between advertisement and appointments to the posts. Rule 9 postulates that the competitive examination shall be held each year but the same is held after 3/4 years. If timely steps are taken by sending the requisitions, in issue of the advertisement, holding of examination, completion of selection processes and in making appointments, the difficulties in all likelihood, would not arise. On the other hand, as in these cases, if there are long gaps of years in taking any of the aforesaid steps, the difficulties are likely to arise. In the present case 3 to 4 years were taken in making appointments in respect of posts advertised on all the four occasions i.e. in the year 1989, 1992, 1996 and 1999. We hope that such a situation would not arise in future. When rule requires examination to be held in the month of January, it is implicit that the entire process up to the appointment shall be completed as soon as possible thereafter and not later than the end of the year so that when the examination is held in the month of January of the next year, the entire selection process of the previous advertisement is over. Another aspect required to be noticed is about special recruitment under proviso to Rule 5 in the exigencies of the service. In such mode of appointments, the compromise with, insofar as merits of the candidates is concerned, cannot be ruled out. Mr Rao appearing for the State of Haryana has informed us that in the recent years resort to special recruitment was made only in the year 1997. That was challenged and quashed by the judgment of the Punjab and Haryana High Court which has attained

finality. Ordinarily if the steps under the Rules are taken in time as above-indicated there would hardly be an occasion to resort to special recruitment avoiding unnecessary litigation of the aforesaid nature which led to the setting aside of the special recruitment of 1997. This is yet another aspect which is required to be borne in mind by the State Government. Be that as it may, in view of the aforesaid discussion our conclusions are as under:

(1) The impugned Act, to the extent of its retrospectivity, except to the limited extent indicated above, does not amount to usurpation of judicial powers by the legislature. It is not ultra vires. It has removed the basis of decisions in Hooda [(1999) 3 SCC 696] and Sandeep Singh [(2002) 10 SCC 549] cases.

(2) The Act is not violative of Articles 14 and 16 of the Constitution except to a limited extent noticed below.

(3) The first proviso to Section 4(3), to the limited extent it provides for dispensing the services of candidates already appointed, is harsh, excessive, arbitrary and violative of Article 14 of the Constitution.

The benefits already granted to the petitioners in Writ Petitions Nos. 215 to 218 and 224 of 2002 could not be taken back. To this extent, retrospectivity is ultra vires. In all other respects, it is valid.

(4) The directions of the High Court in favour of respondents Ajay Malik and Arvind Malhan, subject-matter of Civil Appeals Nos. 3937-38 of 2001, are maintained. For the same reason, Jagdish Sharma and Mahavir Singh being higher in merit than Lalit Kumar and Virender Lather would also be entitled to similar treatment.

(5) The judgments of the High Court in Civil Appeals Nos. 8385 to 8393 of 2002, in view of the provisions of the Act, are set aside."

61. The vires of the Act were upheld as it did not amount to usurpation of judicial powers by the legislature. The base of *Hooda-1* and *Sandeep Singh* cases stood removed. The Act was upheld. The Act did not

violate Articles 14 & 16 of the Constitution except that the first proviso to Section 4[3] of the Act to the limited extent that it provides for dispensing with the services of candidates already appointed, which was declared *"harsh, excessive, arbitrary and violative of Article 14 of the Constitution"*. However, the Court did not declare the appointments unconstitutional or ultra vires. The Act was upheld but the appointments were saved by what Mr Gupta says is a judicial savings clause. In all other respects, it was declared valid.

The facts of the Present Case/s

62. It would be necessary at this stage to dwell on the facts of the present case i.e. CWP No.21564 of 2012 filed by Kulwant Kumar Kalsan represented by Mr Bali. Respondents No.2 to 10 from VSH to Pardeep Godara belong to Group-A batch of 1989 but were initially inducted in Allied services. The petitioner [Kalsan] belongs to Group-B and was appointed on June 25, 1997 against the 12 posts advertised on November 24, 1992 of which 9 were in general and 3 for reserved categories, the result of which examination was declared on March 16, 1996 for appointment in Register-B [direct recruits].

63. Mr Anupam Gupta, learned senior counsel appears for respondents No.4 to 6 but informed this court that he was in fact defending respondents No.2 to 9 alone on instructions from the briefing counsel. R-10 is represented by Mr Sunil Panwar, Advocate. Respondents 11 and 12 are Virender Kumar Dahiya and Sandeep Singh. Virender Kumar Dahiya and Sandeep Singh did not qualify for HCS and were selected in Allied Services but were appointed to HCS on January 10, 2001 and December

07, 2001 respectively under Court orders.

64. The present petition has been filed for quashing the order dated December 12, 2006 [P-16] by which respondents No.2 to 10 have been made senior to the petitioner. The further prayer is for quashing the order dated April 16, 2010 [P-24] by which respondents No.11 and 12 have also been made senior to the petitioner despite the fact that these two respondents were appointed three and a half and four and a half years later till when they served in Allied Services but wrote the same examination under the advertisement dated November 24, 1992 and were appointed through court orders beyond the advertised vacancies, which were nine in number which in effect reallocates them from Allied Services to HCS. The ultimate prayer is for a direction to re-fix the seniority of the petitioner over and above respondents No.2 to 12 in accordance with Rule 20 of the Punjab Civil Services [Executive Branch] Rules, 1930 as applicable to the State of Haryana. A useful table has been incorporated in para.11 of the petition which gives a bird's eye view of the dates of appointment of respondents No.2 to 9 to HCS as a result of court decisions shown against each of their names. The same is reproduced:-

<i>Sr. No.</i>	<i>Name</i>	<i>Date of appointment</i>	<i>Case No.</i>	<i>Date of Decision</i>
1	Virender Singh Hooda	15.12.1999	C.A. No.2286 of 1999	13.03.1999
2	Ajay Malik	31.12.2004	CWP No.17792 of 1999	08/09/00
3	Amarjit Singh Mann	10/12/99	C.A. No.2286 of 1999	13.03.1999
4	Arvind Malhan	31.01.2005	CWP No.5037 of 2000	08/09/00
5	Dinesh Singh Yadav	15.12.1999	C.A. No.2286 of 1999	13.03.1999

<i>Sr. No.</i>	<i>Name</i>	<i>Date of appointment</i>	<i>Case No.</i>	<i>Date of Decision</i>
6	<i>Sujan Singh</i>	<i>06/03/02</i>	<i>CWP No.10397 of 1999</i>	<i>30.01.2001</i>
7	<i>Ashok Kumar Garg</i>	<i>22.10.2003</i>	<i>CWP No.2157 of 2000</i>	<i>07/02/02</i>
8	<i>Pushpinder Singh</i>	<i>06/03/02</i>	<i>CWP No.10397 of 1999</i>	<i>30.01.2001</i>
9	<i>Pardeep Godara</i>	<i>06/03/02</i>	<i>CWP No.10397 of 1999</i>	<i>30.01.2001</i>

65. In *Sandeep Singh's* case and three connected appeals before the Supreme Court there were four appellants. Sandeep Singh, Virender Dahiya, Lalit Kumar and Virender Lathar who all were appointed to HCS under Court orders in *Sandeep Singh case* either in December 2000 or January 2001 and Sandeep Singh on December 07, 2001.

Arguments/Contentions

66. Mr Puneet Bali, learned senior counsel appearing for the petitioner in CWP No.21564 of 2012 and Mr K.K. Gupta, learned counsel appearing for the petitioner in CWP No.22211 of 2011 and lastly Dr Surya Prakash appearing for the petitioners in CWP No.7791 of 2012 who adopted the arguments advanced by his learned colleagues and gave written submissions, have argued on a large range of legal principles emerging from a litany of facts.

67. They argue that seniority can be based only on rules of service. Neither party can get an undue benefit which is not according to the rule of seniority laid down in the Punjab Civil Services [Executive Branch] Rules, 1930 as applicable to Haryana and amended in October 1992. Appointment to the HCS is governed by rule-5, 6, 9 and 11. Rule 6 deals with registers to be maintained from where the appointments are made

according to names entered therein on recommendations of the Commission. Direct recruits who come from Register-B are persons accepted as candidates on the result of a competitive examination through rule-6 (c). Rule-6 (a) is Register A-I consisting of District Revenue Officers, Tehsildars and Naib-Tehsildars accepted as candidates. Register A-II and Register-C are inducted from members of Class III Services and Block Development Panchayat Officers respectively. The manner and mode in which the appointments of accepted candidates are to be made to service is laid down in rule-17 of the 1930 rules as amended. The rule is based on quota and rotation of vacancies in the manner provided which operates as a roster, the footsteps of which are ordained by rule. Roster points are earmarked for all the registers in the ratio and proportion designed in the rules in order to make a combined list. The inter se seniority of candidates from the four registers is determined by slots earmarked in the roster prescribed in rule-17. Rule-20 as amended in 1992 deals with seniority of the members of service and lays down:-

"20. Seniority of members of Service. - (1) The seniority of members appointed to the Service shall be determined from the date of their appointment.

Provided that the order of merit determined by the Public Service Commission or the Selection Committee, as the case may be, in respect of persons appointed from registers prescribed in rule 6 or through special recruitment under the proviso to rule 5 shall not be disturbed.

(2) If the name of a candidate is removed from the register of accepted candidates or the list of special recruits or the order of appointment is cancelled under the provisions of rule 19 and such candidate is subsequently appointed to the Service, his seniority shall be determined from the date of such subsequent appointment."

68. Seniority is to be determined from the date of appointment. It is sequitur that a person becomes a member of the service only on appointment but not before the event happens by the methods prescribed.

69. Mr K.K. Gupta, learned counsel points out that apart from the 4 modes of appointment, there is a 5th mode provided by amendment through proviso to rule-5 introduced on June 19, 1971 by the Government of Haryana enabling it to make Special Recruitment, if in the opinion of the State Government, the exigencies of the Service so require, the State Government may make Special Recruitment to the Service by such methods as it may by notification specify, after consultation with the Public Service Commission. The wisdom of proviso to rule 5 has been adversely commented upon by the Supreme Court in *Hooda-2*. It is pointed out that rule-20 was amended and substituted vide Haryana Government notification dated October 01, 1992 changing the seniority rule in the 1930 rules from accruing of vacancies to be converted as from the dates of appointment to service. Thenceforth, the rule of seniority in HCS is appointment based and not from the date of occurrence of vacancies. In other words, it has ceased to be vacancy based. The rule stood changed before the second requisition was sent to the Commission in November 1992 which led to appointments of Group B officers and before the 1989 batch officers were offered appointments in December 1992 and became members of the service.

70. It is the contention of the petitioners that a right to appointment of a member of the Service can accrue against a vacancy as per roster but it does not create a right to seniority unless a person is declared in terms of

the rules to be a member of the Service. This is for the reason that rule-20 lays down quite apparently that it deals with members of the Service which in Haryana is to run and be reckoned from the date of appointment. The petitioner asserts that such a right to seniority can accrue only from actual appointment though made retrospectively in terms of the Court orders since the court cannot re-enact rules of service without declaring them ultra vires, which is not the admitted case.

71. It is submitted that prior to October 01, 1992 there was a dichotomy between rule-17 and rule-20 i.e. between "vacancy" and "appointment" which was harmonized by the State Government through the amendment. It is submitted that across board all appointments in Group-A and Group-B officers were made after the amendment was carried out on October 01, 1992 and all sides are governed by the common principle. It is their further contention that though the advertisement was issued on August 30, 1989 and the result declared on June 19, 1992 but the appointments came for the first time on December 21, 1992 when the first seven successful candidates in general category were appointed to HCS. Virender Singh Hooda was at merit position 8 and respondents No.3 to 10 were lower in merit but all had been selected and appointed in Allied Services in the first instance as they failed to make it on merit in the lot of 7 posts advertised in the general category.

Litigations amongst those appointed before 1989- An Overview/A Perspective on the parallel litigation fought.

72. At this stage, it would be necessary to advert to another chain of parallel litigation where for the first time the issue of seniority of officers in the cadre of HCS came for judicial comment at the hands of directly

recruited HCS officers of previous batches. Four writ petitions were filed, i.e. CWP No.3549 of 2007 titled *Wazeer Singh Goyat and others vs. State of Haryana and others* and connected writ petitions bearing CWP No.9712 of 2007, CWP No.5791 of 2008 and CWP No.19454 of 2007. The petitioners therein belong to the HCS recruited from Register-B prior to Group-A, Group-B and Group-C officers and stand outside the pale of the present controversy. These petitions were decided by the learned Single Judge on August 03, 2010 regarding their inter se seniority. The facts of the case were that 11 vacancies from Register-B were advertised in the year 1985 which were forwarded by the Government to the Commission for recommending names of successful candidates. The result was declared in 1988. The appointments came in March 1989 except petitioner No.8 who was appointed on compassionate grounds and joined service on November 27, 1991. The vacancies advertised were available in the year 1985. The dispute was with regard to fixation of seniority among Register-B and Register A-I (District Revenue Officers and Tehsildars) candidates. There had been prior litigation which led to the setting aside of appointments in respect of three candidates from Register A-I in the year 1983. This was in CWP No.8855 of 1988 decided on August 03, 1990. In appeal to the Supreme Court, reversion of those candidates was stayed and the Commission was permitted to finalize the pending selection. In view of the directions of the Supreme Court, the process of selection for Register A-I in respect of two vacancies of 1985 remained pending on account of pending litigation. The SLP was disposed of on October 07, 1991. The Government re-initiated the process of selection. That is how respondents

No.3 and 4 were recommended from Register A-I on September 07, 1992 to fill up the two vacancies. Their names were recommended and they came to be appointed on the same day in allied services. With a view to finalize the seniority of the members of the service the Government invited objections and passed an order dated July 03, 2005 fixing the seniority of the Extra Assistant Commissioners. In the seniority list, those petitioners were placed above respondents No.3 and 4. Soon thereafter, State Government issued another order on August 12, 2005 proposing to re-determine the seniority of the cadre of service which was proposed to re-determine seniority from Sr. No.32 onwards. Wazeer Singh Goyat and company claimed that their seniority was not to be disturbed since they were occupying vacancies before Sr. No.32 and, therefore, were not required to respond to the exercise by filing objections to the list circulated. It may be mentioned that respondents No.3 and 4 in CWP No.3549 of 2007 had filed CWP No.2758 of 2006, titled *Narender Singh and another vs. State of Haryana and others* made prayers for re-determination of their seniority. Wazeer Singh Goyat and company were respondents in that petition. In the light of the litigation they made a representation on November 22, 2006 and sought personal hearing from the Chief Secretary, Haryana. It was the stand of the State that seniority had to be determined as it stood prior to October 01, 1992 [Amendment to Rules] by applying the rule of rota and quota on the basis of the roster provided under rule-17 which was the diametrically opposite stand of the petitioners therein that insofar as seniority is concerned it has to be determined on the basis of the unamended rule-20 as applicable at the time

of appointment of respondents No.3 & 4 (Register A-I) candidates.

73. The learned Single Judge noticed that the short and only question which required determination in the petitions was whether seniority is to be governed by the unamended or amended rule-20 of the rules.

74. In connected CWP No.9712 of 2007 the petitioners [Ram Swarup Verma & 10 Ors v. State of Haryana, Virender Singh Hooda, Ajay Malik, Amarjit Singh Mann, Arvind Malhan, Dinesh Singh Yadav, Sujan Singh, Ashok Kumar Garg, Pushpinder Singh & Pardeep Godara were direct recruits and had joined service on May 16, 1994 through Special Recruitment [3/1992] [who stand beyond the pale of the present petition]. The special recruits joined service on May 16, 1994. Interestingly, respondents No.2 to 10 in the present case i.e. VSH and company also participated in the direct selection process pursuant to the advertisement issued in November 1992 [with Group B officers] but could not be appointed against the 12 advertised vacancies as they were unsuccessful in securing appointments to HCS against the advertised vacancies in open competition.

75. Reference to this parallel litigation is necessary with a view to understand the arguments of Mr Bali and Mr K.K. Gupta emerging from those decisions in a case which directly dealt with the issue of seniority for the first time in terms of rules which Mr Bali, learned senior counsel emphasizes is a case where the seniority issue of the predecessors-in-interest was debated on both sides with the State Government as umpire and the Court with the final word to settle the issue of seniority. There

would thus be a need to make a special mention of rule 18 and sub-rule 1 of rule 20 of the rules.

76. Rule 18 of the rules prescribes the order of appointment of candidates and lays down that "candidates on the different registers shall ordinarily be appointed to the Service in the order in which they are selected and their names entered in the respective registers". Sub-rule 1 of rule 20 prescribes the mode of fixation of seniority in accordance with rotation prescribed under rule 17 irrespective of the fact whether or not this rotation is actually followed while making the appointments, therefore, it was argued before the learned Single Judge [Permod Kohli, J.] that the rule clearly requires the seniority to be determined on the basis of the slots available for particular source at a given time, even if no appointment was actually made at the relevant time. It was the contention that the rule of rotation will apply for determination of the seniority in view of the quota prescribed under rule 17 from different registers/sources. The only restriction would be adherence to the inter se merit as determined by the Commission from the various registers.

77. The State and the private respondents relied on the judgment of the Supreme Court in **Arvinder Singh Bains vs. State of Punjab and others**, JT 2006 [11] SC 553. The direct recruits claimed that when vacancies were notified for Register-B in 1980 the earlier vacancies which had occurred between 1978 and 1982 and which were filled up in the year 1986 would be governed by roster points prescribed under rule 18. The Punjab Civil Services [Executive Branch] Rules, 1976 [the extant rules in the State of Punjab] which repealed and replaced the Punjab Civil Services

[Executive Branch] Rules, 1930 prescribed vacancies/posts to be filled on the basis of the roster of 100 vacancies prescribed for filling up posts from various registers. The rule required every 3rd vacancy to be filled up from accepted candidates in Register-B i.e. by direct recruitment. The Supreme Court in *Bains* case held that seniority had to be determined in PCS [EB] according to the rotation of vacancies prescribed under rule 18 of the Punjab rules, 1976 which had repealed the 1930 rules which latter rules are extant in Haryana State as amended in 1992. Rule 18 was held mandatory in *Bains case*. It reads as follows:-

"18. Appointment of accepted candidates to the service. The Govt. shall make appointments to the service in pursuance of Rule 7 from amongst the candidates entered on the various Registers in a slab of 100 vacancies as follows."

78. It was concluded on the strength of rule 18 that seniority is to be fixed by applying the rotation system irrespective of the date of appointment from different registers maintained of accepted candidates from different sources. While we are on *Bains* case and to somewhat digress slightly it would be useful at this point to refer to certain observations made by the Supreme Court in **Prabhjot Singh Mand v. Bhagwant Singh etc**, (2009) 9 SCC 435, at page 443 on *Bains* case:

"It is one thing to say that the judgment delivered by this Court in Arvinder Singh Bains is not a judgment in rem but prima facie this Court has interpreted the Rules, which would be a law declared in terms of Article 141 of the Constitution of India." and would have to be given "...effect on the doctrine of comity and/or amity."

79. Therefore, it follows sequitur that interpretation of service rule by Court is the foundation of law declared to be binding precedent even

though the judgment of the Supreme Court may be not be one in *rem* but would yet bind non-parties. But if direct rule is not in issue nor part of ratio it may not bind parties when not heard.

80. The learned Single Judge dealt with the Haryana Rule as amended in 1992 and opined that seniority is to be determined on the basis of rotation of vacancies prescribed in rule 17 of the Rules. Meaning thereby, the rule prescribes a rotation in view of quota provided under rule 17. It was urged by the respondents that the vacancies pertained to the period prior to amendment of rule 20 i.e. October 01, 1992 and the process of appointment was initiated prior to the amendment and, therefore, the unamended rule 20 would apply in determining seniority. **Y.P. Rangaiah vs. J. Sreenivasa Rao**, AIR 1983 SC 852 was relied on to contend that old vacancies would suffer old rules. But before the selection could be completed the rule was amended rendering some of the candidates ineligible on account of change of qualification and the eligibility criteria. It was in this context that the Supreme Court held that old vacancies would apply to recruitment in terms of rule considered in *Y.V. Rangaiah's* case which required select list to be drawn in advance year-wise and to make promotions accordingly within the life of the panel. This had come to settle vested rights on those who were on the select list and, therefore, the Supreme Court took the view that those rights could not be disturbed and persons had to be appointed in terms of the eligibility criteria and qualifications prescribed before the amendment. The learned Single Judge held *Y.V. Rangaiah* case was distinguishable on facts as in the cases under consideration the question of eligibility was not in issue. Thus, the

question of seniority has to be determined on appointment of a candidate.

The issue becomes moot and in operation only when recruitment cycle is completed and appointments are made and the judgment in *Arvinder Singh Bains* has to be seen in this light.

81. The learned Judge held that rule 17 of the Haryana Rules does not appear to be mandatory in nature. From the reading of rule 17 it appeared to the court that the appointments from different registers shall ordinarily be made in the manner prescribed by adopting the rotation system. The word "ordinarily" signifies considerable leverage to the competent authority. Thus, it is not practicable to make the appointments in rotation as prescribed under rule 17. The rule is relaxable. The judgment in *Arvinder Singh Bains* is not applicable in the State of Haryana. Amended Haryana rule 20 was held inapplicable to rotation of vacancies in the altered method which made seniority dependent from the date of appointment alone. It is settled proposition of law that availability of vacancies is not relevant in seniority. This principle is settled in **Union of India vs. S.S. Uppal and another**, (1996) 2 SCC 168 where the Supreme Court disassociated both the concepts. In *S.S. Uppal* case, the Supreme Court considered the seniority rule in the Indian Administrative Service **where seniority follows appointment to service and the year of allotment in the IAS will have to be determined according to the provisions of the seniority rules which are in force at the time of appointment and not prior thereto.** The date of occurrence of vacancy has really no relevance for the purpose of fixation of seniority in the IAS which can only run from the date the officer is appointed to the IAS.

82. The learned Judge delved further into the moot proposition and held that the date of substantive appointment cannot be reckoned from the date of occurrence of vacancy and **seniority can be reckoned only from the date of substantive appointment to the service.** Having arrived at this conclusion, which the present petitioners claim is the just and proper interpretation of the rules, declined to grant relief in view of the mandate of the directions in *Hooda-1* case.

83. The Court noticed a large number of decisions to reach the conclusion including **State of Uttaranchal and another vs. Dinesh Kumar Sharma**, [2007] 1 SCC 683 as well as the earlier decisions of the Supreme Court in **Ajit Kumar Rath v. State of Orissa**, AIR 2000 SC 85 holding that seniority cannot be claimed from date of vacancy. In **Jagdish Chander Patnaik v. State of Orissa**, AIR 1998 SC 1926, the Court observed:-

“The next question for consideration is whether the year in which the vacancy accrues can have any relevance for the purpose of determining the seniority irrespective of the fact when the persons are recruited? Mr Banerjee's contention on this score is that since the appellant was recruited to the cadre of Assistant Engineer in respect of the vacancies that arose in the year 1978 though in fact the letter of appointment was issued only in March 1980, he should be treated to be a recruit of the year 1978 and as such would be senior to the promotees of the years 1979 and 1980 and would be junior to the promotees of the year 1978. According to the learned counsel since the process of recruitment takes a fairly long period as the Public Service Commission invites application, interviews and finally select them whereupon the Government takes the final decision, it would be illogical to ignore the year in which the vacancy arose and against which the recruitment has been made. There is no dispute that there will be some

time lag between the year when the vacancy accrues and the year when the final recruitment is made for complying with the procedure prescribed but that would not give a handle to the Court to include something which is not there in the rules of Seniority under Rule 26. Under rule 26 the year in which vacancy the recruitment has been made is not at all to be looked into for determination of the inter se seniority between direct recruits and the promotees. It merely states that during the calendar year direct recruits to the cadre of Assistant Engineer would be junior to the promotee recruits to the said cadre. it is not possible for the Court to import something which is not there in Rule 26 and thereby legislate a new Rule of Seniority. We are, therefore, not in a position to agree with the submission of Mr Banerjee, the learned senior counsel appearing for the appellants on this score.”

... “The only other contention which requires consideration is the one raised by Mr Raju Ramachandran, learned senior counsel appearing for the intervenors to the effect that expression ‘recruitment’ and ‘appointment’ have two different concepts in the service jurisprudence and, therefore, when Rule 26 uses the expression ‘recruited’ it must be a stage earlier to the issuance of appointment letter and logically should mean when the selection process started and that appears to be the intendment of the Rule Makers in Rule 26. We are, however, not persuaded to accept this contention since under the scheme of Rules a person can be said to be recruited into service only on being appointed to the rank of Assistant Engineer, as would, appear from Rule 5 and Rule 6. Then again in case of direct recruits though the process of recruitment starts when the Public Service Commission invites applications under Rule 10 but until and unless the Government makes the final selection under rule 15 and issues appropriate orders after the selected candidates are examined by the Medical Board, it cannot be said that a person has been recruited to the service. That being the position it is difficult for us to hold that in the Seniority rule the expression ‘recruited’ should be interpreted to mean when the selection process really started.”

84. Also relied on by the learned single Judge were rulings in **P. Mohan Reddy etc. v. E.A.A.Charles & Ors**, 2001 (2) RSJ 122 (SC) and **Major General R.S. Balyan vs. Secy. Ministry of Defence, Govt. of India and others**, [2007] 1 SCC 513. In *Charles* the Supreme Court held that even though an employee cannot claim to have a vested right to have a particular position in any grade, but all the same he has the right of his seniority being determined in accordance with the Rules which remained in force at the time when he was borne in the cadre. The learned Single Judge found that the respondents in CWP No.3549 of 2007 were appointed on October 19, 1993 and thus their seniority had to be determined with effect from the said date irrespective of the fact that vacancies for their quota was available in the year 1985. The placement of respondents No.3 and 4 over the petitioners in the seniority list was quashed and the order dated December 12, 2006 was set aside and a direction was issued to re-determine seniority in accordance with amended rule 20. This conclusion formed Part-1 of the judgment, if I may humbly say was a succinct exposition of the law on the subject [and that part was affirmed in appeal but relief could still not be granted in view of the dispensation in *Hooda-1*].

85. Notwithstanding the ratio in Part-1 of the judgment, the learned Single Judge noticed that the appointments of the private respondents (VSH etc.) in those cases came to be made on the basis of the directions issued by the Supreme Court in *Hooda-1*. When the petitioners prayed that the directions in *Hooda-1* to adjust Hooda, Malik and Malhan (appellants before the Supreme Court in *Hooda-1*), below the appointees of the 1992

Batch are not binding on the rights of the petitioners since they were neither parties nor were heard nor were the amended rule 20 of the rules considered in *Hooda-1*, which rule made seniority dependent entirely on the date of appointment and, therefore, the directions of the Supreme Court were *per incuriam*, as argued, the plea was answered by the learned single Judge in the negative on the basis of the directions issued in *Hooda-1* where it was directed by the Supreme Court that the appellants were entitled to be appointed against vacancies becoming available up to the date of interview in the selection process completed in the year 1992 in terms of the 1957 and 1972 circulars. Besides, the appellants were not only appointed but adjusted below the appointees of that selection. They were given notional benefits of increments which meant that their appointments relate back to the date of selection. The learned Single Judge found it an admitted position that the petitioners were not party to *Hooda-1*. It was an equally admitted position that the petitioners were appointed to HCS before the respondents in the subsequent selection process to the HCS from Register-B and had become members of the service earlier i.e. in 1996 while *Hooda-1* was rendered on April 13, 1999 and Court appointments followed thereafter. Besides, the State of Haryana had moved a clarification application for modification of the order in *Hooda-1* citing *inter alia* the instructions of Haryana Government dated October 28, 1993 but the applications were rejected on May 01, 2006 in I.A. No.5 in W.P.(C) No.215 of 2002, *Virender Singh Hooda and others vs. State of Haryana and another* with the observations that no clarification is required and they are entitled to challenge the seniority in accordance with

law, which aspect will be decided on its own merits. The clarification application was moved in the background of issuance of a tentative inter se seniority list of Extra Assistant Commissioners appointed to HCS [EB] on August 12, 2005 (P-14). The learned Single Judge when placed in these circumstances could not bring himself to agree with the contentions of the petitioners since it was felt that the field was occupied by directions in *Hooda-1* except the window left in the clarificatory order that they are entitled to challenge the seniority in accordance with law. This really meant that the matter was res judicata without really saying so. But notwithstanding, the court was bound by the directions which would have to be read as under Article 142 handed down by the Supreme Court and the mandate had to be implemented in accordance with Article 144 of the Constitution. The Court feeling helpless in the face of its own findings in Part-1 of the judgment on the rule position in favour of the petitioners felt compelled to hold in Part-2 of the same judgment that the petitioners in the parallel litigation still cannot claim seniority over the private respondents in view of the directions of the final Court. However, the Act, 2002 and the decision in *Hooda-2* was not brought to the notice of the learned single judge which had a material bearing on the issue involved. The Court, however, noticed the directions of the Supreme Court issued in *Sandeep Singh's* case on November 09, 2000 [(2002) 10 SCC 549] and held that benefit of appointment to him would remain prospective from the date of judgment but not earlier and any person who has received directions in terms of *Sandeep Singh's* case from Court is not entitled to benefits in *Hooda-1*. In *Sandeep Singh* case the Supreme Court held and directed as

follows:-

" It is no doubt true that the reported decision of this Court in Hooda does not refer to the aforesaid circular of the year 1993. But it was stated to us that the State of Haryana had filed a review application and appended the said circular of 1993 and the said review application stood rejected by this Court. That apart, even on first principle, it appeals to us to commend that the vacancies available in any particular service till the date of interview at least should be filled up from the very same examination unless there is any statutory embargo for the same. In the case in hand, no statutory embargo has been pointed out to us. In this view of the matter, the judgment of this Court in Hooda should apply to the facts and circumstances. Be it stated that we have been shown the government circular of the year 1993 in Hindi and going through the same, we are persuaded to hold that the circular says the same thing that we have indicated earlier in this judgment. In the aforesaid premises, we set aside the impugned judgments of the Punjab and Haryana High Court and allow these appeals and writ petitions and direct that these four persons, who had appeared at the competitive test in the year 1993 pursuant to the advertisement dated 24-12-1992 should be considered for being appointed to the Haryana Civil Services (Executive Branch). We make it clear that if any other persons, who had appeared at the said examination and who had not approached the Court till today, will not be entitled to file any such application for getting this relief in question so far as the examination of the year 1993 is concerned. It is also made clear that the appellants will get the benefit of this order prospectively i.e. from the date of appointment. The Government may decide the matter within three months."

86. Consequently, CWP No.19454 of 2007 and CWP No.5791 of 2008 were dismissed as the petitioners who were appointed before the 1997 batch though were appointed on June 01, 1999 would have no case

on seniority. Admittedly, they were appointees of later recruitment/selection and cannot claim seniority over and above the private respondents who were the candidates in the selection process held in the year 1992 and have been appointed pursuant to various court directions, though, later than the petitioners in CWP Nos.9712 of 2007, 19454 of 2007 and 5791 of 2008 which petitions were held liable to be dismissed. The order was passed by the learned single Judge on August 03, 2010.

87. It would require special mention that the learned Single Judge in arriving at conclusions did not notice or deal with *Hooda-2* case which held the field and was, with the greatest respect, absolutely essential to the consideration and determination making the judgment somewhat incomplete, if I am permitted to say so, as that part has fallen to be decided in the present set of cases and of the import of *Hooda-2* on the fate of these cases on the limited question of placement in seniority.

88. Since a large number of petitions were disposed of by a common order of the learned Single Judge dated August 03, 2010 including CWP No.9712 of 2007, the petitioner (CWP No.9712 of 2007), a Special Recruit of 1994 namely, Ram Swarup Verma and others carried separate LPA No.1796 of 2010 which was dismissed *in limine* by a detailed order dated December 22, 2010. The Division Bench in its decision dated August 03, 2010 on the question of rule 20 held:-

*“The learned Single Judge has dismissed the petition namely CWP No.9712 of 2007 holding that once the private respondents have been appointed on the directions issued by the Hon'ble Supreme Court in the case of **Virender S.***

Hooda (supra) and further directions issued to place them below/at the tail-end of those 9 persons appointed in the year 1992 along with the benefit of refixation without payment of back wages then it was not possible to apply Rule 20 of the Punjab Civil Services Rules (Executive Branch) Rules, 1930 (as applicable to Haryana) (hereinafter referred to as 'Rules')."

89. The operative directions which have been summarized by the Division Bench as culled from para.5 of the judgment in *Hooda-1* are reproduced:-

"5. Therefore, we have no hesitation in directing the respondents to consider the cases of the appellants for appointment to posts of the Haryana Public Service (Executive Branch). However, it is made clear that the appellants shall be fitted to the posts ranking below to those who had been selected along with the appellants at the time of recruitment made pursuant to the result declared on 19-6-1992. The appellants will be fitted in appropriate posts and they will be accorded appropriate scale of pay by giving them the benefit of increments, if any, but they will not be entitled to any monetary benefits for the period for which they have been kept out of employment. Let such action be taken by the Government expeditiously but not later than a period of three months."

90. With due respect and humility, one does not find the word "refixation" mentioned in the directions of the Supreme Court in *Hooda-1* which the Division Bench paraphrased in its own words. The word "refixation" in service law has developed with time and usage to earn a distinct connotation when we speak of seniority, pay and pension etc. while "fixation" and "refixation" are subordinate ministerial acts, based on the principles attaching thereto as are declared in policy circulars/instructions, rules of service or by court declarations and decrees.

The difference is subtle but vital and was not pointed out since the appeal was dismissed in limine.

91. Be that as it may, it was argued before the Division Bench in appeal that the order passed by the Supreme Court on May 01, 2006, in *Hooda-1* dismissing the application for clarification filed by the appellants (Special Recruits) – (1992-1994) had diluted the directions issued in *Hooda-1* by the Bench itself when liberty was granted to the appellants if they are aggrieved by their placement in the seniority list then it would be open to them to challenge the same in accordance with law and the same was to be decided on its own merit. It would be useful to reproduce the text of the order on the clarification application which reads:-

"No clarification of our judgment is called for. In case, the applicants are aggrieved by the seniority list, it will be for them to challenge in accordance with law, which aspect will be decided on its own merits. The application is disposed of accordingly."

92. In these circumstances, challenge to seniority was made. It was argued by Mr Bali that *Hooda-1* cannot be construed as a verdict determining seniority but only directing consideration in appointment and the mandate of rule 20 would not stand wiped out by any of the observations made by the Supreme Court in the decision since the statutory provision was neither cited nor dealt with nor was required to as appointments were alone sought and the stage of seniority was not reached. It was argued that rigour of rule 20 of the rules must be followed in the case of the appellants particularly when there was no argument raised with regard to rule 20 which prescribed the date of appointment as

the date relevant for the purpose of determining seniority.

93. The Division Bench was of the view that the date of vacancy in the year 1992 'stood frozen' by the directions in *Hooda-1* and, therefore, there was no escape from the conclusion that the appointment is deemed from 1992. The Bench noticed the directions which commanded the respondent State to act in a way those persons "were to be fitted to the post ranking below those" who had been selected along with the appellants. They were to be given appropriate pay scale and benefit of increments but monetary benefits were denied to them 'for the period for which they were kept out of employment'. The Bench applied the principle of deeming fiction to the directions in *Hooda-1* and if they were to be appointed in rank below those who were appointed against the 9 advertised posts (1992) and have, therefore, acquired a superior position than those which private respondents possess. It was held that the subsequent order passed by the Supreme Court on May 01, 2006 in *Hooda-1* would not have the effect of wiping out the directions issued in *Hooda-1* on the basis of which the private respondents were given appointment. The Letters Patent Appeal was dismissed without notice to the State and *in limine*. It may be noted that even in the appeal *Hooda-2* was not noticed.

94. It may be noted that the dispute in both those appeals was *inter se* the 1992 [1989 advertisement] batch and the Special Recruits of 1994 in Register B from proviso to Rule 5 of the 1930 rules through notification dated March 3, 1992 and not *inter se* between recruits of Group-A, Group-B and Group-C officers.

95. I may repeat that Mr Bali and Mr K.K.Gupta have relied on

these judgments only to show that rule 20 was found good but its prescription could not be relied upon or applied due to the weight of the directions in *Hooda-1*. Petitioners were not parties to those cases and only VSH etc. were. Mr Bali, the learned senior counsel submits vehemently that *Hooda-1* can never be read as an authority on rule 17 and amended rule 20 of the rules since the rules were not considered. He submits that it is the pious duty of Court to uphold rule which is legal and valid and particularly a rule which deals with seniority which is not a right in personam but in *rem* and uniform to the cadre. A single cadre can harbour only one ship in its dockyard with all on board governed by one legal principle of seniority. He submits that when *Hooda-1* was decided the engaging issue was appointment of three allied officers to main HCS based on two circulars while seniority was not in issue. Therefore, amended rule 20 had not come into play. Thus it was not read nor was there any occasion to in 1999. This seems why the word seniority is singularly missing in the directions in *Hooda-1*. And for this reason words such as "fitted to the post", "ranking below", "fitted in appropriate posts", "appropriate scale of pay" by giving them "benefit of increments" were thought fit by the Supreme Court when making the directions for considering appointment. If the attention of the Supreme Court was towards appointment of the appellants to HCS the stage had not reached to think of seniority since only consideration had been ordered.

96. Feeling aggrieved by the order and judgment of the learned single Judge applying rule but denying relief on account of *Hooda-1*, some of the petitioners therein preferred letters patent appeals under clause X of

the Letters Patent, 1919. In the intra court appeal carried in LPA No.1015 of 2011 the Division Bench dismissed the petition *in limine* on June 03, 2011 in case titled *Ashok Kumar Bishnoi and others vs. State of Haryana and others*. The Division Bench upheld the view of the learned Single Judge that seniority has to be fixed from the date of appointment and not from the date of occurrence of vacancy. The principle of law was laid down that rule 20 as amended by Haryana would require determination of seniority with reference to date of appointment alone and not from the date of occurrence of vacancies. But the principle could not be applied in the face of the directions in *Hooda-1*. Those directions created a legal fiction which had to be treated as real for all intents and purposes and taken to their logical conclusion to secure the relief of which the Court thought seniority was a part of. It would require special mention that the Division Bench also did not notice or deal with *Sandeep Singh* and *Hooda-2* cases.

97. It is the admitted position that the parties to the present proceedings in Group-A, Group-B and Group-C were not parties to the aforesaid proceedings which culminated before the Division Bench on June 03, 2011. The case related to inter se seniority disputes arising out of the legal fiction amongst candidates of Register-B and Special Recruits under proviso to rule 5 of the rules inserted in the year 1971. It is not disputed that the SLP against the order of the Division Bench was dismissed *in limine* by the Supreme Court without expressing any opinion. Resultantly, the orders were implemented on June 30, 2011 by the Chief Secretary to Government of Haryana and seniority was fixed according to the date of appointment amongst those who contested the cases.

98. In all of these complex circumstances the impugned order has been passed fixing seniority on December 12, 2006.

Contentions of Mr Anupam Gupta, the learned senior counsel.

99. It is the contention of Mr Anupam Gupta that there are only two possible ways of viewing the decision of the Supreme Court in *Hooda-1*, even though it is no longer good law because its base has been removed by the 2002 Act and the vires of the Act have been upheld in *Hooda-2*, except with respect to proviso to Sub-Section (3) of Section 4 which had dispensed with the services of employees as were appointed beyond advertised vacancies occurring and notified for recruitment after August 29, 1989. These two ways are that *Hooda-1* contains a declaration of law which has a binding ratio that continues by reason of res judicata which according to the learned senior counsel grants both appointment and consequential seniority which has to be inferred from the directions which speak of fitment and rank which would amount to an enforceable declaration of law under Article 141 via Article 136. He urges that assuming *arguendo* that there is no declaration of law contained in the judgment with respect to seniority of the appellants the right would still have to be traced as forming part of directions given under Article 142 of the Constitution although the Supreme Court did not expressly say so, while the case was decided under Article 136. Both mean as much. Article 142(1) confers a very wide and extra ordinary jurisdiction to the Supreme Court as possessed by no other Court including this Court to pass decrees and orders to do complete justice in a 'cause' or a 'matter'. These powers are very extensive, which indisputably they are, covering nearly every

proceeding and are a provision meant to give effect to the wide powers of the Supreme Court under Article 136 of the Constitution. In either view of the matter the decision remains binding inter parties. Having projected both the stands at different stages of his address, Mr Gupta ultimately tenaciously holds on to the stand that *Hooda-1* is in *rem* and lays down principles of law which are binding except what the decision has suffered by the 2002 Act and what remains of it in *Hooda-2*. He submits that *Hooda-1* contains binding ratio. He submits that the petitioners, Kalsan and Company [Group-B] are making an attempt to re-open the matter on first principles which is impermissible. *Hooda-1* is a declaration of law and the petitioners cannot be allowed to shift gear midstream or to duck under the judgment or to wish it away.

100. He submits that each decade has its own set of legal principles which are followed resolutely. In judicial re-thinking new principles are evolved which replace old values with changing times. Demands of fresh perceptions in judicial thinking may arise and be of moment in facing new challenges in changing times, the old giving way to the new. Modern judicial movements in their onward march in search of fresher legal pastures of ideas to suit changing values and societal climates as we progress have been roughly decadal, which period accounts for a generation of Judges replaced by their next generation. Law would in its movements be indexed in libraries in the future in Law research libraries in its growth in the 1950s, 60s, 70s and so on. Past precedents are to be respected and understood in the context of the social milieu then existing.

101. Continuing his thread of arguments, he says that in issuing

directions in *Hooda-1*, no provisions of the Constitution were violated. When the Supreme Court used the word 'fitted' to posts and 'ranking' below those who had been selected means none other than seniority otherwise they would be bereft of meaning and content. Learned senior counsel submits that the orders passed by the Supreme Court which owe their power and authority to Article 142 can override service rules in order to do substantial justice in a cause. The power exercised by the Supreme Court located in Article 142 becomes a declaration of law under Article 141 and therefore binding on all Courts within the territory of India enabled by Article 144 and for all civil and judicial authorities to act in aid of enforcing Final orders as a rule of law, failing which the federal structure of the Indian territory will be seriously jeopardized to the peril of the nation and its citizens. Article 142 is sufficient repository of power to decide a cause and declare and enforce the law in the enriched wisdom of the Supreme Court since both provisions together make the decision based on the written Constitution through the beneficial molars in Articles 141 and 142 to do complete justice through Article 136 which is the vehicle of judicial approach and relief in a cause or a matter. Special leave petitions are not filed in the Supreme Court labelled under Article 142, and they need not be, as this is a Brahmastra to strike injustice wherever found. The extraordinary power is intangible, till facts and circumstances of a given case demand and then to be activated to give it the human touch and form, always remaining in repose but accessible like the third eye of Lord Shiva, His right and left eyes representing His activities in the physical world, the third eye in the middle of His forehead symbolizing spiritual wisdom and

power, seeing beyond the apparent and also destroying evil and evil-doers who have injured a suppliant standing before the Final Court praying for relief which no other Court can give. Then it is time for the Supreme Court to step in, in its curative jurisdiction to give the healing touch with its balm to fill wounds inflicted upon a person. Here, Mr Gupta qualifies his submission by saying that the power is in molecular expansion of the law and the Supreme Court is within its jurisdiction to experiment in the law to do complete justice between the parties, even if no legal tools are available, it would still forge new ones to do complete justice in a cause as distinct from a 'case'. What *Hooda-1* does is to put its appellants back to what was their right through subordinate legislation by merely giving effect to the circulars of 1957 and 1972 by court orders declaring a pre-existing right. A position which was pulled back in *Sandeep Singh* case to make it prospective as it was then felt essential to a just decision. He submits that nothing is immutable in rules. No holiness, no sacredness or sacrament is attached to posts being filled beyond advertised vacancies or in excess of notified quota and such a step forward was taken in **Prem Singh vs. Haryana State Electricity Board**, (1996) 4 SCC 319 when the Court made the rule in *Hoshiar Singh* case a little flexible and broad enough to accommodate the exigencies of administration, if they require such a course to be adopted. In *Prem Singh* the Supreme Court guided by larger public interest held :-

"The State could deviate from the advertisement and make appointments on posts falling vacant thereafter in exceptional circumstances only or in an emergent situation and that too by taking a policy decision in that behalf. Even

when filling up of more posts than advertised is challenged the court may not, while exercising its extraordinary jurisdiction, invalidate the excess appointments and may mould the relief in such a manner as to strike a just balance between the interest of the State and the interest of persons seeking public employment."

102. It is his contention that before the principle restricting appointments to the number of vacancies advertised was formalized for the first time by the Supreme Court in *Hoshiar Singh* case which changed the judicial thought on this issue and the rules of the game by reading the equal opportunity clause enshrined in Article 16 of the Constitution in cases of direct recruitment initiatives as immutable, which processes unfortunately took an inordinately long time to come to fruition either by administrative delay or as a result of litigation and in the meantime posts would inevitably remain unmanned to the detriment of administration for reasons beyond control.

103. On the road to justice, judicial precedents are born in the changing milieu by passage of time. He cites a Division Bench decision of this Court rendered a decade before *Hoshiar Singh's* case taking the converse view. The earlier view of this Court in **Shri Subhash Chander Sharma and others vs. State of Haryana and others**, 1984 (1) SLR 165 tenaciously occupied the field of judicial thought in this Court in a case of appointments to HCS (EB) in which *inter alia* the issue arose when a previous Division Bench decision was cited where Government had appointed persons beyond the 60 posts of Headmasters advertised and the appointment beyond 60 posts must necessarily be invalidated. The Subordinate Services Selection Board had recommended double the

number of candidates than the posts originally advertised. The argument was based on certain observations made by the Division Bench of this Court in its earlier decision in **Sachida Nand Sharma and others vs. Subordinate Services Selection Board, Haryana and others**, CWP No.285 of 1983 decided on June 01, 1983 which was the case of the aforesaid Headmasters. In the selection, future vacancies were taken into account while filling excess vacancies which were likely to arise several years ahead and it was on those peculiar facts and a variety of other considerations that the Court was compelled to hold that there had been a denial of equal opportunity for employment to public services qua posts likely to arise in the remote future and filled in the present. In the advertisement, there was a condition that the number of vacancies mentioned was liable to variation. The Division Bench re. *Subhash Chander* dealt directly with appointments in HCS and other Allied Services under the State. The Court referred to rule 9 of the PCS [EB] Rules, 1930 which laid down that competitive examination is to be held yearly for selection of candidates from Register-B.

104. The Division Bench did not treat advertised vacancies as rigid and inflexible principle which harboured no further appointments from the select list and recommendations made by the Commission. It would be profitable to quote the words of S.S. Sandhawalia, J. speaking for the Bench in para.56 to 58 in *Shri Subhash Chander Sharma* case:-

"56. It is patent from the aforesaid rule that it visualises a scheme of annual written examination and viva voce thereafter for completing the selection. This process because of large number of candidates resulting from the

rising tide of the educated-unemployed might well take a period of one or two years for finalisation. Therefore, for the purposes of annual examination, it is incumbent on the authorities to take stock of the existing vacancies as also to reasonably anticipate the vacancies which would arise by the time the selective process is likely to be completed. Mr P.P. Rao, the learned counsel for the private respondents, in an illimitable argument pointed out that public interest requires and indeed demands that as and when vacancies arise candidates should be available to man them in order to avoid the public mischief of important posts remaining vacant for long periods merely because of the tortuous and long process of selection. Consequently the true ideal and indeed real public interest mandates that a reasonable anticipation of vacancies should be made and the process of selection initiated early so as to provide an incumbent the moment a vacancy in fact arises. This according to Mr Rao was not only permissible but, in fact, obligatory. Equally any back log of existing vacancies on the date fixed for inviting application, which may be conveniently labelled as the cut-off date, for conforming to the qualifications prescribed, has equally to be taken into consideration. It was pointed out from the working of the Union Public Service Commission and other State Commissions that they all adopted a pragmatic approach by taking into consideration the existing vacancies and reasonably anticipating vacancies in relation to the process of selection in a composite competitive examination which may sometimes well take a couple of years. It was contended on behalf of the respondents not without plausibility that this procedure becomes imperative in practice and can in no way be termed as unconstitutional.

57. *Equally we find merit in Mr Rao's lucid submission that no inflexible right arises in favour of the citizen to be considered for and to be appointed to a post from the moment it falls vacant in the public service. It was submitted and in our view rightly that the constitutional right of equality of opportunity for consideration comes into play*

only when the employer throws a post open by advertisement or otherwise for filling the said vacancies. Therefore, Article 16 visualises an equality of opportunity for public posts only when they are so thrown open by the State or the employer and not earlier. Indeed, it cannot and does not envisage any abstract or doctrinaire right to any and every post as and when it may happen to arise under the State. It was pointed out that the State may defer appointment to the post at its reasonable discretion and no mandamus can be issued against it for either filling these posts or insisting upon consideration against it till they are advertised or otherwise applications are invited thereto. Reliance was rightly placed on State of Haryana v. Subhash Chander Marwaha, A.I.R. 1973 S. C. 2216 wherein their Lordships had observed in no uncertain terms that even a selection by an august body like the High Court itself gives no inflexible right to appointment to a candidate and the State may validly refuse to appoint such a selectee. Consequently, it appears to us that the issue of consideration under Article 16 has to be viewed in the context of the posts being thrown open and not earlier. It has rightly been pointed out that no duty or obligation is cast on the State to disclose and publish forthwith the number of vacancies which may arise from time to time. Consequently no fundamental right inheres in the citizens to be considered for such vacancies as and when they may happen to arise. It was submitted that the right of the State to defer appointments to posts, or even the absolute one of not appointing any one thereto, and even abolishing them, cannot be unreasonably fettered. Therefore, the corresponding rights and duties herein arise only on that point of time when the posts are thrown open and applications are invited therefor and this must inevitably remain in the discretion of the employer-State.

58. *For all the aforesaid reasons we are unable to read the Headmasters' case as any warrant for the blanket proposition that any selection or appointment beyond the number of posts originally advertised is ipso facto illegal or violative of Article 16. The observations in the said case were*

made in the context of the peculiar facts and circumstances noticed above and its ratio has inevitably to be confined on the same. At the highest, it has laid down that no blanket selections or appointments can be made for vacancies likely to arise for several years in the future. Therefore, in the present case, the contentions raised on behalf of the petitioners on the basis of the Headmasters' case are untenable and have necessarily to be rejected."

105. This view held ground for a about decade till *Hoshiar Singh* changed the rules at the ground level. Mr Gupta submits there can be no jurisprudence without legal ideas and the richer the idea the longer is the judicially active life of a precedent. Absence of legal ideas and legal fictions expresses the poverty of a judicial precedent and not its richness and, therefore, all major movements in judicial reasoning in precedents are to be read in the context of the times in which they were delivered amid the legal principles evolved by courts till that stage and available to the Court while rendering a decision. He says that the higher the Court in the hierarchy, the greater and closer is its engagement with ideas and the judgments relied upon by the parties have to be read in that context and so also the legislative reaction in enacting the 2002 law. In this way, the courts have ever struggled with principles, grappling with ideas and legal fictions and the proliferation of the legal premises of all that have hitherto been applied and on which the decision can be based. Forget about seniority, service law itself is not necessarily composed of principles of constitutional law, but more or less, on the pedestrian principles of service law, which former, is too high sounding a word to be applied to administrative law. And for executive decisions to be governed by the rule of law as found in rules of service will not take special character only

because some of them were framed through power conferred by proviso to Article 309 or the protections afforded by Articles 16 and 311 of the Constitution of India. Mr Anupam Gupta contends that if a legal fiction is not created in anti-dated appointment, a person cannot be put back to the position which he ought to have held but for the Government not complying with the circulars of 1957 and 1972. If law permits a legal fiction to be created, and the Supreme Court creates one, there would be deemed seniority by virtue of Article 142 in *Hooda-1* even though it was not expressly said as much, but pointing certainly in that direction. This is the Supreme Court's power of judicial legislation through Article 142 which Mr Anupam Gupta says rather interestingly is the unwritten List IV of the Seventh Schedule of the Constitution. He submits that such power has been exercised recently by the Supreme Court on both its judicial and administrative side following the law laid down by it earlier in the celebrated case, **Vishaka vs. State of Rajasthan**, (1997) 6 SCC 241. The Supreme Court passed a judicial order on July 17, 2013 approving the regulations formulated by it to render full and complete justice in gender sensitisation and enacted the Sexual Harassment of Women at the Supreme Court of India (Prevention, Prohibition and Redressal) Regulations, 2013 which were legislated by the Supreme Court ushering in a vital regime to protect women from sexual harassment at workplaces in the institution of the Supreme Court and in its workplaces. The Final Court enacted the regulations through judicial intervention in Writ Petition (Civil) No.162 of 2013 in case **Ms. Binu Tamta and another vs. High Court of Delhi and others** vide order dated July 17, 2013 and directed

itself, that is, the Supreme Court on its administrative side jurisdiction for its officers to take note of the same and to arrange that the regulations are promulgated and given wide publicity by notifying the regulations. The writ ran from the judicial side of the Supreme Court to its administrative side upon which the Registrar, Supreme Court of India, New Delhi reflected the directions of the Supreme Court, 'By Order' which reads as follows:-

"SUPREME COURT OF INDIA

New Delhi, the 6th August 2013

No. F.26/2007-SCA(I)- In exercise of the powers conferred by sub-clause (2) of Clause 1 of " The Gender Sensitisation and Sexual Harassment of Women at the Supreme Court of India (Prevention, Prohibition and Redressal) Regulations, 2013", the Chief Justice of India hereby appoints, the date of publication of the Regulations in the Official Gazette, as the date on which provisions of the said Regulations shall come in to force."

106. Consequently, the Central Government notified the regulations in the Gazette of India on September 21, 2013 (Bhadra 30, 1935) Part-I/Section 1 on August 27, 2013 under the Gazette Head "Notifications relating to Non-Statutory Rules, Regulations, Orders and Resolutions issued by the Ministries of the Government of India [other than the Ministry of Defence] and by the Supreme Court". The regulations were gazetted by Central Government under Article 142. Therefore, the learned senior counsel submits that Article 142 and jurisdiction exercised under it by the Supreme Court is not to be seen as a decree or an order but as a constitutional source of power aimed at doing complete justice in a cause or a matter. Jurisdiction under Article 142 is *ex cathedra*, so is Article 136.

The decision in *ex cathedra* because a *lis* is brought to Court and parties heard before making an order. In this way, Article 142 is a source of judicial law making, to read down, to read up, to read under and to find the golden rule which balances rights, duties and liabilities in a cause or a matter on principles of justice, equity and good conscience and the overarching judicial freedom in the maxim *ex debito justitiae*. He emphasizes by saying with full moral authority and as a student of law that Article 142 is nothing less than judicial legislation and reiterates that it deserves to be read as List IV of Schedule VII of the Constitution by fiction of the Constitution and the unique powers resting with the Supreme Court of India. Powers which are unparalleled, unfettered and without comparison in any constitutional law system in any other country except Bangladesh and Nepal which have enacted Articles 104 and 88[2] in their respective Constitutions which are similar to the provisions of our Constitution.

The Scope of Article 142 (1), COI

107. In order to understand the scope of Article 142 he presses before the Court a large selection of judgments of the Supreme Court expounding the scope of Articles 142 and 32. To start with he refers to paragraphs 52 and 53 in re. **Vineet Narain and others vs. Union of India and another**, (1998) 1 SCC 226 which read as follows:-

"52. As pointed out in *Vishaka [(1997) 6 SCC 241]* it is the duty of the executive to fill the vacuum by executive orders because its field is coterminous with that of the legislature, and where there is inaction even by the executive, for whatever reason, the judiciary must step in, in exercise of its constitutional obligations under the aforesaid

provisions to provide a solution till such time as the legislature acts to perform its role by enacting proper legislation to cover the field.

53. On this basis, we now proceed to give the directions enumerated hereafter for rigid compliance till such time as the legislature steps in to substitute them by proper legislation. These directions made under Article 32 read with Article 142 to implement the rule of law wherein the concept of equality enshrined in Article 14 is embedded, have the force of law under Article 141 and, by virtue of Article 144, it is the duty of all authorities, civil and judicial, in the territory of India to act in aid of this Court. In the issuance of these directions, we have accepted and are reiterating as far as possible the recommendations made by the IRC.

108. In **Ashok Kumar Gupta vs. State of U.P.**, [1997] 5 SCC 201 the Court observed at p.250, para.60:-

"The phrase 'complete justice' engrafted in Article 142[1] is the word of width couched with elasticity to meet myriad situations created by human ingenuity of cause or result of operation of statute law or law declared under Articles 32, 136 and 141 of the Constitution...."

109. The scope of the powers of the Supreme Court under Article 142(1) of the Constitution were delineated in the Constitution Bench decision in **Union Carbide Corporation and others vs. Union of India and others**, (1991) 4 SCC 584 which is the sextant for measuring the latitudes and longitudes of exercise of this mostly public policy jurisdiction overriding statutory enactments. In celebrated para.83, the Court held authoritatively in expansive words from which a great deal is made explicit which may require almost no further guidance to Courts:-

"83. It is necessary to set at rest certain misconceptions in the arguments touching the scope of the powers of this Court under Article 142(1) of the Constitution. These issues

*are matters of serious public importance. The proposition that a provision in any ordinary law irrespective of the importance of the public policy on which it is founded, operates to limit the powers of the apex Court under Article 142(1) is unsound and erroneous. In both Garg [AIR 1963 SC 996] as well as Antulay cases [(1988) 2 SCC 602] the point was one of violation of constitutional provisions and constitutional rights. The observations as to the effect of inconsistency with statutory provisions were really unnecessary in those cases as the decisions in the ultimate analysis turned on the breach of constitutional rights. We agree with Shri Nariman that the power of the Court under Article 142 insofar as quashing of criminal proceedings are concerned is not exhausted by Section 320 or 321 or 482 CrPC or all of them put together. The power under Article 142 is at an entirely different level and of a different quality. Prohibitions or limitations or provisions contained in ordinary laws cannot, ipso facto, act as prohibitions or limitations on the constitutional powers under Article 142. Such prohibitions or limitations in the statutes might embody and reflect the scheme of a particular law, taking into account the nature and status of the authority or the court on which conferment of powers — limited in some appropriate way — is contemplated. The limitations may not necessarily reflect or be based on any fundamental considerations of public policy. Sri Sorabjee, learned Attorney General, referring to Garg case [AIR 1963 SC 996], said that limitation on the powers under Article 142 arising from “inconsistency with express statutory provisions of substantive law” must really mean and be understood as some express prohibition contained in any substantive statutory law. He suggested that if the expression ‘prohibition’ is read in place of ‘provision’ that would perhaps convey the appropriate idea. **But we think that such prohibition should also be shown to be based on some underlying fundamental and general issues of public policy and not merely incidental to a particular statutory scheme or pattern.** It will again be wholly incorrect to say*

*that powers under Article 142 are subject to such express statutory prohibitions. That would convey the idea that statutory provisions override a constitutional provision. Perhaps, the proper way of expressing the idea is that in exercising powers under Article 142 and in assessing the needs of "complete justice" of a cause or matter, **the apex Court will take note of the express prohibitions in any substantive statutory provision based on some fundamental principles of public policy and regulate the exercise of its power and discretion accordingly.** The proposition does not relate to the powers of the Court under Article 142, but only to what is or is not 'complete justice' of a cause or matter and in the ultimate analysis of the propriety of the exercise of the power. No question of lack of jurisdiction or of nullity can arise."*

110. In **Kalyan Chandra Sarkar vs. Rajesh Ranjan alias Pappu Yadav and another**, (2005) 3 SCC 284 the Supreme Court had the following to observe on the plenary powers under Article 142 in para.27:-

"27. It may therefore be understood that, the plenary powers of this Court under Article 142 of the Constitution are inherent in the Court and are complementary to those powers which are specifically conferred on the Court by various statutes though are not limited by those statutes. These powers also exist independent of the statutes with a view to do complete justice between the parties ... and are in the nature of supplementary powers ... (and) may be put on a different and perhaps even wider footing than ordinary inherent powers of a court to prevent injustice. The advantage that is derived from a constitutional provision couched in such a wide compass is that it prevents "clogging or obstruction of the stream of justice"(See Supreme Court Bar Assn.[(1998) 4 SCC 409], SCC p. 431, para 47.)"

111. Therefore, Article 142 vests the Supreme Court with the repository of discretionary power that can be wielded in appropriate

circumstances to deliver "complete justice" in a given cause and that is what was done in *Hooda-1*, according to the learned senior counsel.

112. In **Zahira Habibullah Sheikh vs. State of Gujarat**, (2004) 5 SCC 353 the Supreme Court held that the power to transfer a criminal trial from one State to another is within its jurisdiction under Article 142 of the Constitution.

113. In **Supreme Court Bar Association and others vs. B.D. Kaushik**, (2012) 6 SCC 152 the Court observed in para.86 as follows:-

"86. We are unable to accept the said submission made by Mr Dwivedi and Mr Singh, since the need to implement the directions contained in the judgment does not cease upon the judgment being delivered. In order to enforce its orders and directions, the Supreme Court can take recourse to the powers vested in it under Article 142 of the Constitution to do complete justice to the parties. In such cases, the lis does not cease and the expression "matter pending before it" mentioned in Article 142 of the Constitution, would include matters in which orders of the Supreme Court were yet to be implemented, when particularly such orders were necessary for doing complete justice to the parties to the proceedings. To take any other view would result in rendering the orders of the Supreme Court meaningless."

114. He refers in particular to the words "yet to be implemented" in *Kaushik* in order to juxtapose them with the directions and observations in para.68 of *Hooda-2* read with the directions (2) and (3) of para.73 of the same judgment. In **Manohar Lal Sharma vs. Principal Secretary and others**, [2014] 2 SCC 532 [popularly, the Coal Gate case] the Supreme Court explained the power under 142(1) of the Constitution in paragraphs 43 and 47 as under:-

"43. The power under Article 142(1) of the Constitution

which provides that the Supreme Court in exercise of its jurisdiction may pass such decree or make such order as is necessary for doing complete justice in any "cause" or "matter" has been explained in large number of cases. It has been consistently held that such power is plenary in nature. The legal position articulated in Prem Chand Garg [AIR 1963 SC 996] and A.R. Antulay [(1988) 2 SCC 602], with regard to the powers conferred on this Court under Article 142(1) has been explained in Delhi Judicial Service Assn. [(1991) 4 SCC 406] It is expounded by the three-Judge Bench in Delhi Judicial Service Assn. [(1991) 4 SCC 406] that power under Article 142(1) to do "complete justice" is entirely of different level and of a different quality. Any prohibition or restriction contained in ordinary laws cannot act as a limitation on the constitutional power of this Court. Once this Court is in seisin of a cause or matter before it, it has power to issue any order or direction to do "complete justice" in the matter. This legal position finds support from other decisions of this Court in Poosu [(1976) 3 SCC 1], Ganga Bishan [(1986) 1 SCC 75] and Navnit R. Kamani [(1988) 4 SCC 387].

47. The Supreme Court has been conferred very wide powers for proper and effective administration of justice. The Court has inherent power and jurisdiction for dealing with any exceptional situation in larger public interest which builds confidence in the rule of law and strengthens democracy. The Supreme Court as the sentinel on the qui vive, has been invested with the powers which are elastic and flexible and in certain areas the rigidity in exercise of such powers is considered inappropriate."

115. Mr Anupam Gupta also cites **Prakash Singh and others vs. Union of India and others**, [2006] 8 SCC 1 as an instance of judicial law making when the Supreme Court issued various directions including the setting up of the Police Complaints Authority and miscellaneous directions which owed their existence to the plenary power under Article 142

involving judicial legislation for doing complete justice in any cause or matter in supreme overriding public interest of police reforms which was a dire need of the nation where the State Governments were unable to meet or measure up to the challenges presented by the felt necessities of the times for the collective good of the nation.

116. The learned senior counsel submits that Articles 141, 142 and 144 are a judicial outlet and fountain of a collection of ideas which remain inert till they are activated and sprout while venturing to do complete justice in a cause or a matter. The Constitution itself is a proclamation and a statement of ideas for the present and the future. *Hooda-1* is a judicially evolved reasonable classification by the Court under Article 142 of the Constitution akin to legislative power, and therefore, survives on the question of fitment, rank and seniority even though its basis may have been removed by the Act of 2002 as upheld in *Hooda-2*, except to the extent indicated therein. It is not confined to only appointments, as saved by the Supreme Court, but spells much more in terms of relief actually granted and capable of being filtered down in implementation. *Hooda-1* amalgamates two species into one cohesive unit and separates others in the future by acting in the past. The learned senior counsel continues his thread of arguments and submits that the Division Bench speaking through G.S.Singhvi, J., when His Lordship headed the Bench of this Court, in the first major round of litigation in 1996 on merits, read down the 1957 circular as an enabling provision which did not reflect any mandatory overtones. This was an idea which weighed to decline mandamus. The Supreme Court in *Hooda-1* validated the instructions as an idea, as a legal

proposition which the circulars supported. The judicial battle was really one of ideas and concepts consistent with the principles of good administration where posts/vacancies ought to be filled in direct recruitment lest they take long time to suffer another cycle of recruitment. Mr Gupta submits that what is enabling is lawful and not unlawful and this he says was a contradiction in the order of the division bench of this Court which was creased out in *Hooda-1*.

117. In *Sandeep Singh* the Court was confronted with the 1993 circular relied upon by the State of Haryana which the Hon'ble Bench of the Supreme Court read in original in Hindi and after going through the same the Court felt persuaded to hold that the circular says the same thing that was indicated in the earlier part of the judgment where an observation had come that even though *Hooda-1* did not refer to the circular of the year 1993 but the review application which appended the circular stood rejected by the Supreme Court, and that apart even on first principle it appealed to the Supreme Court to commend the view that the vacancies available in any particular service till the date of interview at least should be filled up from the very same examination unless there is any statutory embargo for the same. The Court recorded, that the case in hand (*Sandeep Singh*), no statutory embargo had been pointed out to the Supreme Court. In this view of the matter, the judgment of this Court in *Hooda-1* should apply to the facts and circumstances and continue to govern the inter se seniority. The benefit of appointment was granted to *Sandeep Singh* but at the same time, it was made prospective from the date of appointment under court directions. This separated *Sandeep Singh* case from earlier

court orders including *Hooda-1* beneficiaries. Therefore, he submits that a Court subordinate to the Supreme Court cannot go into the correctness of the decision in *Hooda-1* asked for by persons who are trigger happy to shoot down the judgment, as the petitioners want, and to wish away *Hooda-1* even though it has ceased to exist in view of the Act of 2002 and the ruling in *Hooda-2*, notwithstanding, that in *Hooda-2* it was emphatically ruled out of consideration. But what Mr Anupam Gupta submits is that *Hooda-1* is still necessarily retrospective in granting seniority otherwise there would be no distinction left between *Hooda-1* and *Sandeep Singh's* cases and this emboldens him to submit that *Hooda-1* does not even create a fiction at all with respect to seniority as he had argued earlier in his address but creates real tangible rights which stand crystallized, vested and accrued. He says that there is sufficient indication in rule 11 of the 1930 Rules empowering the Governor of Haryana to include for Register-B, in the order of merit, the names of such number of candidates as Government may from time to time determine, from amongst those who had been declared as qualified in the examination by the Commission without any distinction drawn between the 7th and the 8th candidate, the difference being only fortuitous and accidental. It cannot then be said that respondents 2 to 9 have not been declared qualified in the examination which consists of both HCS and Allied Services and amongst the first 7 and 8 downwards no merit was drawn by the Commission by marking boundaries where one ends and the other starts. This was an inherent feature in the consolidated merit list which was made in running form. In short, appointments beyond advertised vacancies do not suffer

any absolute, inviolable or immutable principle admitting of no exception. The fault lies in not making recruitments year-wise as rule 9 of the 1930 rules mandates, otherwise such problems would not arise and if they have, they can be resolved as was done in *Hooda-1* granting deemed appointment and, therefore, deemed seniority.

118. While we are on the discussion of the scope of Article 142 of the Constitution it would be useful to notice some other judgments of the Supreme Court on exercise of such extraordinary power. The Supreme Court in several cases has defined its own jurisdiction to do complete justice between the parties in a cause. In **Manohar Lal Sharma vs. Principal Secretary and others**, (2014) 2 SCC 532 [paragraphs 43 & 46] the Supreme Court held that this jurisdiction should not be in conflict with the law expressly provided for in a statute dealing expressly with the subject. The power has to be within statutory limitations and in larger public interest.

119. In **Common Cause vs. Union of India**, (1999) 6 SCC 667 the Court held that it cannot ignore the substantive law much less constitutional guarantees. S. Rajendra Babu, J. was a member of the Bench that delivered judgment in *Common Cause*, four months after his Lordship wrote the opinion for the Court in *Hooda-1* on April 13, 1999 while *Common Cause* was pronounced on August 03, 1999.

120. In **Sushil Kumar Singhal vs. Punjab National Bank**, (2010) 8 SCC 573 the Supreme Court while dealing with Article 142 of the Constitution held that power to do complete justice would not justify directions which are contrary to law or not permissible in law.

121. In **CBI vs. Keshub Mahindra**, (2011) 6 SCC 216 the Supreme Court held that any order made by it in violation and breach of statutory provisions would be a case against the ends of justice. The inherent power should not be exercised as against any express bar of law engrafted in a provision of law. In para 11 the court held:-

“No decision by any court, this Court not excluded, can be read in a manner as to nullify the express provisions of an Act or the Code and the 1996 judgment never intended to do so. In the 1996 judgment [cf.(1996) 6 SCC 129], this Court was at pains to make it absolutely clear that its findings were based on materials gathered in investigation and brought before the Court till that stage. At every place in the judgment where the Court records the finding or makes an observation in regard to the appropriate charge against the accused, it qualifies the finding or the observation by saying "on the materials produced by the prosecution for framing charge". "At this stage", is a kind of a constant refrain in that judgment. The 1996 judgment was rendered at the stage of sections 209/228/240 of the Code and we are completely unable to see how the judgment can be read to say that it removed from the Code sections 323, 216, 386, 397, 399, 401 etc. or denuded a competent court of the powers under those provisions. In our view, on the basis of the material on record, it is wrong to assume that the 1996 judgment is a fetter against the proper exercise of powers by a court of competent jurisdiction under the relevant provisions of the Code.”

122. In **Pramod Kumar Saxena vs. Union of India**, (2008) 9 SCC 685 the Supreme Court held that under Article 142 it cannot direct an authority to act contrary to law. In order to do justice in a cause it can do substantial justice between the parties but not those who are not parties as without hearing both sides the decision cannot be called doing justice.

123. In **Monica Kumar (Dr.) and another vs. State of Uttar**

Pradesh and others, (2008) 8 SCC 781 the Supreme Court observed that in the exercise of its inherent power in Article 142 it is advisable to leave it undefined and uncatalogued so that it remains elastic enough to be moulded to suit a given situation. Reference may also be had to the decisions of the Supreme Court for the understanding of the scope of Article 142 to the following decisions: **B.S. Joshi and others vs. State of Haryana and another**, (2003) 4 SCC 675; **Nikhil Merchant vs. CBI and another**, (2008) 9 SCC 677; **Manoj Sharma vs. State and others**, (2008) 16 SCC 1 all three judgments were upheld on reference to larger bench of three Judges as to the correctness of the three judgments on the question of scope of Section 482 Cr.P.C. and quashing criminal proceedings in **Gian Singh vs. State of Punjab**, (2012) 10 SCC 303. The Court observed: *“...the exercise of inherent powers would depend entirely on the facts and circumstances of each case. In other words, not that there is any restriction on the power or authority vested in the Supreme Court in exercising powers under Article 142 of the Constitution, but that in exercising such powers the Court has to be circumspect, and has to exercise such power sparingly in the facts of each case.”* In short and to put it in another way, the benevolence of Article 142 is to prevent injustice and at the same time to construct an edifice of complete justice in a cause. Justice means justice to all.

124. The learned senior counsel reminds the Court that we live in an age of scepticism where abuse of power, breach of trust and loss of faith are readily alleged, inferred and deduced and recent history may compel such a way of thinking. But everything is relative to social justice in the

community we live and so is merit and one should not fall easy prey to popular beliefs and legal platitudes on measuring merit without a fuller understanding of the life and times we live in. Merit is an intrinsic value itself and should not suffer an elitist view or an impairment of the psyche that a person who is appointed within the advertised quota is superior to the person who is next below the last in the same list of recommendations. The select list is a running account of merit, serially numbered and does not certify any one of them to be inferior or superior to the other as a human being and an educated person in any fixed or absolute terms or by a mathematical formula to measure individual human effort, given the luck factors involved in any examination which can vary astonishingly from minute to minute, hour to hour and day to day. The peak performance waxing and waning with passage of time and by the hour, just as athletes do while breasting the finishing tape in the hundred meter dash in the Olympics in a photo finish and within fractions of seconds of each other and who would finally be seen on the victory stand. This is inherent in any system of examinations where inevitably a merit list is drawn. The sooner we erase this wrong notion from our mind that a wide disparity on merit exists between the first lot of 7 selected candidates and the next 9 starting from VSH in the 1989 advertisement/recruitment process, the better it would be. And it is this marginal difference which stands effaced in *Hooda-1* where all were placed on the same footing in a single merit list prepared by the Commission for induction into HCS and Allied services, rescued by the operation of the mandatory circulars of 1957 and 1972. These circulars permitted judicial recourse to them to claim filling

additional vacancies arising after the announcement of the selection result/recommendations in May 1992 and within 6 months therefrom. If Government defaulted in its duty to give effect to the circulars, at the appropriate time, and remitting the nine vacancies to a fresh recruitment process from where the petitioners claim rights over and above the respondents with respect to seniority, then the appellants in *Hooda-1* should not be made to suffer. Legal fictions run out realities. *Hooda-1* cannot be read in isolated doom. It goes without saying that its retrospectivity in directing consideration for making 'appointments' holds the field and would continue to, till the officers concerned retire from service. This is indisputable. None can join issue on this and none have before me nor could. And while we are on the question of merit it may be apt to refer to the observations in **M. Nagaraj v. Union of India**, (2006) 8 SCC 212 the Constitution Bench of the Supreme Court explaining in para. 45 what merit signifies in the everyday world:

"45. Merit is not a fixed absolute concept. Amartya Sen, in a book Meritocracy and Economic Inequality, edited by Kenneth Arrow, points out that merit is a dependent idea and its meaning depends on how a society defines a desirable act. An act of merit in one society may not be the same in another. The difficulty is that there is no natural order of "merit" independent of our value system. The content of merit is context-specific. It derives its meaning from particular conditions and purposes. The impact of any affirmative action policy on "merit" depends on how that policy is designed. Unfortunately, in the present case, the debate before us on this point has taken place in an empirical vacuum. The basic presumption, however, remains that it is the State who is in the best position to define and measure merit in

whatever ways it considers it to be relevant to public employment because ultimately it has to bear the costs arising from errors in defining and measuring merit.."

The Ruling in *State of J&K vs. Sat Pal*; (2013) 11 SCC 737:

125. One of the judgments of the Supreme Court quoted by Mr Anupam Gupta deserves a special mention and with some necessary discussion on the case. It is a service law matter of unique importance where the Supreme Court exercised its power under Article 142 in express words in a service matter unlike the other cases cited by him. The case in point is **State of Jammu & Kashmir and others vs. Sat Pal**, (2013) 11 SCC 737 in which reference was made to *Hooda-1* and therefore is of a special value in the understanding of the present cases. The facts were that Sat Pal was next below in merit to one Trilok Nath in the select list of direct recruitment to the advertised posts of Junior Engineer [Civil] Grade-II. They were both Scheduled Caste reserved category candidates. The admitted position was that Trilok Nath was offered appointment but declined to accept the offer and did not join service. Sat Pal laid claim on the vacant post as next in waiting before the High Court of Jammu & Kashmir at Jammu. The High Court issued notice and called upon the State Government to file pleadings which were not filed and the right to file objections was closed by order dated April 05, 2010. The Supreme Court noticed that it should have been natural for the High Court to infer that the assertions made by the respondent before it were truthful and acceptable for a final determination of the controversy. Despite the aforesaid, the High Court disposed of the writ petition at the admission stage with a direction to the State to consider appointment keeping in mind

the communication dated May 05, 2008 issued by the Chief Engineer, R&B Department, Jammu, affirming that Trilok Nath had declined to join. A period of two months was fixed to take a final decision. The Department rejected the claim on two grounds. Firstly, that the waiting list issued in respect of the recruitment has outlived its validity way back in May 2008 and appointment cannot be offered accordingly. Secondly, the vacancies cannot be filled at a belated stage. Aggrieved by the rejection order dated August 23, 2011 Sat Pal instead of assailing the same by way of a fresh writ petition filed a Contempt Petition. The Contempt Petition was disposed of on October 29, 2011 by passing the following order:-

“The claim of the petitioner for his appointment as Junior Engineer (Civil), Grade II arose during the validity of select list/wait list. The duty was cast on the competent authority, who was seized of the select list/wait list to fill up the vacancies from the wait list, but it failed to perform its duty. It is not the fault of the petitioner that his claim for appointment was not considered during the validity of select list/wait list. The fault is committed by the authority and the petitioner cannot be penalised for the same. The claim of the petitioner on merits deserved to be allowed for being appointed on the post of Junior Engineer (Civil), Grade II when select list/wait list was in operation. Same having not been done despite request having been made, his right of consideration for being appointed would thus survive though such claim was considered by the Government after the expiry of the validity period of select list/wait list.

Consideration order issued by the Government does not comply with the court directions. Before initiating action for framing rule in this contempt petition, it will be appropriate to afford an opportunity to the respondents to consider the whole issue and pass orders in accordance with the judgment of the Court. Four weeks’ time is granted to the respondents to reconsider the whole issue in the light of the

*observations made hereinabove and file compliance report
by or before next date.”*

126. Feeling aggrieved by the directions issued in the contempt petition, the State of J&K carried an intra court appeal, assailing the order passed in the petition on the ground that directions were not permissible in exercise of contempt jurisdiction. The High Court dismissed the appeal as not maintainable. Both the orders were assailed before the Supreme Court by the State of J & K. In para.9 the Supreme Court observed in caustic words, the crux of the controversy:-

“9. The controversy in hand is yet another illustration of the denial of a legitimate claim, of an innocent citizen. Rather than appreciating the claim raised by the respondent before the High Court through SWP No. 1156 of 2009, to which the appellants failed to even file their response, the same was ordered to be closed by an order dated 5-4-2010. Thereupon the appellants have chosen to pursue a course, which would sideline the main controversy. The course adopted would neither serve their own purpose, nor the purpose of the respondent Sat Pal.”

127. The Supreme Court held on merits that a waiting list would commence to operate when offers of appointment had been issued to those emerging on the top of the list. The existence of a waiting list allows room to the appointing authority to fill up vacancies which arise during the subsistence of the waiting list. A waiting list commences after vacancies are filled and a post becomes available. The Court found that in the controversy the aforesaid situation for operating the waiting list had not arisen, because one post was actually never filled. Even if it is assumed that all the posts were filled up and Trilok Nath was offered appointment, even then the validity of the waiting list had to be determined with

reference to April 22, 2008 when it was offered to Trilok Nath. Even the State did not dispute that the waiting list was valid till May 2008. If Trilok Nath was found eligible for appointment against the vacancy in question out of the same waiting list, Sat Pal would be equally eligible for appointment against the said vacancy. This would be the unquestionable legal position. It was in this background of the controversy the Supreme Court drew from its earlier dicta in *Hooda-1*. The Court referred to para.3 of the case. The Supreme Court also relied on its past dicta in **Mukul Saikia vs. State of Assam**, [2009] 1 SCC 386 with respect to operation of waiting lists against notified vacancies and not future vacancies. Para.33 of *Saikia* was quoted which is in its crucial part underlined for emphasis, since it is a reiteration of the principles laid down in *Hoshiar Singh* case.

“33. At the outset it should be noticed that the select list prepared by APSC could be used to fill the notified vacancies and not future vacancies. If the requisition and advertisement was only for 27 posts, the State cannot appoint more than the number of posts advertised, even though APSC had prepared a select list of 64 candidates. The select list got exhausted when all the 27 posts were filled. Thereafter, the candidates below the 27 appointed candidates have no right to claim appointment to any vacancy in regard to which selection was not held. The fact that evidently and admittedly the names of the appellants appeared in the select list dated 17-7-2000 below the persons who have been appointed on merit against the said 27 vacancies, and as such they could not have been appointed in excess of the number of posts advertised as the currency of select list had expired as soon as the number of posts advertised are filled up, therefore, appointments beyond the number of posts advertised would amount to filling up future vacancies meant for direct candidates in violation of quota rules. Therefore, the appellants are not

entitled to claim any relief for themselves. The question that remains for consideration is whether there is any ground for challenging the regularisation of the private respondents."

128. The Supreme Court made a telling comment in para.14 of *Sat Pal*: [in respect of the Contempt Petition order dated October 29, 2011] to the following effect: "The aforesaid observations were advisory in nature. Rather than initiating action against the appellants [State of J&K] for having missed the point, while considering the claim of the respondent [Sat Pal] in contempt jurisdiction, the High Court in its wisdom required the appellants to correct the mistake committed" by them. The High Court did not, in the first instance, initiate any coercive action against the appellants. In the aforesaid view of the matter, it was found apparent that the appellants unnecessarily preferred a Letters Patent Appeal to assail the order of the High Court passed in contempt jurisdiction. The Supreme Court did not accept the technical grounds of maintainability of the appeal. The Court was conscious of its earlier dicta in **Prithawi Nath Ram vs. State of Jharkhand**, [2004] 7 SCC 261, **V.M. Manohar Prasad vs. N.Ratnam Raju**, [2004] 13 SCC 610 and **Midnapore Peoples' Coop. Bank Ltd. vs. Chunilal Nanda**, [2006] 5 SCC 399 that an appeal was not maintainable against an order passed in contempt jurisdiction. The Court held that the pleas raised by the State of J&K could not be said not to be "fully legitimate". There was truth in it as far as the legal position stood. Therefore, the Supreme Court declined to invoke jurisdiction vested in it under Article 136 of the Constitution for debating and deciding the technical pleas advanced by the appellants. Instead, the Court invoked its

jurisdiction under Article 142 of the Constitution for doing complete justice in the cause. The Supreme Court found that entertaining the appeals would defeat the ends of justice for which Sat Pal had approached the High Court. Entertaining the objections of the State would result in deviating from the merits of the claim raised by Sat Pal. The Court recorded in clear words that it gave no pleasure to say that the State is not an adversary, and ought not to have behaved in the manner it has chosen in the facts and circumstances of the case. It was in this background that a direction was issued to the State to appoint Sat Pal against the post of Junior Engineer [Civil] Grade-II and in the circumstances the appointment will relate back to the permissible date contemplated under the rules laying down conditions of service of the cadre to which Sat Pal will be appointed. Naturally, the respondent will be entitled to seniority immediately below those who were appointed from the same process of selection. The monetary benefits, it was ordered, will accrue from the date of the order i.e. from February 05, 2013.

129. It emerges from the aforesaid verdict that seniority was linked to rules laying down conditions of service and not otherwise. Rules were not departed from and were applied in carving out the just and meet relief under Article 142 (1). This is a decision of outstanding value in its dispensation of doing complete justice in a cause in a service matter, in the face of an order passed in contempt jurisdiction which could easily have been faulted but was saved to hand down even handed justice in a special way. This is the solitary case in the selection of judgments referred to by Mr Anupam Gupta that deals directly with service law in relation to

Article 142 of the Constitution. *Hooda-1* does not refer to Article 142 of the Constitution or that the Court was expressly acting under it. Consequently, the directions issued in *Hooda-1* remain confined to Article 136 of the Constitution and thus its ratio alone would be binding precedent and a stare decisis and not of the kind as enunciated in *Union Carbide* case in its paragraph 83 which is universal in its application as “stare decisis”. The distinction is apparent from para.16 in *Sat Pal* case where Court refused to act under Article 136 which was felt inadequate to impart full justice and instead chose to act directly under Article 142 for doing complete justice in the cause. In these special circumstances, I would not read the decision in *Sat Pal* case, relied upon by the respondents [Group-A], as one which completely favours the cause of those Mr Gupta represents because the order is still hedged amidst the rules of service which are supreme and seniority has to be read in that context alone, otherwise this Court may be seen as not abiding by the Constitution and the laws as established.

130. Yet another case cited by Mr Anupam Gupta is **Madan Lal and others vs. State of Jammu & Kashmir and others**, [1995] 3 SCC 486 which dealt with the process of selection of Munsifs in the State of J&K. The requisition was for 11 vacancies in the light of the Jammu & Kashmir Civil Services [Judicial] Recruitment Rules, 1967. In all 79 candidates were found qualified for the viva voce test to be interviewed under rule 10. One of the eight issues raised, that a merit list of 16 candidates in General category was prepared and 4 candidates from the reserved category. Rule 41 of the Rules was in consideration. The Government of J&K wrote to

the Public Service Commission on the subject of selection of candidates for appointment as Munsifs in the Judicial Department that only 11 vacancies are presently available and a list of 20 candidates be prepared and furnished to the Government. The Commission was informed that no waiting list of candidates is required. It was this letter with reference to rule 41 that was the mainstay of the case of the appellants. Rule 41 permitted waiting list to remain in operation for a period of one year from the date of recommendations when published in the Government Gazette or till the list is exhausted, whichever is earlier, the Supreme Court noted on point of fact that the life of the waiting list was one year which does not include anticipated vacancies and the recruitment initiated could be for selecting 11 suitable candidates. However, the Commission may by abundant caution prepare a list of 20 and even 30 candidates as per ranking of merit. But such a list will have a maximum life of one year from the date of publication or till all the required appointments are made whichever event happened earlier. Therefore, candidates from Sr. Nos.12 to 20 can be considered only in case within one year of the publication of the list in the Gazette all the 11 vacancies do not get filled up for any reason. In such a case, only this additional list of selected candidates would serve as a reservoir from which meritorious suitable candidates can be drawn in order of merit to fill up the remaining requisition and advertised vacancies, out of the total 11 vacancies. The Supreme Court relied on its earlier dicta in *Hoshier Singh* case. It was in these circumstances that the Court distinguished **Asha Kaul (Mrs) vs. State of J&K**, [1993] 2 SCC 573 where the facts were that the list remains valid

for one year from the date of its approval and from the date of publication, and if within such one year, any of the candidates therein is not appointed, the list lapses and a fresh list has to be prepared. If the Government wanted to disapprove or reject the list, it ought to have done so within a reasonable time of the receipt of the select list in the face of complaints received by the Government about the process of selection. But in *Madan Lal* the requisition was for 11 posts and not 20 vacancies as in *Asha Kaul* case and therefore inclusion in the select list does not confer any indefeasible right to appointment, but there was an obligation on the Government to fill up all the posts for which requisition and advertisement were given. Finally, the Supreme Court held in *Madan Lal* that the moment these 11 posts are filled up within one year of the publication of the list, this list will get exhausted or if for any reason these 11 vacancies could not be filled up by the time one year from the date of publication of the list is over, even then the list would get exhausted and fresh recruitment will have to be made in the light of fresh requisition from the State. The Court, in computing one year's currency of the select list as per rule 41, the period during which appointments were stayed during pendency of the proceedings would naturally get excluded. This is how contention No.8 was answered that the waiting list can be operated within its life but only towards the requisitioned number of vacancies, i.e. 11. Mr Anupam Gupta submits that the 1957 circular has an inbuilt theory of waiting list, the currency of which is six months for vacancies which arise after the recommendations are made and the dicta in *Madan Lal* case should not be read against his clients since the present case is dependent

on different principles where the field was occupied by the 1957 and 1972 circulars.

131. Learned senior counsel then refers to the ruling in **Ms. Neelima Shangla, Ph.D. Candidate vs. State of Haryana and others**, [1986] 4 SCC 268 where the Supreme Court carved out an exception to the general rule against appointments in excess of vacancies advertised. This decision was pre *Hoshiar Singh*. He points out that *Neelima Shangla* is a case decided post **Maneka Gandhi**, [AIR 1978 SC 597] and **Ajai Hasia**, [AIR 1981 SC 487] cases and the rule really was against arbitrariness in state action and these two rulings of the Supreme Court rationalize the law.

132. The facts in *Neelima Shangla* were that her name was not included in the select list of appointments to the Haryana Civil Service [Judicial Branch]. Though several successful candidates were not appointed, it was only one of them who filed a writ petition in the High Court challenging the selection. This Court made an interim order to keep one post vacant pending decision. The rule in question was rule 8 of the Punjab Civil Service [Judicial Branch] Rules, 1951 as amended and applicable to the State of Haryana. Rule 8 was thus worded:-

"Rule 8: There is no limit to the number of names borne in the High Court Register but ordinarily no more names will be included than are estimated to be sufficient for the filling of vacancies which are anticipated to be likely to occur within two years from the date of selection of candidates as a result of examination."

133. The restrictive rule laid down by the Supreme Court in its earlier dicta in **State of Haryana vs. Subash Chander Marwaha**, [1974] 3 SCC 220 [also a case of appointment to Judicial service] where Government

decided not to appoint candidates who have secured less than 55 per cent marks. The result was that although there were a large number of vacancies only a few candidates were selected for appointment. The selection was challenged on the ground that it could not be so restricted when qualified candidates were available. The Supreme Court rejected the submission and upheld selection disentitling candidates to be considered for appointment against the left out vacancies. The Supreme Court in *Neelima Shangla* explained that even though a principle has been laid down in *Marwaha* still the selection cannot arbitrarily be restricted to a few candidates, notwithstanding the number of vacancies and the availability of qualified candidates. There must be a conscious application of the mind of the Government and the High Court before the number of persons selected for appointment is restricted. The Supreme Court reasoned that any other interpretation of rule 8 of Part 'D' of the rules would be meaningless. The Supreme Court held that though the rules required the Public Service Commission to publish the result of the examination and, apparently, also to communicate the result to the Government, the Public Service Commission did not publish the result in the first instance and sent only the names of 17 candidates belonging the general category to the Government, though many more had qualified. The Court held "That was wrong. The names of all the qualified candidates had to be sent to the Government." The Supreme Court rejected the argument of the Commission and reason given for not communicating the entire list of qualified candidates to the Government since they were originally informed that there were 28 vacancies. That is not a sound reason at all,

the Supreme Court held. Under the rules relating to appointment of Subordinate Judges in Haryana, the Commission is not concerned with the number of vacancies at all nor is it expected to withhold the full list of successful candidates on the ground that only a limited number of vacancies are available. The stand of the Government of Haryana based on the reasoning of the Commission was rejected. The Court found from supervening events that the High Court had already informed the Government that there are more vacancies which were required to be filled. The Government did not know of this, that names of several candidates have been withheld from the Government by the Commission when it wrote to it to hold fresh competitive examination. The Supreme Court held that if the government had been aware that there were qualified candidates available they would have surely applied rule 8 of Part D and made the necessary selection to be communicated to the High Court. The net result was that the petitioner's name was not sent for being appointed as a Subordinate Judge. She was directed to be appointed to HCS [Judicial Branch] by including her name in the register maintained under rule 1 of Part D of the Rules. She was held entitled to her due place in the seniority list of 1984 batch. However, it should not be lost sight of that the Judicial Branch examination is a single selection process for a single service since it is not conducted as part and parcel of recruitment to any other service under the State and therefore a running list is significantly of a different hue. Be that as it may, it may not be necessary to add any gloss to the true ratio of *Neelima Shangla* case since it stands already culled out by the Constitution Bench of the Supreme Court in **Shankarsan Dash v. Union**

of India, (1991) 3 SCC 47, in the following words:-

"It is true that the claim of the petitioner in the case of Miss Neelima Shangla v. State of Haryana was allowed by this Court but, not on the ground that she had acquired any right by her selection and existence of vacancies. The fact was that the matter had been referred to the Public Service Commission which sent to the Government only the names of 17 candidates belonging to the general category on the assumption that only 17 posts were to be filled up. The Government accordingly made only 17 appointments and stated before the Court that they were unable to select and appoint more candidates as the Commission had not recommended any other candidate. In this background it was observed that it is, of course, open to the Government not to fill up all the vacancies for a valid reason, but the selection cannot be arbitrarily restricted to a few candidates notwithstanding the number of vacancies and the availability of qualified candidates; and there must be a conscious application of mind by the Government and the High Court before the number of persons selected for appointment is restricted. The fact that it was not for the Public Service Commission to take a decision in this regard was emphasised in this judgment."

134. Nothing more can be said of *Neelima Shangla* case than what is said above. Thus, Mr Anupam Gupta's reading of the case from the point of view conceived by him is not directly on the point and strikes a different note. The case ultimately was not dependent on vacancy based relief or on the principle that she had acquired a right by virtue of selection and recommendation of the Commission. Rather, the case was allowed on quite another point, that is, the rule against arbitrariness and fairness-in-action not of the Commission but of the State Government and the High Court.

Re: On the question of arbitrariness, discrimination and classification.

135. According to Mr Anupam Gupta, the Court exercised in the above cited two cases [*Maneka Gandhi v. Union of India & Ajay Hasia v. Khalid Mujib Sehravardi & Ors.*] the rule against arbitrariness, the philosophical thrust of which rule was first expounded by the Constitution Bench of the Supreme Court in **Charanjit Lal Chowdhury vs. The Union of India and others**, AIR 1951 SC 41, which is the first rendition of the Supreme Court on the width and scope of Article 14 drawing thought largely per Fazl Ali, J., from Professor Willis on the subject; holding:-

"[8] *The only serious point, which in my opinion, arises in the case is whether Article 14 of the Constitution is in any way infringed by the impugned Act. This Article corresponds to the equal protection clause of the Fourteenth Amendment of the Constitution of the United States of America, which declares that "no State shall deny to any person within its jurisdiction the equal protection of the laws". Professor Willis dealing with this clause sums up the law as prevailing in the United States in regard to it in these words:*

"Meaning and effect of the guaranty--The guaranty of the equal protection of the laws means the protection of equal laws. It forbids class legislation, but does not forbid classification which rests upon reasonable grounds of distinction. It does not prohibit legislation, which is limited either in the objects to which it is directed or by the territory within which it is to operate. 'It merely requires that all persons subjected to such legislation shall be treated alike under like circumstances and conditions both in the privileges conferred and in the liabilities imposed.' 'The inhibition of the amendment was designed to prevent any person or class of persons from being singled out as a special subject for discriminating and hostile legislation'. It

does not take from the states the power to classify either in the adoption of police laws, or tax laws, or eminent domain laws, but permits to them the exercise of a wide scope of discretion, and nullifies what they do only when it is without any reasonable basis. Mathematical nicety and perfect equality are not required. Similarity, not identity of treatment, is enough. If any state of facts can reasonably be conceived to sustain a classification, the existence of that state of facts must be assumed. One who assails a classification must carry the burden of showing that it does not rest upon any reasonable basis." [Page 579, 1st Edition of Constitutional Law by Prof. Willis.]

Having summed up the law in this way, the same learned author adds :---

"Many different classifications of persons have been upheld as constitutional. A law applying to one person or one class of persons is constitutional if there is sufficient basis or reason for it."

*There can be no doubt that Article 14 provides one of the most valuable and important guarantees in the Constitution which should not be allowed to be whittled down, and, while accepting the statement of Professor Willis as a correct exposition of the principles underlying this guarantee, I wish to lay particular emphasis on the principle enunciated by him that any classification which is **arbitrary** and which is made without any basis is no classification and a proper classification must always rest upon some difference and must bear a reasonable and just relation to the things in respect of which it is proposed."*

136. This was a giant leap forward where classification was subjected to principles of non-arbitrariness. According to the learned senior counsel this is a first time within the first year of its constitution the Supreme Court introduced the word 'arbitrary' through the treatise of the learned author Prof. Willis theorizing on the Constitution of the United States in relation to the Fourteenth Amendment of the Constitution of United States

of America, which declares that "*No State shall deny to any person within its jurisdiction the equal protection of the laws*". A clear connection was established between the 14th Amendment of the United States and Article 14 of the Constitution of India. The question before the Supreme Court revolved around the validity of the **Sholapur Spinning and Weaving Company [Emergency Provisions] Act, 1950** which was challenged as being in violation of the right to property guaranteed under Article 31 as it then stood and an Act as infringing the rights under Articles 19 and 14 of the Constitution as well. The Act was challenged as a piece of discriminatory legislation, creating inequality before the law and violating the principles of equal protection of laws under Article 14. It was in these circumstances that the Supreme Court went into the question of classification and state action whether it was free from arbitrariness. The challenge was rejected. The Act was upheld but the valuable principle was introduced that legislation suffers reasonable classification which must always rest upon some difference and must bear a reasonable and just relation to the things in respect of which it is proposed. Later, these significant words would be put in more mechanical form as legislation must bear if it is to survive, an intelligible differentia which must have nexus with the objects sought to be achieved. If the two can co-exist and the classification is reasonable then the Court must tilt in favour of upholding the legislation.

137. Mr Anupam Gupta next would then refer to the Constitution Bench decision in **The State of Bombay and another vs. F.N. Balsara**, AIR 1951 SC 318 [May 25, 1951]. The Supreme Court relied on its then

recent dicta in *Charanjit Lal* case on the meaning and scope of Article 14.

138. It is then the turn of the Constitution Bench decision of seven Judges in the **State of West Bengal vs. Anwar Ali Sarkar and another**, AIR 1952 SC 75 [11.01.1952] which ruling is very significant in the development of law in India and a shining star in protection of civil liberties of the citizen. The challenge was to the West Bengal Special Courts Act, 1950 which had created a Special Court to try various criminal offences alleged to have been committed by 50 persons who attacked a factory known as the Jessop Factory in Dum Dum, Calcutta and were tried and convicted by the Special Court constituted by a notification dated January 26, 1950 in exercise of powers conferred by section 5[1] of the Act. The Supreme Court declared the Act unconstitutional and violative of Article 14 of the Constitution. The Court did not find a valid classification in the real sense of the term to subject a class of persons under a penal procedure prescribed by the Act. Trials could take place only by the criminal courts established by law. The Court held that there could be no classification of "offences" or "classes of offences". The rule of law was emphatically embedded into the penal law and even that should be free of arbitrary action of the State. Citizens could not be discriminated in this manner howsoever grave the offence may be. Offenders could be handed over to the law alone and not handed over to a special law. The offending section 5 of the Act creating the Special Court with the object to provide for the speedier trial for the certain offences which was struck down as unconstitutional, reads as follows:-

"1. A Special Court shall try such offences or classes of

offences or cases or classes of cases, as the State Government may, by general or special order in writing, direct.

2. No direction shall be made under sub-section (1) for the trial of an offence for which an accused person was being tried at the commencement of this Act before any Court but, save as aforesaid, such direction may be made in respect of an offence, whether such offence was committed before or after the commencement of this Act."

139. Mr Gupta connects the principles laid down in *Anwar Ali* with the ratio of *Hooda-1* quoting per Mahajan, J. stating in short the scope of Article 14 in paragraphs 85, 86 and 87:-

"It is designed to prevent any person or class of persons for being singled out as a special subject for discriminatory and hostile legislation. Democracy implies respect for the elementary rights of man, however suspect or unworthy. Equality of right is a principle of republicanism and Article 14 enunciates this equality principle in the administration of justice. In its application to legal proceedings the Article assures to everyone the same rules of evidence and modes of procedure. In other words, the same rule must exist for all in similar circumstances. This principle, however, does not mean that every law must have universal application for all persons who are not by nature, attainment or circumstance, in the same position.

[86]By the process of classification the State has the power of determining who should be regarded as a class for purposes of legislation and in relation to a law enacted on a particular subject. This power, no doubt, in some degree is likely to produce some inequality; but if a law deals with the liberties of a number of well-defined classes, it is not open to the charge of denial of equal protection on the ground that it has no application to other persons. The classification permissible, however, must be based on some real and substantial distinction bearing a just and reasonable relation to the objects sought to be attained and cannot be made arbitrarily and without any substantial basis. Classification thus means segregation in classes

which have a systematic relation, usually found in common properties and characteristics. It postulates a rational basis and does not mean herding together of certain persons and classes arbitrarily. Thus the legislature may fix the age at which persons shall be deemed competent to contract between themselves, but no one will claim that competency to contract can be made to depend upon the stature or colour of the hair. "Such a classification for such a purpose would be arbitrary and a piece of legislative despotism" Vide Gulf Colorado & Santa Fe Railway Co. v. W.H. Ellis, [1897] 165 U.S. 150.

[87]Speedier trial of offences may be the reason and motive for the legislation but it does not amount either to a classification of offences or of cases. As pointed out by Chakravarti J. the necessity of a speedy trial is too vague and uncertain a criterion to form the basis of a valid and reasonable classification. In the words of Das Gupta J. it is too indefinite as there can hardly be any definite objective test to determine it. In my opinion, it is no classification at all in the real sense of the term as it is not based on any characteristics which are peculiar to persons or to cases which are to be subject to the special procedure prescribed by the Act. The mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of Article 14. To get out of its reach it must appear that not only a classification has been made but also that it is one based upon a reasonable ground on some difference which bears a just and proper relation to the attempted classification and is not a mere arbitrary selection."

140. Mr Anupam Gupta would then take the Court to dicta per Mukherjea, J. in *Anwar Ali* which he contends is relevant to *Hooda-1*, observing that "it can be taken to be well settled that the principle underlying the guarantee in Article 14 is not that the same rules of law should be applicable to all persons with the Indian Territory or that the same remedies should be made available to them irrespective of differences of circumstances. Mukherjea, J. referred to earlier dicta in *Charanjit Lal* emphasizing that Article 14 "only means that all persons

similarly circumstanced shall be treated alike both in privileges conferred and liabilities imposed". The position between the two should be substantially the same. Having said this, the Court brought in the question of classification holding that "as there is no infringement of the equal protection rule, if the law deals alike with all of a certain class, the legislature has the undoubted right of classifying persons and placing those whose conditions are substantially similar under the same rule of law, while applying different rules to persons differently situated." The Hon'ble Judge drew strength from Dowling Cases on Constitutional Law, 4th E.D. 1139 observing that:-

"It is said that the entire problem under the equal protection clause is one of classification or of drawing lines vide 'Dowling cases on Constitutional law', 4th Ed. 1139. In making the classification the legislature cannot certainly be expected to provide "abstract symmetry." It can make and set apart the classes according to the needs and exigencies of the society and as suggested by experience. It can recognize even "degrees of evil" Vide Skinner vs. Oklahoma (1942) 316 U s. 535 at p.540, but the classification should never be arbitrary artificial or evasive. It must rest always upon real and substantial distinction bearing a reasonable and just relation to the thing in respect to which the classification is made; and classification made without any reasonable basis should be regarded as invalid Southern Rly Co. v. Greene, (1910) 216 U.S. 400 at p.412. These propositions have not been controverted before us and it is not disputed also on behalf of the respondents that the presumption is always in favour of the constitutionality of an enactment and the burden is upon him, who attacks it, to show that there has been transgression of constitutional principles."

141. It is the contention of the learned senior counsel that the first

seven inductees to HCS prior to *Hooda-1* and VSH, Mann and Yadav and so also the remaining respondents till respondent No.9 are persons similarly circumstanced, if not identically, and deserve to be treated alike in privileges conferred in *Hooda-1*. Their inter se positions are substantially the same and they should not be de-classified and separated from the Group by bifurcating seniority to their detriment from their appointments.

142. Mr Anupam Gupta would then draw the attention of the Court to the felicity of language and constitutional law thinking, in the invaluable opinion of Vivian Bose, J. in his separate but concurring judgment and the treatment the learned Judge gave to the words equality, classification and discrimination in *Anwar Ali*. Learned senior counsel reads in *extenso* in court the rich ideas in paragraphs 79, 80, 83 to 88, 91 and 92 which make a pleasure to read in their felicitous and forensic literary heights, an opinion expressed from the highest judicial altitude, which should be made a part of law syllabus, as a must-read:-

“[79] *Then, again, what does "equality" mean? All men are not alike. Some are rich and some are poor. Some by the mere accident of birth inherit riches, others are born to poverty. There are differences in social standing and economic status. High sounding phrases cannot alter such fundamental facts. It is therefore impossible to apply rules of abstract equality to conditions which predicate in equality from the start; and yet the words have meaning though in my judgment their true content is not to be gathered by simply taking the words in one hand and a dictionary in the other, for the provisions of the Constitution are not mathematical formula which have their essence in mere form. They constitute a framework of government written for men of fundamentally differing opinions and written as much for the*

future as the present. They are not just pages from a text book but form the means of ordering the life of a progressive people. There is consequently grave danger in endeavouring to confine them in watertight compartments made up of ready made generalisations like classification. I have no doubt those tests serve as a rough and ready guide in some cases but they are not the only tests, nor are they the true tests on a final analysis.

[80] What, after all, is classification? It is merely a systematic arrangement of things into groups or classes, usually in accordance with some definite scheme. But the scheme can be anything and the laws which are laid down to govern the grouping must necessarily be arbitrarily selected; also granted the right to select, the classification can be as broad based as one pleases, or it can be broken down and down until finally just one solitary unit is divided off from the rest. Even those who propound this theory are driven to making qualifications. Thus, it is not enough merely to classify but the classification must not be 'discriminatory', it must not amount to 'hostile action', there must be 'reasonable grounds for distinction', it must be 'rational' and there must be no 'substantial discrimination'. But what then becomes of the classification? and who are to be the judges of the reasonableness and the substantiality or otherwise of the discrimination? And, much more important, whose standards of reasonableness are to be applied? --the judges'--the government's?--or that of the mythical ordinary reasonable man of law which is no single man but a composite of many men whose reasonableness can be measured and gauged even though he can neither be seen nor heard nor felt? With the utmost respect I cannot see how these vague generalisations serve to clarify the position. To my mind they do not carry us one whit beyond the original words and are no more satisfactory than saying that all men are equal before the law and that all shall be equally treated and be given equal protection. The problem is not solved by substituting one generalisation for another.

[83] This, however, does not mean that judges are to

determine what is for the good of the people and substitute their individual and personal opinions for that of the government of the day, or that they may usurp the functions of the legislature. That is not their province and though there must always be a narrow margin within which judges, who are human, will always be influenced by subjective factors, their training and their tradition makes the main body of their decisions speak with the same voice and reach impersonal results whatever their personal predilections or their individual backgrounds. It is the function of the legislature alone, headed by the government of the day, to determine what is, and what is not, good and proper for the people of the land; and they must be given the widest latitude to exercise their functions within the ambit of their powers, else all progress is barred. But, because of the Constitution, there are limits beyond which they cannot go and even though it falls to the lot of judges to determine where those limits lie, the basis of their decision cannot be whether the Court thinks the law is for the benefit of the people or not. Cases of this type must be decided solely on the basis whether the Constitution forbids it.

[84] I realise that this is a function which is incapable of exact definition but I do not view that with dismay. The common law of England grew up in that way. It was gradually added to as each concrete case arose and a decision was given ad hoc on the facts of that particular case. It is true the judges who thus contributed to its growth were not importing personal predilections into the result and merely stated what was the law applicable to that particular case. But though they did not purport to make the law and merely applied what according to them, had always been the law handed down by custom and tradition, they nevertheless had to draw for their material on a nebulous mass of undefined rules which, though they existed in fact and left a vague awareness in man's minds, nevertheless were neither clearly definable, nor even necessarily identifiable, until crystallised into concrete existence by a judicial decision; nor indeed is it necessary to travel as far afield. Much of the

existing Hindu law has grown up in that way from instance to instance, the threads being gathered now from the rishis, now from custom, now from tradition. In the same way, the laws of liberty, of freedom and of protection under the Constitution will also slowly assume recognisable shape as decision is added to decision. They cannot, in my judgment, be enunciated in static form by hidebound rules and arbitrarily applied standards or tests.

[85] I find it impossible to read these portions of the Constitution without regard to the background out of which they arose. I cannot blot out their history and omit from consideration the brooding spirit of the times. They are not just dull, lifeless words static and hide bound as in some mummified manuscript, but living flames intended to give life to a great nation and order its being, tongues of dynamic fire, potent to mould the future as well as guide the present. The Constitution must, in my judgment, be left elastic enough to meet from time to time the altering conditions of a changing world with its shifting emphasis and differing needs. I feel therefore that in each case judges must look straight into the heart of things and regard the facts of each case concretely much as a jury would do; and yet, not quite as a jury, for we are considering here a matter of law and not just one of fact. Do these "laws" which have been called in question offend a still greater law before which even they must bow?

[86] Doing that, what is the history of these provisions? They arose out of the fight for freedom in this land and are but the endeavour to compress into a few pregnant phrases some of the main attributes of a sovereign democratic republic as seen through Indian eyes. There was present to the collective mind of the Constituent Assembly, reflecting the mood of the peoples of India, the memory of grim trials by hastily constituted tribunals with novel forms of procedure set forth in Ordinances promulgated in haste because of what was then felt to be the urgent necessities of the moment. Without casting the slightest reflection on the Judges and the Courts so constituted, the fact remains that

when these tribunals were declared invalid and the same persons were retried in the ordinary Courts, many were acquitted, many who had been sentenced to death were absolved. That was not the fault of the judges but of the imperfect tools with which they were compelled to work. The whole proceedings were repugnant to the peoples of this land and, to my mind, Article 14 is but a reflex of this mood.

*[87] What I am concerned to see is not whether there is absolute equality in any academical sense of the term but whether the collective conscience of a sovereign democratic republic can regard the impugned law, contrasted with the ordinary law of the land, as the sort of substantially equal treatment which men of resolute minds and unbiased views can regard as right and proper in a democracy of the kind we have proclaimed ourselves to be. Such views must take into consideration the practical necessities of government, the right to alter the laws and many other facts, but in the forefront must remain the freedom of the individual from unjust and unequal treatment, unequal in the broad sense in which a democracy would view it. In my opinion, 'law' as used in Article 14 does not mean the "legal precepts which are actually recognised and applied in the tribunals of a given time and place" but "the more general body of doctrine and tradition from which those precepts are chiefly drawn, and by which we criticise, them." (Dean Pound in 34 *Harvard Law Review* 449 at 452).*

[88] I grant that this means that the same things will be viewed differently at different times. What is considered right and proper in a given set of circumstances will be considered improper in another age and vice versa. But that will not be because the law has changed but because the times have altered and it is no longer necessary for government to wield the powers which were essential in an earlier and more troubled world. That is what I mean by flexibility of interpretation.

[91] It may be that justice would be fully done by following the new procedure. It may even be that it would be more truly done. But it would not be satisfactorily done, satisfactory that is to say, not from the point of view of the

governments who prosecute, but satisfactory in the view of the ordinary reasonable man, the man in the street. It is not enough that justice should be done. Justice must also be seen to be done and a sense of satisfaction and confidence in it engendered. That cannot be when Ramchandra is tried by one procedure and Sakharam, similarly placed, facing equally serious charges, also answering for his life and liberty, by another which differs radically from the first.

[92] The law of the Constitution is not only for those who govern or for the theorist, but also for the bulk of the people, for the common man for whose benefit and pride and safeguard the Constitution has also been written. Unless and until these fundamental provisions are altered by the constituent processes of Parliament they must be interpreted in a sense which the common man, not versed in the niceties of grammar and dialectical logic, can understand and appreciate so that he may have faith and confidence and unshaken trust in that which has been enacted for his benefit and protection.”

The law could not have been more charmingly put with such extraordinary reach. No man could say it better or more profoundly.

143. Mr Gupta says that Court must keep alive to these principles in their broader sense in deciding the present *lis*, even though *Anwar Ali* is a matter involving the criminal law. When it comes to legal principles, fields and subjects of law stand obliterated and new principles become possible of application to a hundred and one different fact situations in diverse fields and circumstances. Therefore, equality has not to be read in the abstract where there was inequality to start with, the error having been committed by the Government in failing to apply the two circulars in question. For that, his clients cannot be faulted and they deserve to be systematically arranged within a single classification of the 1989-1992

batch. He then refers to passages from the separate opinion of Chandrasekhara Aiyar, J. in *Anwar Ali* in paragraphs 70 and (75c)

"(70) It is well settled that equality before the law or the equal protection of laws does not mean identity or abstract symmetry of treatments. Distinctions have to be made for different classes and groups of persons and a rational or reasonable classification is permitted, as otherwise it would be almost impossible to carry on the work of Government of any State or country. To use the felicitous language of Holmes J. in Bain Peanut Co. v. Pinson (1931) 282 U. S. 499, at p.501. "We must remember that the machinery of government could not work if it were not allowed a little play in its joints."

And then:-

(75c) Discrimination may not appear in the statute itself but may be evident in the administration of the law."

144. If not to miss the point, the expression 'intelligible differentia' appears to have been introduced for the first time in the Indian law by the Supreme Court by Sudhi Ranjan Das, J. [Once a Chief Justice of this Court] in his separate opinion in *Anwar Ali Sarkar* case.

145. The learned counsel then cites **Pathumma and others vs. State of Kerala and others**, AIR 1978 SC 771, a seven Judge Constitution Bench which tested the vires of Kerala Agriculturists' Debt Relief Act [2 of 1970]. Section 20 of the Act came to the relief of agriculturist debtors drowned in poverty and economic backwardness and the miserable conditions in which they lived, it cannot be said that if they are treated as separate category or class of preferential treatment in public interest then the said classification is unreasonable. He makes special reference to paragraphs 41, 42, 44 and 45, the gist of which is that special treatment of

class of persons is constitutionally protected and within Article 14 and whether the rights of a special class of an agriculturist debtor is superior to the rights of bona fide alienees of properties and auction purchasers can be made to suffer operation of the provisions of Act and suffer loss of property. The Court found justification in treating an auction-purchaser at a court sale differently from a bona fide alienee of the auction-purchaser who derived his rights before the date of publication of the Kerala Agriculturist's Debt Relief Bill, 1968 which became law and could not possibly have been aware of the hazards of purchasing property of an indebted agriculturist at the time of purchase. The Court found it futile to contend that if the legislature has protected appellant's interest by an express provision in sub-s.[6] of S.20, it has thereby made a hostile discrimination against the auction purchaser as a class. The appeals were dismissed. The Court reiterated that equality before the law does not mean that the same set of law should apply to all persons under every circumstance ignoring differences and disparities between men and things. Learned senior counsel reads from para.41 in *Pathumma* the following passage:-

“41. A reasonable classification is inherent in the very concept of equality, because all persons living on this earth are not alike and have different problems. Some may be wealthy; some may be poor; some may be educated; some I may be uneducated some may be highly advanced and others may be economically backward. It is for the State to make a reasonable classification which must fulfil two conditions: (1) 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. (2) The differentia must have a reasonable nexus to

the object sought to be achieved by the statute.

He would then refer to para.42:-

*“42. In view of these authorities let us see whether the selection of the agriculturist debtors by the State for the purpose of improving and ameliorating their lot can be said to be a permissible classification. While dealing with the first argument we have already pointed out the economic conditions prevailing in the State and the abject poverty in which the agriculturist debtors were living. We have also referred to the Directive Principles of State Policy as contained in the Constitution and have held that it is the duty of the legislature to implement these directives. Having regard, therefore, to the poverty and economic backwardness of the agriculturist debtors and their miserable conditions in which they live, it cannot be said that if they are treated as a separate category or class for preferential treatment in public interest then the said classification is unreasonable. It is also clear that in making the classification the legislature cannot be expected to provide an abstract symmetry but the classes have to be set apart according to the necessities and exigencies of the society as dictated by experience and surrounding circumstances. All that is necessary is that the classification should not be arbitrary, artificial or illusory. Having regard to the circumstances mentioned above, we are unable to hold that the classification does not rest upon any real and substantial distinction bearing a reasonable and just relation to the thing in respect of which the same is made. This view was taken in the case of *State of West Bengal V. Anwar Ali Sarkar*, 1952 SCR 284 at p. 321 :(AIR 1952 SC 75 at p. 88) In our opinion, both the conditions of reasonable classification indicated above are fully satisfied in this case. For these reasons, we hold that section 20 of the Act is not violative of Article 14 of the Constitution and reject the first branch of the argument on this point.”*

146. In reaching the conclusion, the Supreme Court relied on its

earlier dicta in *Charanjit Lal Chowdhury* and *Anwar Ali Sarkar* cases. This is the canvas against which the Court must draw its conclusions in this case on the issue of non-segregation of rights of the first point of batch reference of officers, says the learned senior counsel.

147. He then submits that service law has developed its own language, jargon and words used and re-used in this branch of the law which has evolved its own legal lexicon and inventory of words. In order to stress the point he draws attention to a Full Bench decision of this Court in **Raj Kumar, ASI vs. The State of Punjab and others**, 1980 [3] SLR 779, a case involving promotion in the Police Department from List 'D' as envisaged by rule 13.9 of the Punjab Police Rules, 1934 involving promotion from Head Constable to Assistant Sub- Inspectors of Police. The question arose of the difference between officiating promotion and probation in context of where Head Constables are drawn from districts but shift from district to range seniority then the matter has to be considered at the higher level of the range then all eligible Head Constables from the group of Police districts comprising a range have to be considered equally and only then can a conscious order be made putting a Head Constable on probation against the post which may lead to ultimate confirmation or of confirmation straight away, by giving him the benefit of his officiating service would arise under rule 13.18 of the Rules. In the view of the majority it appeared to their Lordships to be plain that the rules clearly visualize three distinct categories of Assistant Sub-Inspectors, namely, those confirmed in the post, those placed on probation against the said post, those merely officiating as such. The Full Bench was confronted

with an earlier decision of this Court in Division in **Sat Pal ASI and others vs. The Delhi Administration and others**, 1974 [1] SLR 733 was not correctly decided as it did not adequately advert to and, therefore, failed to construe the true import of rule 13.4[2] and the earlier rule 13.9 [2] which in express and distinct terms mention officiating promotion and substantive promotion to the rank of ASI. The promotion authorities of Head Constables and ASIs were different, one by the Superintendent of Police and the other by the Deputy Inspector General of Police. The criterion for making these promotions was separately prescribed for the two, one under rule 13.1 while the other under rule 13.4[2]. The Court read the two rules 13.4 and 13.18 of the PPR together and it appeared to the Court that the terminology of officiation is used in contradistinction to and distinctly separate from being placed on probation. Officiation is placed at a lower level than probation and only as a discretionary power, it is possible for the authorities to utilize it for the purpose of the reduction of the prescribed periods of probation. The two concepts appear to be sharply divided and distinctly well understood. The Full Bench did not think it possible to efface this distinction and to attempt to use them as inter-changeable or synonymous terms. Therefore, officiation may well be against a wholly temporary vacancy as also against a regular or permanent vacancy. The framers had envisaged "officiation" against all kinds of vacancies. The Full Bench held that permanent vacancies cannot possibly be excluded from the concept of an officiation against them. Yet again, the stand that "officiation" must necessarily be of a fleeting or a very short duration is unsupported by principle or authority. In conclusion, it was

said that in the relevant rules the terms "officiation" have been advisedly used as distinct and separate concepts. They cannot therefore be either treated or deemed to be synonymous. Consequently, a mere officiation even against the permanent post of an Assistant Sub Inspector of Police cannot be deemed to be one on probation against the said post. The question posed for opinion by the Full Bench was answered thus and there could be no deemed probation from the date of officiation and an express order under rule 13.18 of the Rules had to be passed for putting such an official on probation and till then he continues merely to officiate on that post.

148. Mr Gupta cites *Raj Kumar* to dwell on what want of vacancy would mean in the cadre strength. The appellants in *Hooda-1* would be deemed to be appointed w.e.f. December 1992 on the strength of vacancy kept preserved for them by the two circulars 1957 and 1972 for which there is sufficient and reasonable classification and non-discrimination in terms of the broad principles laid down in *Charanjit Lal Chowdhury*, *Balsara* and *Anwar Ali Sarkar* cases *supra*.

149. Even if it is assumed that that the question of seniority was not in issue in *Hooda-1* and *Hooda-2* even then the question has been specifically examined and answered by this Court in the litigation which arose between 2000/2001 and then during the period 2006 and 2011 as noticed above. On these premises Mr Anupam Gupta submits that the petitioners of subsequent batches have no case for being ranked higher in the seniority list than his clients and the seniority rule cannot be invoked against them by virtue of the fiction in *Hooda-1*.

Submissions of Mr Puneet Bali

150. Mr Bali reminds, on facts, that VHS had approached this Court for the first time claiming benefit of the instructions 1957 and 1972 in 1996 but after the instructions dated October 28, 1993 were issued the scenario completely changed and the rules of the game underwent transformation. VSH had not initiated litigation till after, in 1994 unsuccessfully though and without the aid of the circulars nor had he challenged the November 1992 process for 12 vacancies to HCS in the first writ petition. The principle of waiting list stood abolished insofar as Combined Examination/Interview selection/recruitment processes were concerned and, therefore, it is canvassed by the learned senior counsel Mr Bali that the 1993 instructions were in due operation prospectively foreclosing the case of VSH group. and even when appointments are protected by court orders, they cannot get further benefit of seniority on an edifice which is not built on legal foundations of statutory rules of service attaching to the seniority issue.

151. To the contrary of what Mr Anupam Gupta asserts, Mr Puneet Bali, learned senior counsel while leading the arguments on behalf of the petitioning 1992/1996 batch officers (Group-B) that *Hooda-1* did not deal directly with seniority as the claim of the three appellants was to secure an appointment on the strength of 1957 and 1972 circulars. He argues that the 1957 circular is general in nature and is not post specific or department specific as observed in para.24 of *Hooda-2*. Mr Bali points out to para.24 of *Hooda-2* and the observations made there:-

"24. The aforesaid circular is general in nature and does

not refer to any particular service or service rules. In law if an executive instruction is contrary to statutory rules, the rules will prevail and not the executive instructions. Further reading of the aforesaid circular shows that it is applicable to pre-existing vacancies."

152. Mr Bali connects this observation of the Supreme Court with the observations made in para.32 which read as follows:-

"32. Rules do not contemplate any waiting list for the filling up of vacancies in excess of the number determined by initiating the recruitment process. Hooda decision [(1999) 3 SCC 696] is based on the aforesaid two circulars. We, as already stated, are concerned with the question whether the basis of that decision has been removed by the impugned legislation. We cannot go into the question of correctness of the said decision."

153. On a conjoint reading of the observations of the Supreme Court in both the above paragraphs in *Hooda-2*, learned senior counsel submits that a serious doubt is cast on the applicability of the 1957 instructions but the Court did not go into the question as it could not go into the correctness of *Hooda-1* in challenge to the vires of the Act.

154. It is then pointed out from para.36 of *Hooda-2* that the Supreme Court considered its earlier decision in **Ashok Kumar Yadav vs. State of Haryana**, (1985) 4 SCC 417 and observed that the judgment does not make any reference to any circular though it involves the same service. It was observed that it does not appear from materials on record that for recruitments to the posts in HCS, the circulars of 1957 and 1972 were ever applied in any prior decision of any Court. The circular, the Court observed in *Hooda-2*, it seems, were relied upon for the first time in *Hooda-1*. Having made this observation, the Supreme Court in *Hooda-2*

noticed its earlier decision in *Hoshiar Singh's* case which had revolutionized the concept of excess appointments beyond advertised vacancies and the prohibitions clamped by the Supreme Court on them as abrasive of the concept of equal opportunity. The only exception to *Hoshiar Singh* is in *Prem Singh* where the Supreme Court carved out an exception to deviate from the advertisement and make appointments on posts falling vacant after the advertisement in "exceptional circumstances only" or "in an emergent situation" and "that too by taking a policy decision in this behalf". However, a carte blanche was not given nor a free hand extended to the recruiting authority to do as it wishes in making appointments beyond advertised vacancies. There was no olive branch extended there. Mr Bali points out that Hon'ble G.T. Nanavati, J. was party to both *Hooda-1* and *Prem Singh* cases and this is a vital clue in the understanding of *Hooda-1*. Both the rulings were rendered a few months apart.

155. He next points out to paragraphs 40 and 41 where the Supreme Court observed as follows:-

"40. The stand of the Government in the case in hand is that the impugned enactment was brought in so as to make the appointments for which advertisements were subsequently issued in consonance with Articles 14 and 16 and, therefore, the question of the Act violating the rights of the petitioners under those constitutional provisions does not arise.

41. On the aforesaid line there are other decisions as well. (See Gujarat State Dy. Executive Engineers' Assn. v. State of Gujarat [(1994) Supp (2) SCC 591] and State of Bihar v. Madan Mohan Singh [(1994) Supp (3) SCC 308].) If the same list has to be kept subsisting for the purpose of filling

up other vacancies also, that would naturally amount to deprivation of rights of other candidates who would have become eligible subsequent to the advertisement and selection process. In Madan Lal v. State of J&K [(1995) 3 SCC 486] the contention that was accepted by this Court was that since the advertisement was only for 11 vacancies, the merit list of 20 was bad and violative of the rules. It was observed that the moment those 11 posts are filled up within two years of the publication of the list, the list will get exhausted and if for any reason these 11 vacancies could not be filled up by the time one year from the date of publication of the list is over, even then the list would get exhausted and fresh recruitment will have to be made in the light of fresh requisition from the State."

156. In para.43 the Supreme Court made an observation of far reaching consequences in the understanding of *Hooda-1* when it observed that larger public interest demanded the grant of opportunity to all eligible candidates. The text of para.43 reads as follows:-

"43. The problem faced by the State, in the light of the above interpretation, was that during long gap of years between one advertisement and the other as is evident from the facts abovementioned, a number of other persons attained eligibility who would be deprived of opportunity to compete for the posts advertised subsequently besides there being absence of waiting list provision in the statutory rules. The State Government says that to overcome these difficulties, the legislature stepped in, repealed the circulars with effect from the year 1989 and clarified the position for future. Clearly, in our view, the larger public interest demanded the grant of opportunity to all eligible candidates."

157. In para.52 the Supreme Court refused to accept the contention as possibly that vested rights cannot be taken away by the legislature by way of retrospective legislation and in this process rights of some are

bound to be affected one way or the other. The Court observed in para.52 that it cannot be urged in every case that the exercise by the legislature while introducing a new provision or deleting an existing provision with retrospective effect *per se* shall be violative of Article 14 of the Constitution. If that stand is accepted, the Court went on to observe, then the necessary corollary shall be that the legislature had no power to legislate retrospectively, because in that event, a vested right is affected.

158. In para.59 the Court in *Hooda-2* refused to accept the broad proposition sought to be contended by VSH etc. that the effect of the writs issued by the Courts cannot be nullified by the legislature by enacting a law with retrospective effect. The Supreme Court clipped the contention and spoke as follows:-

"The question, in fact, is not of nullifying the effect of writs which may be issued by the High Court or this Court. The question is of removing the basis which resulted in issue of such a writ. If the basis is nullified by enactment of a valid legislation which has the effect of depriving a person of the benefit accrued under a writ, the denial of such benefit is incidental to the power to enact a legislation with retrospective effect. Such an exercise of power cannot be held to be usurpation of judicial power. In our view, repeal of the circulars was permissible. The circulars were validly repealed by the impugned Act, and it made the law declared in Virender S.Hooda v. State of Haryana, (1999) 3 SCC 696 ineffective.

159. In para.67 lies one of Mr Bali's foundational arguments that the Act 2002 was declared *intra vires* and its retrospectivity not *ultra vires* except to "the limited extent" which the Court would "presently indicate" which have to be read in the text and context of the whole judgment and

not in bits and pieces. It was declared in *Hooda-2* that the Act does not amount to usurpation of judicial power by the legislature. The Act does not violate Articles 14 and 16 of the Constitution. Mr Bali picks out two crucial observations in paragraphs 67 and 68 in his support, the first of which is as follows:-

"The candidates have right to posts that are advertised and not the ones which arise later for which a separate advertisement is issued"

"Despite the aforesaid conclusion, the Act [proviso to Section 4(3) to the extent it takes away the appointments already made.]"

160. Mr Bali picks the second cue and vital observation to hammer his point that retrospectivity was faulted to a limited extent as indicated by the Supreme Court in *Hooda-2* that rights of subsequent batch, i.e. his clients stand on the issue of inter se seniority are resurrected and what is declared bad in the Act was proviso to Section 4[3] only to the extent it took away appointments already made. But for the judgment Group-A candidates would have lost their jobs and returned to their previous ones. Therefore, no further right was envisioned or granted in *Hooda-2* except what the Courts gave and stood implemented by the Government and not an inch more. He then draws attention to the third limb in paragraphs 67 and 68 that some of the petitioners (Group-A) had been appointed much before the Act was enforced equalling 10 in number including Sandeep Singh who was the tenth candidate and, therefore, to implement the court's decision would be unreasonable, harsh, arbitrary and violative of Article 14 of the Constitution. The Supreme Court qualified the limited interference by the second vital observation with respect to appointments

on the legal principle that:-

"The law does not permit the legislature to take back what has been granted in implementation of court's decision. Such a course is impermissible."

161. Accordingly, it follows sequitur that what was not implemented in *toto* or understood unambiguously by a final order of the State Government expressed through the Chief Secretary, Haryana, who is the cadre controlling authority and the implementing authority of court directions/decisions, cannot be resurrected and have become to say the least stillborn. The submission is that the Supreme Court in *Hooda-2* saved two things, firstly, the appointments already made, and secondly, what had already been implemented of the directions in *Hooda-1* by the State Government reckonable from the date of decision. Seniority was neither pressed, argued or granted nor was given till much after *Hooda-2* in 2006 by the final seniority list which is under challenge in the present proceeding. Mr Bali would lay emphasis on the words "what has been granted" used in the past tense and not looking to the future to await implementation. There is a difference in a court decision and its implementation of decretal directions leaving no ambiguity whatsoever or open to debate. This is not to say that a court decision can ever be flouted as that would be contempt and contumacious conduct. All that Group-B say is that the word "seniority" was not a part of the directions in *Hooda-1*, even when the meaning of the word seniority is absolutely clear in its resonance in service law as understood and well accepted. The same is not exactly synonymous with words "fitted" and "rank" and the differences in their shades of meaning when the word, as urged by Mr Bali, was well

known but not used in *Hooda-1* which if written would have been an end of the matter, but still subject to canvassing the argument in court that the decision was not binding on the rights of subsequent batches of HCS officers [Group-B] when they were neither party nor heard.

162. It is then submitted in continuation of the above contention by Mr Bali that what could not be taken back from the court's directions was what was implemented by the State Government of the Court's decision. In 2002, the State Government had not implemented *Hooda-1* to confer seniority on any of Group-A officers till such time as the final impugned seniority list was circulated in 2006 and remained inchoate before. That disputed part remained unimplemented. If it remained unimplemented then it is not saved to the extent of the directions in *Hooda-2*, as one preserving a right to seniority as well when the term 'seniority' has not been used in *Hooda-1* and only the words "fitted" and "rank" were carefully chosen by the Supreme Court in declaring the rights of the appellants in *Hooda-1* for the appellants to be considered for appointment. This interpretation finds favour in the directions subsequently issued in *Sandeep Singh* case which did not grant its beneficiaries a retrospective seniority, though ordered appointment on principles of parity of treatment and equality under Article 14 of the Constitution. The two concepts were delinked in the judgment as they do not occasion an invidious and hostile discrimination.

163. What Mr Bali argues is that *Hooda-2* did not give a declaration of a right to the post which has to be governed by rules 6, 17 and 20 of the Rules which prescribes the mode of recruitment year-wise in rule 9,

fixation of inter se seniority with reference to the date of appointment, while the old system of vacancies was got rid off by the amendment to the rules carried out on October 01, 1992 only after which the advertisement dated November 24, 1992 was published which led to appointments in 1997 of Group-B officers belatedly taking their seniority from the dates of their appointment in accordance with rules.

164. Still further, Mr Bali refers to para.71 of the judgment in *Hooda-2* to submit that what the Supreme Court held was that the appointments given to Hooda, Mann and Yadav in Executive Branch at Sr. Nos.8, 10 and 12 respectively when appointed on December 03, 1999 in compliance of the decision in *Hooda-1* dated April 13, 1999 could not be taken back then it would be iniquitous to deny relief to Ajay Malik and Arvind Malhan when it was granted to other candidates who were lower in merit position than Malik and Malhan as determined by the Commission. In this way, Jagdish Sharma and Mahavir Singh had a case and, therefore, the Writ Petition No.215 of 2002 was allowed only for the reason that they were higher in merit than Lalit Kumar and Virender Lather, who had by then received favourable orders from Court and, consequently, both Jagdish Sharma and Mahavir Singh were entitled to the same relief as Ajay Malik and Arvind Malhan, by observing, "in view of the peculiar facts of their case". The directions issued by this Court on July 03, 2004 in CWP No.7281 of 2000 were held as not calling for any interference. It may be noted that Jagdish Sharma and Mahavir Singh were appointed to HCS for the first time after the judgment was pronounced in *Hooda-2* to whom seniority was not given by this Court which order was

appealed and case decided in *Hooda-2*.

165. Mr Bali refers to an affidavit filed by the State Government in this case on court directions. On August 20, 2013 this Court passed an interim order calling upon the Government of Haryana to file an affidavit disclosing what was called for in the said order which runs as follows:-

“Mr Gurminder Singh, learned counsel would produce a copy of the writ petition filed under Article 32 of the Constitution before the Supreme Court in 2002.

Mr Nehra, learned State counsel would file an affidavit of the Deputy Secretary after approval of the Chief Secretary as to what benefits other than offering reallocation and appointment under order dated 3.12.1999 to the petitioners in CWP No.20080 of 2012 – after pronouncing of judgment in Varinder Singh-I but before pronouncing of judgment in Varinder Singh-II. The affidavit also to disclose to this Court whether as and when direct recruits came between 1992 and 1999; whether a condition was laid down in the appointment letter/s that their seniority would remain subject to pending litigation before the Supreme Court.”

166. The response affidavit dated September 12, 2013 discloses that the State Government in compliance of directions in *Hooda-1* reallocated VSH, Amarjit Singh Mann and Dinesh Singh Yadav to HCS [EB] under rule 5 of the Rules vide order dated December 03, 1999. After they were appointed they represented to Government for fixing their seniority along with the 1992 batch of HCS Officers as per orders in *Hooda-1* with all consequential benefits. The State Government fixed their names in order of merit vide order dated July 27, 2001 and it was mentioned in the order that the inter se seniority will be fixed later on. Further on, VSH was deemed appointed on January 01, 1993 i.e. the date from which the junior

Smt. Sunita Verma was appointed. This was done vide order dated April 17, 2006. VSH was granted Senior Scale and Selection Grade w.e.f. January 01, 1998 and January 01, 2003 vide order dated June 12, 2006. This meant that VSH and Ajay Malik were deemed to be appointed in HCS on December 29, 1992 the date when the junior Smt. Indra Goyal was appointed in HCS vide letter dated May 08, 2007. His senior scale and selection grade were ante-dated w.e.f. December 29, 1997 and December 29, 2002. Similar orders were passed in the case of Mr Ajay Malik on June 18, 2007. It is further stated that 12 candidates against vacancies of the year 1992 were appointed from Register-B in June 1997. It is stated in para.9 of the affidavit that no condition was laid down in the appointment orders of candidates appointed from 1992 to 1999 in HCS from Register-B that their seniority would remain subject to pending litigation before the Supreme Court. It is forthcoming from the record that the seniority of the ten officers concerned was not fixed inter se members of the service at any time prior to the passing of the impugned final seniority list in 2006.

167. Then, Mr Bali links paragraphs 67, 68, 71 & 72 with the ultimate directions issued in para.73 which have been extracted (*supra*) but are again quoted to carry on with the thought processes of Mr Bali in expounding his case. The same are reproduced:-

"(1) The impugned Act, to the extent of its retrospectivity, except to the limited extent indicated above, does not amount to usurpation of judicial powers by the legislature. It is not ultra vires. It has removed the basis of decisions in Hooda [(1999) 3 SCC 696] and Sandeep Singh [(2002) 10 SCC 549] cases.

(2) The Act is not violative of Articles 14 and 16 of the Constitution except to a limited extent noticed below.

(3) The first proviso to Section 4(3), to the limited extent it provides for dispensing the services of candidates already appointed, is harsh, excessive, arbitrary and violative of Article 14 of the Constitution.

The benefits already granted to the petitioners in Writ Petitions Nos. 215 to 218 and 224 of 2002 could not be taken back. To this extent, retrospectivity is ultra vires. In all other respects, it is valid.

(4) The directions of the High Court in favour of respondents Ajay Malik and Arvind Malhan, subject-matter of Civil Appeals Nos. 3937-38 of 2001, are maintained. For the same reason, Jagdish Sharma and Mahavir Singh being higher in merit than Lalit Kumar and Virender Lather would also be entitled to similar treatment.

(5) The judgments of the High Court in Civil Appeals Nos. 8385 to 8393 of 2002, in view of the provisions of the Act, are set aside."

168. On a conjoint reading of these paragraphs, Mr Bali submits that when in direction (1) the Supreme Court held that retrospectivity of the Act of 2002 does not amount to usurpation of judicial powers by the legislature and the same is not ultra vires and has removed the basis of the decisions in *Hooda-1* and *Sandeep Singh* cases, even then a caveat was entered while upholding the Act by guarded words- "except to the limited extent indicated above". These observations go back to para.67 and save, according to Mr Bali, only the appointments and nothing more and to this extent, *Hooda-2* appears to override the directions in *Hooda-1* and, therefore, the directions in *Hooda-1* can only be read after *Hooda-2* was rendered, as saving appointments by direction (3) which declares the first proviso to Section 4[3] as bad, "to the limited extent" it provides for

dispensing with the services of candidates already appointed, which legislative action was found "harsh, excessive, arbitrary and violative of Article 14 of the Constitution".

169. Mr Bali submits that Article 16 is not mentioned in the directions and in this, he agrees with Mr Anupam Gupta, learned senior counsel for the respondents, that seniority is not a constitutional issue or of any constitutional value and is not a fundamental right. Article 16 preserves equality of opportunity. He contends that because the Supreme Court categorically directed in para.68 that the law does not permit the legislature to take back what has been granted in implementation of the court's decision then if the State Government had understood the directions in Hooda-1 as short of seniority coupled with the fact that the administration did not implement the decision by interpreting the directions to contain a right conferring seniority from the fictional date of appointment then right to seniority, if any, has been omitted in the ultimate directions of the Supreme Court in Hooda-2 and is not protected while holding that the basis of Hooda-1 and Sandeep Singh cases stands removed and cannot be considered extant law. He urges that in case protection were not given, without striking down the first proviso to Section 4(3) as unconstitutional then the direction has to be read in the manner that dispensing with services of the candidates was only a harsh, excessive and arbitrary act which was violative of Article 14 of the Constitution and therefore appointments were saved. After all, in direction (2) the Supreme Court had declared that Act is not violative of both Articles 14 and 16 of the Constitution "except to a limited extent noticed

below" which quite evidently meant directions in (3) downward. It is quite obvious that ultimate directions in Hooda-1 have to be read with para. 73 in Hooda-2 and together. When an Act does not violate Article 14 action becomes non-discriminatory. Therefore, Mr Bali reasons that the decisions in *Charanjit Lal*, *Balsara* and *Anwar Ali Sarkar* cases have no bearing on this case by virtue of binding decision in *Hooda-2* and what it alone leaves in residue from *Hooda-1*.

170. Thus, it appears reasonable from a conjoint reading of directions [2] and [3], the first upholding the Act in *toto* as not violative of Articles 14 and 16 of the Constitution and then hedging them in with the limited extent indicated in direction (3), can refer only to the primary grievance that the petitioners in *Hooda-2* should not be thrown out of their job otherwise directions (2) and (3) read with direction (1) may present interpretative difficulties in harmonizing the three consecutive directions issued by the Supreme Court. The first three directions cannot be read in mutual exclusion but in a theme of judicial thought and indicative of what ultimately weighed in the minds of the Hon'ble Judges of the Bench in making the order and saving the appointments which, to use the words of Mr Anupam Gupta is a judicial savings clause but argued by him in a different context.

171. The next submission of Mr Bali is that neither the learned Single Judge nor the Letters Patent Bench noticed or dealt with the judgment in *Hooda-2* and confined the examination to the directions issued in *Hooda-1* alone while both formed an organic whole, and this combined reading of all the previous cases is for the first time to be

undertaken in the present case. Therefore, he submits that the judgments of this Court, both in single and division bench, are incomplete discussion on the subject matter and are not binding precedents on the interpretation of the directions in *Hooda-2* or the role of amended rule 20 in the 1930 Rules has had to play, which statutory provision was tested cursorily by observing that rule 20 ceased to apply in the face of the directions in *Hooda-1*. He submits that the issue of seniority is still at large and wide open to be decided by this Court in the present proceedings *de novo* and from scratch without being weighed down by past precedent on the limited issue of seniority except to closely instruct itself on the binding multiple ratios in *Hooda-2*, which is the *magna carta* on the 2002 Act insofar as appointments are concerned which stand preserved but not what remained unimplemented at the hands of the disputing State or handed down expressly in *Hooda-2*. In both these decisions the boiling point of seniority was not achieved or redressed for the entire cadre as only one principle of seniority can apply otherwise that would violate Article 14 and result in unfair discrimination. Neither do those cases touch upon or decide the issue directly or declare who is senior to whom. In any case a fair interpretation was placed on rule 20 by the learned single judge and that part was upheld in appeal twice over in the parallel litigation. The Supreme Court did not strike down proviso to rule 4[3] in as many words. It only safeguarded appointments which means appointments were restored, quite literally, from the date of promulgation of the Act i.e. March 27, 2002 which destroyed retrospectively Group-A rights from August 29, 1989/1992. Mr Bali submits that this barrier stands removed

by direction (3) and the respondent would have a right to continuity in service with personal rights in *Hooda-1* restored, but not all 'personnel' rights including cadre seniority which right was not expressly granted in *Hooda-1* because seniority was not in issue and only appointments by reallocation were in question. Seniority may or may not come with appointment, when it comes through court orders. That is a matter of relief. It is but sure that seniority follows appointment with reference to rules of service, if any, but it is not the other way round. They are both different concepts but which can marry, if rules enable.

172. At this stage, Mr K.K.Gupta, learned counsel on the petitioners' side, takes the judgment of the Supreme Court in **State of Jammu & Kashmir and others vs. Sat Pal** (*supra*) from the armoury of Mr Anupam Gupta, and cites it again to contend that where the Supreme Court exercised its powers under Article 142 in favour of the respondent to do complete justice in a cause, even then while directing appointment from 2008 expressly gave 'seniority' to Sat Pal from the due date along with his batch according to rule. No such categorical direction was given in *Hooda-1*. Besides, in *Sat Pal*, with the appointment, seniority was given as per rules of service governing the cadre of Junior Engineer (Civil) Grade II and not *de hors* them. Mr K.K.Gupta submits that the ruling in fact supports his case and not that of the learned senior counsel Mr Anupam Gupta.

173. There can be no doubt that the court when judges a cause or a matter, says what it means and means what it says. Inferences drawn from words used in operative directions contained in judgments lie in the

province of interpretation and are not the surest way to what is decreed. Ratios lie in judgments from where reasons come forth for the conclusions. They may not lie in directions, which directions become the decree in writ proceedings. What is not specifically decreed is not executable. Nor can be implemented, there being no decree determining a right claimed. Fitment and 'rank next below' can be given without seniority as a necessary consequence depending on the nature of benefit or condition of service enshrined in rules. This is not impossibility itself and is practically and theoretically possible depending on the structure of the rules. Grant of rank below the original batch may give rise to rights based on fictional length of service, such as entitlement to time-scales of pay, super-time scales, Assured Career Progression benefits based on length of fictional regular service required to notionally achieve the periodic time-steps in the scheme to confer the benefit, annual increments notionally given from back date would bring pay at par with those appointed earlier so that incumbents do not suffer pay disparity in the same rank and status, rank in priority list for allotment of government accommodation, to name a few, etc. etc. If retrospective seniority was decreed in *Hooda-1*, the Supreme Court may not have, while rejecting Interlocutory Application, given liberty to claim seniority in separate proceedings by the non-parties to *Hooda-1*. The issues respecting seniority in this batch of cases is not *res integra* in any of the two cases, namely, *Hooda-1* and *Hooda-2* cases, just as it is *res integra* in *Sandeep Singh* case.

Re: The Instructions dated October 28, 1993

174. In his next limb of submissions, Mr Bali invites the attention of

the Court to the Haryana Government Instructions dated October 28, 1993 which deal with the subject of appointments of candidates out of the waiting list prepared by the Haryana Public Service Commission and the Subordinate Services Selection Board (presently known as Staff Selection Commission, Haryana). He points out that these instructions were not considered in *Hooda-1*. They were, however, considered in *Sandeep Singh* case as well as in *Hooda-2*. It is his case that these instructions are valuable since they overhaul the Punjab/Haryana Government circulars dated March 22, 1955, May 20, 1972 and September 08, 1972. Rather interestingly, there is no reference in these instructions to the Punjab Government circular dated March 22, 1957 or the Haryana Government circular dated May 26, 1972. It may be noted that the instructions dated May 20, 1972 and May 26, 1972 though speak on the same subject but are differently numbered and, therefore, they are not one and the same thing. The three instructions mentioned in the instructions dated October 28, 1993 have not been produced on record and this Court has not have the advantage of reading them of what they might say. But I take that these are of little importance as none of the parties have referred to them during the course of the arguments.

175. It is the supplementing contention of Mr Bali that the 1993 instructions overhaul the subject of waiting lists with respect to Combined Examinations where direct recruitment takes place for more than one service in one written examination followed by *viva voce*. In para.2 of the instructions there is reference to the Commission and the validity of the original lists for six months after which period it has been clarified that

the original list would come to an end. Para.3 fixes the validity period of the expiry of the original list by one year after which time they would cease to operate. Para.4 preserves the principles of 1957 circular and vacancies arising thereafter i.e, after 6 months from the recommendations would comprise a fresh requisition sent to the Commission. Para.5 of the instructions is what Mr Bali seriously refers to as of primary importance as it ushers in a new system of operation of the waiting list and introduces the new principle which appears most evidently formulated in the light of the decision rendered by the Supreme Court in **Hoshiar Singh vs. State of Haryana and others**, AIR 1993 SC 2606 delivered on August 25, 1993 which altered judicial thought on the subject of filling posts in excess of the advertised vacancies as being unconstitutional. This was a case relating to appointments of Inspectors of Police in Haryana where the recruitment was made on the recommendations of the Subordinate Services Selection Board, Haryana, a decision directly binding on the State of Haryana since it was party and the recipient State to honour the directions of the Supreme Court. The instructions of May 26, 1972 and October 28, 1993 applied to the Commission as well as the Board in Haryana. It seems quite apparent that the instructions of October 28, 1993 were issued in the aftermath of the decision of the Supreme Court in *Hoshiar Singh* case which had been rendered two months earlier. The instructions which modified the three earlier instructions kept alive waiting lists for the period of six months mostly to leave sufficient elbow room to the Government to make appointments from the select list sent by the Commission and the Board. However, in the modification process, a

whole new idea was introduced by the Government with respect to recruitments made on the basis of Combined Examinations/Interviews by which a single recruitment process is made to different services but under a common select list, the more meritorious finding berths in superior/higher services which are more sought after. It would, therefore, be necessary to reproduce para.5 of the instructions of 1993 again to understand the drift of the argument of Mr Bali:-

"5. For the past some time it came to the notice of the Government that where the selection is made for several services by way of combined examination/interview and due to some reasons the vacancy of one service could not be filled or due to some reason it again become available, then the candidates of other services make their clam and for that also approach to the Courts. Because in such cases, there is combined merit list, thus, if it is done then the whole list is required to be amended. Therefore, these instructions would not be applicable where the selection is made through written examination and interviews, whether for one service or combined services. In such cases, no waiting list shall be prepared and in case any other vacancy is made available other than the vacancies intimated to the Haryana Public Service Commission at the time of interview or the vacancy could not be filled from the list sent by the Haryana Public Service Commission, then the same would be carry forward for the next recruitment. These instructions would also not be applicable where there is specific provision in the rules."

176. A reading of para.5 reveals that Government felt some difficulty in dealing with a combined merit list and situations arising out of vacancies not remaining filled or of some reason becoming available again, in such cases candidates of other services would lay claim in higher services by approaching courts. In order to obviate this difficulty, it was

declared as a policy decision that the 1993 instructions and the three instructions mentioned therein would not be applicable where the selection is made through written examination and interviews, whether for one service independently or combined services. In such cases, no waiting list was to be prepared and in case any other vacancy became available other than the vacancies intimated to the Commission, these vacancies would have to be carried forward to the next recruitment. Para.5 clearly did not apply to the Subordinate Staff Selection Board and was in exclusive domain of the Public Service Commission which recruits to Class I and Class II posts while the Board deals with Class III and IV.

177. The difficulty arises that while the scheme in para.5 was made a policy on October 28, 1993, the circular dated May 26, 1972 was not mentioned in these modifying instructions. Therefore, it becomes significant as to what the instructions dated May 26, 1972, promulgated six days after the instructions dated May 20, 1972, would mean since the instructions dated May 26, 1972 pointedly refer to the Punjab Government instructions dated March 22, 1957 and speak of vacancies as arise within six months of the receipt of the recommendations of the Commission. These instructions laid down that in respect of vacancies which arise after the expiry of the period of six months it is necessary to send a requisition to the Commission to initiate a recruitment process. The first two sentences of the instructions dated May 26, 1972 can only be read as paraphrasing what the instructions dated March 22, 1957 laid down and as not containing virgin policy decision of Haryana Government. It is in this manner that the instructions of 1957 are to be read in conjunction with

para. 5 of the instructions dated October 28, 1993 and its exclusionary clause. Mr Bali points out these instructions of 1993 were operating when VSH filed his first writ in 1994. Waiting lists in combined competitive examinations for various services were rendered defunct. The rule in 1957 circular was rendered non-existent in Haryana by virtue of para. 5 of the 1993 circular but continued to operate for recruitments in Class III and IV and competitive posts other than through combined competitive examinations which were placed at a superior level. Still further, the virgin instructions dated 15th/18th April, 1959 [quoted in para.41 supra] were never noticed in any of the judgments under consideration making the position absolutely clear that the 1957 circular was not designed for combined competitive examinations for recruitment to HCS but was designed in yesteryears for single service recruitment where aspirants competed for PCS alone in joint Punjab and recommendations of the Commission were made accordingly. Therefore, vacancies arising in 6 months of the date of recommendations could well accommodate filling up by candidates next below the advertised number. The distinction between the merit of the last candidate and the ones next below stood effaced to the extent of available vacancies within the time prescribed. The position was materially altered after 1959 in Punjab and consequently in Haryana after Re-organisation gave it Statehood on November 1, 1966. Haryana's inheritance of the Punjab Circular dated October 22, 1957 has to be read accordingly. I am inclined to think that the Haryana Government committed no error in not applying the rigours of the 1957 Circular in November 24, 1992 when it advertised 12 vacancies for Group B of which

9 were in general category and 3 reserved. This facet has emerged for the first time and cannot be ignored in decision making.

The stand of the State in Hooda-2.

178. In para.4 of the affidavit of Shri Dhan Singh, Deputy Secretary at page 347 of the paper book in the main case it has been stated that consequent upon the orders dated April 13, 1999 passed in *Hooda-1* the seniority of Extra Assistant Commissioners of the 1992 batch including Messrs Virender Singh Hooda, A.S. Maan and Dinesh Singh Yadav who have been appointed as a result of HCS [EB] and Allied Services Examination held by the Commission in March 1991 was fixed in order of merit vide order dated July 27, 2001. The order is placed at Annexure R/1 at page 350. The State has mentioned in the reply as it is in the order dated July 27, 2001 that the *inter se* seniority of the Extra Assistant Commissioners will be fixed later on. It is, therefore, urged by Mr Bali that the order dated July 27, 2001 cannot be treated as a final order in implementation of the directions in *Hooda-1*. The issue remained eminently open for examination and final decision of the Government and of the subsequent court in view of Supreme Court order dated May 5, 2006 passed in IA No 5 in *Hooda-2* declining clarification but giving liberty to challenge seniority list in accordance with law. The position of inchoate seniority remained so even after *Hooda-2* was delivered on October 27, 2004.

179. Both Mr Bali and Mr Anupam Gupta have dwelt at length on the import of the instructions dated 1957 and the instructions dated May 26, 1972 and both the circulars have been read and re-read by them to try and

understand their pith and substance and of their vintage and archaic importance and relevance in present day context. But on one point, they both are agreed that these instructions have been poorly drafted and are not happily worded and especially the 1972 circular and are not model circulars in policy making by subordinate legislation to be eulogised. While the instructions of 1972 refer to the 1957 Punjab circular but the word "revised" is used and that word cannot be read as one which substituted the latter on the policy re-traversed. It is then a debatable point as to how much of the 1957 circular survived to run its writ in the State of Haryana in combined competitive examination of the nature of HCS (EB) and Allied Services.

180. But it appears almost certain that Haryana Government applied its conscious mind for the first time in the direction of the corpus of the 1957 circular convolutedly in 1972 and then directly in 1993. The scheme remained in motion but was substantially revised by splitting it in two distinct parts, as further discussed. In the first part in Para.(a) of instructions dated May 26, 1972 the Commission/Board was instructed that they would recommend five names in addition to the number of vacancies intimated by the Department. The Commission/Board was obliged to intimate to the Department, where the recruitments were contemplated, whether waiting list for filling the additional vacancies occurring thereafter is available with them or not. The policy was revised to mean that if the number of additional qualified candidates be less than five then recommendations only to the extent of the number of qualified candidates will be made by the Commission/Board. In all the three

situations contemplated in sub-para.(a) the waiting list principle subsumes the triad. It does create a waiting list situation but goes on to explain it rather inarticulately.

181. When sub-para.(b) of the instructions dated May 26, 1972 (P-5) deal with additional vacancies occurring within a period of six months on receipt of recommendations, then the vacancies which occur later on can be filled from amongst the five additional candidates/recommended by the Commission/Board and no more. In case of vacancies which occur subsequently meaning thereby after six months, and are such as exceed five then it will be necessary to obtain more names from the waiting list maintained by the Commission/Board. The date on which the Department makes a reference to the Commission/Board will be relevant in regard to the prescribed limit of six months from making appointments after obtaining additional names from the waiting list maintained by the Commission/Board. Another situation was visualized where the information regarding additional names is received after the expiry of a period of six months even then the regular appointment can be made out of the additional names recommended. However, if the Commission/Board have not made any recommendations regarding filling up of any post by direct recruitment during that period or if they have made any recommendations but these were made earlier than the period of last six months then it will not be necessary for the Department to ask for additional names but from out of the waiting list prepared by the Commission. In this confusion of words it appears that the Commission can recommend five names in addition to number of vacancies intimated.

The point at which this can be done is the date of recommendations in sub-para.(a). It appears from sub-para.(b) that additional vacancies arising within six months from the date of recommendations can only be filled from amongst the five additional candidates recommended and none else. In case, the vacancies arising after six months exceeds five then the waiting list can be activated.

182. On a combined reading of the 1957, 1972 and the October 28, 1993 policy instructions, it appears that the 1972 instructions revised the 1957 policy as indicated above. It was more cosmetic in nature and less substantive. But one thing is certain that the first two instructions did not speak of recruitments through combined examinations/interviews and were general in nature as affirmed in *Hooda-2*. However, the 1993 instructions are specific and unambiguous in what they contain in para.5 with sufficient precision where for the first time the question of selection through combined examination/interviews was addressed resulting in the birth of the policy circular which are in tune with the principles laid down in *Hoshiar Singh's* case by the Supreme Court. It seems that the Government broke the October 28, 1993 instructions into two parts, one for recruitment in general services in a single selection process where the criterion was not based on selection through examinations and interviews, and secondly, separated those recruitments from the more important services of the State where recruitment is through combined examinations and interviews to fill superior posts in Government on which the present and future administration of the State rests. The distinction appears to be one of segregating officers from officials and separating those posts which

are administratively important to run the affairs in the State from the lesser. In such higher services the policy in para.5 would apply. It appears that this distinction have not been brought out in any of the earlier judgments and deserves to be addressed in the constitutional duty cast upon this Court when the issue is raised and pressed from many prisms and points of view and valuable rights claimed thereunder. I would have to start with a clean slate to search for a plausible answer. I am inclined to think that this court would be abdicating its duty if it does not try to appreciate the philosophy of the circular and opine on its worth in the context of the present case, which includes an opinion expressed on whether it impacts actual appointments made or ordered before. These instructions cannot also be wished away. But they do entrench upon the instructions dated March 22, 1957 and carve out an exception, or at least attempt to do so, which instructions the Supreme Court have held are general in nature in *Hooda-2* itself. It is another matter whether the instructions dated October 28, 1993, when operated prospectively, as all instructions do, then what impact they may they have on cases filed after they came into existence, where the advertisements were issued and requisitions sent to the Commission/Board prior to October 28, 1993 given that selection does not give an indefeasible right to appointment and rights have not crystallized, matured or declared by a court of law. This question is ticklish and would need some answer.

**Question of 9 vacancies/Sanctioned cadre Posts occupied by
18 incumbents-Conundrum-Effect of.**

183. Continuing with his thread of arguments, Mr Bali refers to

para.15 in *Hooda-2* to stress that the stand of the State in the case; and if he may be permitted to say so with respect, was unfortunately not pointed out to the Court in *Hooda-1* decided in 1999, as noticed in para. 15 of *Hooda-2*, that the posts advertised in 1992 were already filled up in the year 1997 itself (Group-B officers) two years earlier and, therefore, there were no sanctioned posts or vacancies left for giving effect to the directions of the Court in favour of candidates who had appeared in the combined examination conducted for the posts advertised in the year 1989 for HCS and Allied services. In deference to Court directions Group A officers were accommodated via rule 5 notionally which method alone could have adjusted claims of Group-A. Contends that the issue was not presented before the Supreme Court in the right perspective and an order was passed without hearing the parties likely to be affected. In this sense, *Hooda-1* is not binding on the rights of the petitioners. Mr Bali then submits that it was the duty of VSH, Mann and Yadav in *Hooda-1* case to have apprised the Court of the true facts that some parties already appointed to HCS were required to be heard but they concealed this material fact from Court. This has resulted in the State Government making appointments in excess of sanctioned posts under Court orders and of persons lower in merit in their batch being appointed to higher service and thus, has the potential of adversely affecting public interest and quality of public service inconsistent with the concept of efficiency of administration. He submits that merit beyond advertised posts in a class of service is immaterial. Merit cannot be read as suggested by Mr Anupam Gupta down the spine of the full list sent by the Commission for different

posts as per merit in the combined examination or there is no material difference between 7th and the 8th position. Therefore, the judgment in *Hooda-1* remained restricted to its own facts and is not a judgment in *rem*. It is well settled that a person who is not a party to a judgment is not bound by it and there is great weight of judicial precedents on the point which need no further elaboration.

184. It was the stand of the State that the 1957 and 1972 circulars were issued at a time when the law declared in *Hoshiar Singh* (1993) and other cases was not known. The State argued that the 1930 rules contemplate annual competitive examinations for selection of candidates for Register-B. These statutory rules confer a statutory right on candidates who become eligible in the subsequent year to be considered for vacancies which arose subsequent to the advertisement given in the previous year. This statutory right could not be and was not intended to be taken away by the circulars of 1957 and 1972. It is well settled that administrative circulars cannot override the right to equality conferred by Articles 14 and 16(1) of the Constitution or a statutory provision like rule 9 of the 1930 Rules. It is, therefore, argued that two sets of people have got appointment against the same posts which is impermissible in service law and in antithesis of its accepted and well known principles, tried and tested in courts. Meaning thereby, the nine vacancies which were put in future recruitment in November 1992 on the basis of which appointments came in 1997 pursuant to the examination held in 1996 were in occupation of 9 substantive vacancies/post holders and, therefore, 18 officers have come to occupy 9 posts, which is rather strange like a riddle, wrapped in a mystery,

inside an enigma. The petitioners were necessary parties when *Hooda-1* was rendered and had a right to be heard before their rights against disturbing their seniority in terms of rule 20 could be affected by retrospective intrusion by allied service officers. Resultantly, it was further argued that the appellants in *Hooda-1* and the petitioners [not the present ones] thereafter claiming parity in terms of *Hooda-1* were not appointed against substantive vacancies and, therefore, cannot be declared members of the Service prior to their appointment as that could violate the cardinal principles of service law that one vacancy cannot be occupied by two people and not without ensuing complications in fixation of their inter se seniority.

185. The learned senior counsel points out from para.20 in *Hooda-2* that the Supreme Court proceeded on the assumption that the decisions in *Hooda-1* and *Sandeep Singh* cases were correct and on that basis *Hooda-2* would have to be decided and to consider whether the Act has removed the basis of those decisions or, in fact, in that disguise, it has usurped the judicial power.

186. Besides, it is pointed out that the present petitioner [Kalsan and company, Group-B] were neither party to the *Hooda-1* nor heard in the making of the order.

187. The Supreme Court held that the contention that *Hooda-1* was not properly argued is of no relevance.

188. Mr Bali would lastly urge that the impugned seniority list deserves to be quashed as it is based on the principles of vacancies and not appointments and thereby rule 20 of the Rules as amended on October 01,

1992 stands obliterated and written off which is impermissible in absence of rule 20 being declared constitutionally bad or being struck down as ultra vires, which is not the case. The petitioners also lay challenge to the seniority list for breach of principles of natural justice. They submit that they were not effectively heard by the State when the impugned order was made and the seniority list deserves to be quashed for violation of the principles of *audi alteram partem* as well.

189. In support of his arguments, he has placed reliance on a selection of judgments with respect to seniority issue which may be briefly referred to.

190. In **Gujarat State Dy. Executive Engineers' Association vs. State of Gujarat and others**, 1994 Supp [2] SCC 591 the Supreme Court held in paragraphs 11 and 12 as follows:-

"11. The entire appointment of direct recruits, therefore, from the waiting list was not proper. But these persons have been appointed and are working now at least for five years. It would, therefore, be unjust and harsh to quash their selection at this stage. Therefore, while refraining from quashing the appointment made in pursuance of the direction issued by the High Court, we are of the opinion that the waiting list for one year cannot furnish source of recruitment for future years, except in very exceptional cases. It is, however, necessary to add that non-holding of examination at the instance of the Government could not result in reducing the quota of direct recruits to be worked out on the principle for determination of such vacancies. Therefore, if vacancies had collected between 1983 and 1993 due to interim orders passed by the courts, and they have not been taken into account when the examination for 1993 was held then it would be expedient to direct the Government to work out the same immediately and send the requisition to the Commission for holding selection for, if the

next examination is going to be held within one year from today. We may clarify that it is nobody's case that the quota rule has broken. Therefore the direction is being issued to protect the quota of direct recruits during 1983 to 1993 in the peculiar facts of the present case.

12. Taking up the application of direct recruits, who have been appointed in pursuance of the decision of the High Court, for deemed date of appointment and grant of seniority at the same place as those appointed in 1980 or in 1983 on the basis of selection held in 1980 and 1982, suffice it to say that even the appointment of these candidates was not in accordance with law yet we have not set it aside on equitable considerations. Further, a candidate appointed in pursuance of a direction issued by the High Court in 1989 in respect of a vacancy which might be deemed to have existed in 1981-82 cannot get seniority over those candidates who were appointed either from the same batch on the basis of better aggregate marks or over those candidates who were selected in the subsequent examination. No parallel could be drawn from Ashra case[†]. He was found to have been illegally excluded from the select list as a result of operation of a letter issued by the Commission which was found to be arbitrary. He was, therefore, entitled to be placed in the select list. He was, therefore, entitled to deemed date of appointment. That cannot apply to those who were in the waiting list. A candidate from the waiting list appointed subsequently cannot claim appointment from a back date. Even otherwise appointment of a candidate operates from the date he is appointed and not from the date those from the select list are appointed. Same principle applies even amongst inter se appointees from the waiting list. For instance, if A, B and C are appointed from the waiting list as and when vacancy arises say in 1990, 1991 and 1992, respectively, then their seniority shall be counted from the date of their appointment and B cannot claim it from 1990 or 1991 (sic) nor C can claim either from 1991 or 1990. The claim of the direct recruits is, therefore, rejected and it is directed that they shall be given seniority from the date of their appointment and not from any back date."

191. In **Ashok Pal Singh and others vs. Uttar Pradesh Judicial Services Association and others**, [2010] 12 SCC 635 the Supreme Court observed in paragraphs 19 & 20 as follows:-

"19. The effect of saving the promotee from invalidation of the promotion is that he would be allowed to continue, but his seniority will be reckoned only when he is adjusted against a promotee vacancy in the next recruitment. Therefore all the consequences of striking down Rules 22(3) and 22(4) followed, the only consequence that was excluded was the invalidation of appointments already made by applying the said sub-rules (3) and (4) of Rule 22. Such protection cannot be widened or extended, to deny the quota of direct recruits in the temporary vacancies and thereby nullify the striking down of the said sub-rules. Nor can the protection against invalidation of promotion be used to exclude the number of vacancies equal to the number of officers who were given protection, while computing the vacancies to be filled by different sources. Consequently, in spite of the protection against invalidation and reversion, all the appointments of promotees to temporary vacancies will have to be counted and adjusted against the substantive vacancies under promotee quota under the Rules. In short, the direct recruits should be given quota in the temporary posts also.

20. Therefore, the first direction in the impugned judgment of the High Court (that vacancies occupied by promotees in excess of their quota shall be excluded from computation of respective quotas for direct recruitment and promotion) is contrary to the decision in O.P. Garg [1991 supp (2) SCC 51], and cannot be sustained."

192. In **Siddharam Satlingappa Mhetre vs. State of Maharashtra and others**, [2011] 1 SCC 694 the Supreme Court held in paragraphs 31 & 34 as follows:-

"31. Mr Jethmalani submitted that not only the decision in Sibbia case [(1980) 2 SCC 565] must be followed on account of the larger strength of the Bench that delivered it but the

subsequent decisions must be held to be per incuriam and hence not binding since they have not taken into account the ratio of the judgment of the Constitution Bench. He further submitted that as per the doctrine of "per incuriam", any judgment which has been passed in ignorance of or without considering a statutory provision or a binding precedent is not good law and the same ought to be ignored. A perusal of the judgments in Salauddin Abdulsamad Shaikh v. State of Maharashtra [(1996) 1 SCC 667], K.L. Verma v. State [(1998) 9 SCC 348], Adri Dharan Das v. State of W.B. [(2005) 4 SCC 303] and Sunita Devi v. State of Bihar [(2005) 1 SCC 608] indicates that none of these judgments have considered SCC para 42 of Sibbia case [(1980) 2 SCC 565] in proper perspective.

34. Mr Jethmalani further submitted that the said issue came up for consideration before the Madras High Court in Palanikumar v. State [(2007) 4 CTC 1 (Mad)] wherein after discussing all the judgments of this Court on the issue, the Court held that the subsequent judgments were in conflict with the decision of the Constitution Bench in Sibbia case [(1980) 2 SCC 565] and in accordance with the law of precedents, the judgment of the Constitution Bench is binding on all courts and the ratio of that judgment has to be applicable for all judgments decided by the Benches of same or smaller combinations. In the said judgment of Sibbia case [(1980) 2 SCC 565] it was directed that the anticipatory bail should not be limited in period of time."

193. Lastly, Mr Bali refers to **Union of India and others vs. Ramesh Gandhi**, [2012] 1 SCC 476 where the Supreme Court held in paragraph 22 and 25 to 27 as follows:-

"22. It is well known that decisions are rendered by courts on the basis of the facts pleaded before them and the issues arising out of those pleaded facts. As we have already pointed out, the only issue projected on the basis of the facts placed before the Calcutta High Court and this Court is the competence of the Coal Controller to give directions which in

substance amounted to variation of the terms of the contracts to which the private company and Coal India Ltd. are parties. This Court in Coal India Ltd. v. Continental Transport and Construction Corpn. [(1997) 9 SCC 258] declared that the Coal Controller had the requisite legal authority to give such directions but did not examine any other issue.

25. This Court on more than one occasion held that fraud vitiates everything including judicial acts. In S.P. Chengalvaraya Naidu v. Jagannath [(1994) 1 SCC 1], this Court observed as follows: (SCC p. 2, para 1)

“1. ‘Fraud avoids all judicial acts, ecclesiastical or temporal’ observed Chief Justice Edward Coke of England about three centuries ago. It is the settled proposition of law that a judgment or decree obtained by playing fraud on the court is a nullity and non est in the eye of the law. Such a judgment/decree—by the first court or by the highest court—has to be treated as a nullity by every court, whether superior or inferior. It can be challenged in any court even in collateral proceedings.”

26. Again in A.V. Papayya Sastry v. Govt. of A.P. [(2007) 4 SCC 221] this Court reviewed the law on this position and reiterated the principle. In paras 38 and 39 it was held as follows: (SCC pp. 236-37)

“38. The matter can be looked at from a different angle as well. Suppose, a case is decided by a competent court of law after hearing the parties and an order is passed in favour of the applicant plaintiff which is upheld by all the courts including the final court. Let us also think of a case where this Court does not dismiss special leave petition but after granting leave decides the appeal finally by recording reasons. Such order can truly be said to be a judgment to which Article 141 of the Constitution applies. Likewise, the doctrine of merger also gets attracted. All orders passed by the courts/authorities below, therefore, merge in the judgment of this Court and after such judgment, it is not open to any party to the judgment to approach any court or authority to review, recall or reconsider the order.

39. The above principle, however, is subject to exception of fraud. Once it is established that the order was obtained by a successful party by practising or playing fraud, it is vitiated. Such order cannot be held legal, valid or in consonance with law. It is non-existent and non est and cannot be allowed to stand. This is the fundamental principle of law and needs no further elaboration. Therefore, it has been said that a judgment, decree or order obtained by fraud has to be treated as a nullity, whether by the court of first instance or by the final court. And it has to be treated as non est by every court, superior or inferior."

27. If a judgment obtained by playing fraud on the court is a nullity and is to be treated as non est by every court, superior or inferior, it would be strange logic to hear that an enquiry into the question whether a judgment was secured by playing fraud on the court by not disclosing the necessary facts relevant for the adjudication of the controversy before the court is impermissible. From the above judgments, it is clear that such an examination is permissible. Such a principle is required to be applied with greater emphasis in the realm of public law jurisdiction as the mischief resulting from such fraud has larger dimension affecting the larger public interest."

I am not prepared to accept this judgment as of any relevance to this case and would reject any argument based on it.

Reliance on Principles of sub silentio-stare decisis: Mr Bali

194. The principle is pressed with reference to case law. In **Jaisri Sahu v. Rajdewan Dubey**, AIR 1962 SC 83 the Supreme Court while pointing out the procedure to be followed when conflicting decisions are placed before a bench extracted a passage from Halsbury's Laws of England incorporating one of the exceptions when the decision of an appellate court is not binding. Does this principle extend and apply to a

conclusion of law, which was neither raised nor preceded by any consideration. In other words can such conclusions be considered as declaration of law? Here again the English courts and jurists have carved out an exception to the rule of precedents. It has been explained as the rule of sub silentio.

195. He relies on **Municipal Corporation of Delhi vs. Gurnam Kaur**, [1989] 1 SCC 101 to urge that only a Judge's decision is binding as an authority upon a subsequent Judge is the principle on which the case was decided. The rights of the petitioners, insofar as seniority is concerned, were neither agitated, adjudicated nor directly decided in *Hooda-1*. Quotability as law applies to the principles of a case in its ratio decidendi. He submits that *Hooda-1* does not contain ratio decidendi on question of inter se seniority but on appointments. He refers to paragraphs 10 and 11 of the judgment to contend that pronouncements of law, which are not part of the ratio decidendi are classed as *obiter dicta* and not authoritative and the Court is not bound to follow it. The Supreme Court held that a decision should be treated as given *per incuria* when it is given in ignorance of the terms of a statute or of a rule having force of statute. The Supreme Court quoted in *Gurnam Kaur* from Professor P.J. Fitzgerald, editor of 'Salmond on Jurisprudence' where the concept of sub silentio is explained as follows:-

"A decision passes sub silentio, in the technical sense that has come to be attached to that phrase, when the particular point of law involved in the decision is not perceived by the court or present to its mind. The court may consciously decide in favour of one party because of point A, which it considers and pronounces upon. It may be shown, however,

that logically the court should not have decided in favour of the particular party unless it also decided point B in his favour; but point B was not argued or considered by the court. In such circumstances, although point B was logically involved in the facts and although the case had a specific outcome, the decision is not an authority on point B. Point B is said to pass sub silentio."

196. A decision passes sub silentio, in the technical sense that has come to be attached to that phrase, when the particular point of law involved in the decision is not perceived by the court or present to its mind. In **Lancaster Motor Co. (London) Ltd. v. Bremith Ltd.** (1941) KB 675, 677 : (1941) 2 All ER 11 the Court did not feel bound by earlier decision as it was rendered without any argument, without reference to the crucial words of the rule and without any citation of the authority. This decision was approved by the Supreme Court in *Municipal Corporation of Delhi v. Gurnam Kaur (supra)*. The Bench held that, 'precedents sub silentio and without argument are of no moment.' The courts thus have taken recourse to this principle for relieving from injustice perpetrated by unjust precedents. A decision which is not express and is not founded on reasons nor it proceeds on consideration of the issue cannot be deemed to be a law declared to have a binding effect as is contemplated by Article 141 of the Constitution. Uniformity and consistency is the core of judicial discipline. But that which escapes in the judgment without any occasion is not ratio decidendi.

197. In **B. Shama Rao v. Union Territory of Pondicherry**, AIR 1967 SC 1480 it was observed, 'it is trite to say that a decision is binding not because of its conclusions but in regard to its ratio and the principles

laid down therein.' Any declaration or conclusion arrived without application of mind or preceded without any reason cannot be deemed to be declaration of law or authority of a general nature binding as a precedent. Restraint in dissenting or overruling is for sake of stability and uniformity but rigidity beyond reasonable limits is inimical to the growth of law.

198. In 'Salmond on Jurisprudence' 12th Edn., p.153, Section 27 page 153 it is opined on situations by the learned author where a particular point of law involved in the decision is not perceived by the court or present to its mind, the Court may consciously decide in favour of one party because of point A, which it considers and pronounces upon. It may be shown, however, that logically the court should not have decided in favour of the particular party unless it also decided point B in his favour; but point B was not argued or considered by the court. In such circumstances, although point B was logically involved in the facts and although the case had a specific outcome, the decision is not an authority on point B. Point B is said to pass sub silentio. A good illustration is **Gerard v. Worth of Paris Ltd.** (1936) 2 All E.R. 905 (C.A). There, a discharged employee of a company, who had obtained damages against the company for wrongful dismissal, applied for a garnishee order on a bank account standing in the name of the liquidator of the company. The only point argued was on the question of the priority of the claimant's debt, and, on this argument being heard, the Court of Appeal granted the order. No consideration was given to the question whether a garnishee order could properly be made on an account standing in the name of the liquidator.

When, therefore, this very point was argued in the subsequent case before the Court of Appeal in **Lancaster Motor Co. v. Bremith Ltd.** (1941) 1 KB 675 at 677 (C.A.) the court held itself not bound by its previous decision. Sir Wilfred Greene, M.R. said that he could not help thinking that the point now raised had been deliberately passed sub silentio by counsel in order that the point of substance might be decided. We went on to say that the point had to be decided by the earlier court before it could make the order which it did; nevertheless, since it was decided "without argument, without reference to the crucial words of the rule, and without any citation of authority", it was not binding and would not be followed. A case is only an authority for what it actually decides.

199. The rule that a precedent sub silentio is not authoritative goes back at least to 1661 in **R.V. Warner (Ward)** 1 Keh. 661 Lev. 8 when counsel said: "An hundred precedents sub silentio are not material"; and Twisden, J., agreed: "Precedents sub silentio and without argument are of no moment". This Rule ever since has been followed.

200. Mr Bali points out that it has been laid down by their Lordships in the Supreme Court in the case of **A.R.Antulay v. R. S. Nayak**, 1988 (2) SCC 602 as per Mukharji, Oza and Natarajan, JJ. that "Per incuriam are those decisions given in ignorance or forgetfulness of some statutory provisions or of some authority binding on the Court concerned so that in such cases some part of decision or some step in the reasoning on which decision is based is found on that account to be demonstratively wrong" (See para. 42 of the Report). In para 47, Their Lordships further laid down that "It is settled law that if a decision has been per incuriam the Court can

ignore it." The Hon'ble Justice Venkatachalaiah in *A.R. Antulay* in para. 138 of the report observed and laid down: "It has been asserted that the impugned directions issued by Five Judges Bench was per incuriam as it ignored the statute and earlier *Chadha's* case. But the point is "that the circumstance that a decision is reached per incuriam merely serves to denude the decision of its precedent value. Such a decision would not be binding as a judicial precedent." At page 658 the Supreme Court held that a decision touching upon the jurisdiction of the court has to be, not only consistent with the fundamental rights guaranteed by the Constitution, the same cannot even be inconsistent with the substantive provisions of the relevant statutory law.

201. In **State of UP v. Synthetics and Chemicals Ltd**, [1991] 4 SCC 139 a two Judge Bench of the Supreme Court held the decision of the Constitution Bench in **State of Uttar Pradesh & Others v. M/s. Synthetics & Chemicals Ltd. & Others**, [1990] 1 SCC 109 in its conclusion of law that no sales or purchase tax could be levied on industrial alcohol prospectively overruling the Supreme Court's earlier decision in **State of Uttar Pradesh & Others v. M/s. Synthetics & Chemicals Ltd. & Others**, [1980] 2 SCC 441 was not correctly decided as it fell in both the exceptions, namely, rule of sub silentio and being in per incuriam to the binding authority of the precedents. The Court carved out two exceptions to the doctrine of precedents, namely, the rule of sub silentio and the decision being per incuriam. If a decision falls within either of the two i.e. of sub silentio or per incuriam, the decision then loses its binding authority as a precedent under Article 141 of the Constitution.

(cf. paragraphs 40 and 42 within the reported text of the judgment).

202. In **Haryana Financial Corporation and Anr. v. Jagdamba Oil Mills and Anr.**, the Supreme Court took much the similar view and held that the Court should not place blind reliance on decisions without discussing the fact situation of the decision on which reliance is placed. For the method of reading judgments in order to cull out the ratio and what is binding precedent: See also on the point, Supreme Court rulings in **State of Orissa v. Sudhangshu Sekhar Mishra**, AIR 1968 SC 647; **Ambica Quarry Works v. State of Gujrat**, (1987) 1 SCC 213; **Bhavanagar University v. Politana Sugar Mills (P) Ltd**, (2003) 2 SCC 111; **Bharat Petroleum Corporation Ltd. v. N.R. Vairaman**, (2004) 8 SCC 579; **Ispat Industries Ltd. v. Commissioner Customs, Mumbai**, (2006) 12 SCC 583.

203. In re. **Karnal Improvement Trust, Karnal v. Parkash Wanti (Smt) (Dead) & Anr.**, 1995 (5) SCC 159, the Supreme Court while dealing with Section 59 of the Punjab Improvement Trust Act, 1922 observed on the principle of stare decisis thus:

“Thus we hold that normally the decisions which have been followed for a long period of time and have been acted upon by persons in the formulation of contracts or in the disposition of that property or other legal processes should generally be followed afterwards but this rule is not inexorable, inflexible and universally applicable in all situations. The appellant court will not shirk from overruling the decision or series of decisions which establish a ratio plainly outside the statute or in negation of the object resulting in defeating the purpose of the statute or when the Court is convinced that the view is clearly erroneous or illegal. Perpetration of such an illegal

decision would result in grievous wrong. When the decision touches upon the jurisdiction of the Court or the Tribunal, it is but the duty of the appellate court to consider the correctness thereof and lay down the correct law. When two views are reasonably possible, the alternative view which is consistent with justice and equity, and if no irremedial injury would ensue thereunder, the earlier view may be accepted in the interest of public or for any other valid and compulsive reasons. If it touches the jurisdiction or question of law of great public importance or involves interpretation of the statute, the erroneous interpretation would not be a ground for the court to shirk its responsibility to reconsider the interpretation and lay down the correct principle of law. In that behalf, the doctrine of stare decisis becomes inapplicable. Interpretation of the special statute of local character, if it is consistent with the purpose of the statute and justice and no irremedial injury would arise therefrom, the view of the High Court will be respected by this Court. If the previous decision is plainly erroneous, the court must be satisfied that the view of the High Court is justified. It is not possible or desirable or expedient to lay down any principle which should govern the approach of this court in dealing with the applicability of the doctrine of stare decisis. It would always depend upon several relevant considerations particularly touching the jurisdiction of the court or the Tribunal which decides the dispute. It is seen that Sohan Lal's ratio was laid in the year 1981 [Sohan Lal v. State of Haryana, AIR 1981 Pb & Hry 349] and within 7 years when the opportunity arose, its legality was questioned but the subsequent bench upheld the ratio of Sohan Lai's case. Therefore, it is a case of transient nature and it did not acquire the status attracting stare decisis. The Act intended adjudication by plurality of opinions with multi-voice rather than individual dicta. The doctrine of stare decisis, if applied, would perpetrate illegal interpretation defeating the statutory objective of the Act and a decree by incompetent adjudicator would get

executed."

How are judgments to be read?- Broad principles culled out.

204. This is a question posed and answered in several dicta the most oft-quoted of which is, per Lord Halsbury in **Quinn v. Leathem**, 1901 AC 495 observing:-

"Every judgment must be read as applicable to the particular facts proved or assumed to be proved, since the generality of the expressions, which may be found that they are not intended to be expositions of the whole law but governed or qualified by the particular facts of the case, in which such expressions are to be found."

205. In **Herrington v. British Railways Board** (1972 (2) WLR 537)

Lord Morris spoke:

"There is always peril in treating the words of a speech or judgment as though they are words in a legislative enactment, and it is to be remembered that judicial utterances are made in the setting of the facts of a particular case. Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases. Disposal of cases by blindly placing reliance on a decision is not proper."

206. The following words of Lord Denning in the matter of applying precedents have become locus classicus. The two extracts are:

Each case depends on its own facts and a close similarity between one case and another is not enough because even a single significant detail may alter the entire aspect, in deciding such cases, one should avoid the temptation to decide cases (as said by Cardozo, J.) by matching the colour of one case against the colour of another. To decide therefore, on which side of the line a case falls, the broad resemblance to another case is not at all decisive."

And:

"Precedent should be followed only so far as it marks the path of justice, but you must cut the dead wood and trim off the side branches else you will find yourself lost in thickets and branches. My plea is to keep the path of justice clear of obstructions which could impede it."

207. In **Bharat Petroleum Corporation Ltd. v. N.R.Vairamani**, AIR 2004 SC 4778 the Supreme Court observed and advised for guidance of courts:

"Court should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. Observations of Courts are neither to be read as Euclid's theorems nor as provisions of the statute and that too taken out of the context. These observations must be read in the context in which they appear to have been stated. Judgments of Courts are not to be construed as statutes. To interpret words, phrases and provisions of a statute, it may become necessary for judges to embark into lengthy discussions but the discussion is meant to explain and not to define. Judges interpret statutes, they do not interpret judgments. They interpret words of statutes; their words are not to be interpreted as statutes."

208. To return to the cases in hand. A brief note on the four writ petitions comprising this bunch would be useful to understand the prayers made in each of them.

CWP No.21564 of 2012 (By Mr Puneet Bali, Sr. Advocate)

209. This petition has been filed by Kulwant Kumar Kalsan praying for quashing the final seniority list dated December 12, 2006 (P-16) declaring respondent Nos.2 to 10 from VSH to Pardeep Godara senior to the petitioner and for quashing of the order dated April 16, 2010 (P-24)

whereby Messrs Virender Kumar Dahiya and Sandeep Singh, respondent Nos.11 and 12 were also made senior to Kalsan in violation of rule 20 of the rules. The prayer is that the petitioner be declared senior to respondent Nos.2 to 12 by applying rule 20, notwithstanding the mode of appointment.

CWP No.22211 of 2011 (By Mr K.K. Gupta, Advocate)

210. Ms. Monika Malik and six co-petitioners have also challenged the seniority/gradation list and the order dated June 30, 2011 (P-3) issued in the aftermath of CWP No.3549 of 2007 filed by Shri Wazeer Singh Goyat and connected petitions CWP No.9712 of 2007, CWP No.5791 of 2008 and CWP No.19454 of 2007 challenging the inter se seniority of Messrs Ashok Kumar Bishnoi and Narender Singh who were appointed on October 19, 1993 against the vacancies of year 1985. The writ petition was allowed and the seniority list dated December 12, 2006 over and above the petitioners was quashed by downgrading Messrs Ashok Kumar Bishnoi and Narender Singh and to re-determine the seniority according to rule 20 i.e., from the date of appointment. Their case is that if the aforesaid two officers have been downgraded on the principle of seniority from the date of appointment then that principle should be applied to VSH, Mann, Malhan, Yadav, Sujan Singh, Ashok Kumar Garg, Pushpender Singh and Pardeep Godara (respondent Nos.2 to 10) as well to bring about uniformity in application of rule 20 in a converse situation claiming parity in application of principle of non-discrimination in Article 14 of the COI. They pray that the principle of law laid down by Permod Kohli, J. [as his Lordship then adorned this Court] on August 03, 2010 on the construction

of rule 20 which is the salutary principle to be applied as it is settled proposition of law that date of substantive appointment cannot be reckoned from the date of occurrence of vacancy and seniority has to be reckoned only from the date of substantive appointment and the prevalent rules at the time of appointment are to be applied to draw seniority list, a principle accepted in a series of judgments of Courts. It may be mentioned that CWP No.9712 of 2007, Mr Ram Swarup Verma and 10 others dealt with the 1994 batch of Special Recruitment while CWP No.5791 of 2008, Messrs Jitender Kumar and others and CWP No.19454 of 2007, Ms. Hema Sharma and others dealt with the 1999 batch (Group-C). While these cases were decided on August 03, 2010 (by Permod Kohli, J.in two antithetical parts, the judgment in *Hooda-2* was not brought to the notice of the Court and neither in the Letters Patent Appeals that followed which may have made a material difference from the colossal impact of the 2002 Act and what was taken back from it in *Hooda-2* and how much of it remained on the statute book. To that extent it is said to be sub silentio in Part-2 of the judgment and it be so declared so as not to perpetuate right deprivation forever contrary to rule.

CWP No.20080 of 2012 (By Mr Gurminder Singh, Sr. Advocate)

211. This petition has been filed by VSH and Ajay Malik claiming seniority over Sunita Verma, Sultan Singh Goshwal, Geeta Bharti and Pankaj Chaudhary who were appointed to HCS on January 01, 1993 and December 21, 1992 respectively. They have impugned the order dated December 13, 2006 which downgrades the petitioners' seniority which is claimed to have been granted in compliance of the directions of the

Supreme Court in *Hooda-1*. They submit that their seniority inter se the four respondents should be determined as per merit determined by the Commission. It may be mentioned that one Bhupinder Singh came to be appointed in HCS (EB) on January 05, 1993 from source other than Register-B and, consequently, the aforesaid four officers have been placed next below Bhupinder Singh and after the first seven HCS (EB) officers appointed from advertisement 1989. The pleaded prayer is for uniform application of rule 20 and that two principles of seniority cannot run parallel in one cadre. Remarkably, this is the principle invoked and the principal stand that the Kalsan group of petitioning officers also assert in their cases to downgrade the seniority of VSH group by uniform application of rule 20, whether unamended or amended and restrict seniority to accrue from the dates of appointment.

CWP No.7791 of 2012 (By Dr Surya Prakash, Advocate)

212. This petition has been brought by Jai Krishan, Pardeep Kumar, Jatinder Kumar, Dharmender and Dharamvir Singh who belong to the third cycle in Register-B (Group-C) and were appointed to HCS (EB) on June 01, 1999. They pray for quashing of the seniority list dated April 16, 2010 in which respondents Varinder Kumar Dahiya, Sandeep Singh, Mahavir Singh, Jagdish Sharma, Lalit Kumar and Varinder Singh Lather who were appointed to HCS (EB) as a result of Court orders and joined service on January 10, 2001, December 07, 2001, December 31, 2004, January 04, 2005, December 04, 2000 and December 17, 2000 respectively have been shown senior to the petitioners who joined earlier. It is their case that Sandeep Singh was granted appointment from the date judgment

in his case was rendered by the Supreme Court in Sandeep Singh vs. State of Haryana and therefore they cannot be made senior to the petitioners contrary to the directions issued by the Supreme Court and, therefore, they request that the seniority list dated December 12, 2006 (P-11) prepared by the respondent-State be preserved and they be continued to be placed senior to Sandeep Singh and party.

The case of Sandeep Singh -Revisited

213. *Sandeep Singh vs. State of Haryana and another* was rendered on November 09, 2000 by the Supreme Court (2002) 10 SCC 549. Two Civil Appeals and two Writ Petitions (Civil) No.392 and 449 of 2000 were decided in Sandeep Singh case. They were given parity of treatment with VSH but the appellants were directed to get the benefit of the order prospectively i.e. from the date of appointment. No other person was to be granted appointment as had not approached the Court earlier and relief was barred for them so far as examination of the year 1993 is concerned. The appellants therein had applied under the advertisement dated November 24, 1992 (wrongly printed as December 24, 1992 in the text of the judgment) but could make it only in the Allied Services in the written examination conducted in the year 1993 i.e. with Group-B HCS (EB). When the tentative seniority list was issued inviting objections respondents No.11 and 12 i.e. Messrs Virender Kumar Dahiya and Sandeep Singh filed objections stating that they should be given seniority on the same principle as VSH and party Group-A. Their claim was rejected by the Chief Secretary, Haryana on December 12, 2006 for the reason that the benefit of the order of the Supreme Court could be given

prospectively i.e. from the date of appointment akin to the case of Messrs Dahiya and Sandeep Singh the cases of Messrs Mahavir Singh, Jagdish Sharma, Lalit Kumar and Virender Lather was also rejected. Despite rejection they moved an application on July 26, 2008 yet again claiming seniority in terms of *Hooda-1*. A fresh file was initiated by the Government and was marked for comments. The advice of the Advocate General, Haryana and the Legal Remembrancer, Haryana was thrown to the winds. A fresh proposal was moved on the premise that the judgment in *Sandeep Singh* case passed by the Supreme Court was not clear as to seniority to be assigned. This led the State of Haryana to file I.A. No.4 of 2009 in disposed of Civil Appeal No.7422 of 1999 (*Sandeep Singh's* case) inter alia praying for the following relief:-

“i) clarify the judgment dated 09.11.2000 passed by this Hon'ble Court in Civil Appeal No.7422 of 1999, as to how the Appellants therein are to be fitted in the cadre i.e. as per Service Rules & Instructions, thereby giving them fitment as per their position in the joint/common merit list prepared by HPSC or otherwise.”

214. The application came on for hearing before the Supreme Court on February 2, 2010 and the following order was passed on the statement of the opposite party that it has no objection to the prayer of the Government being allowed as per prayer clause 1 (i). The order reads:-

“Heard the learned counsel for the parties.

This application has been filed by the State of Haryana making the following prayer:

“i) clarify the judgment dated 09.11.2000 passed by this Hon'ble Court in Civil Appeal No.7422 of 1999, as to how the Appellants therein are to be fitted in the cadre i.e. as per Service Rules & Instructions, thereby giving them fitment as

per their position in the joint/common merit list prepared by HPSCand;

ii) Pass any other or further order/s which this Hon'ble Court may deem fit and proper in the circumstances of the case."

The learned counsel for the opposite party has no objection to the abovesaid prayer being allowed as per clause 1(i).

I.A. No.4 is disposed of accordingly."

215. Mr Bali submits that in this application deceit was practiced by the beneficiaries of the order in agreeing and consenting to the prayer for modification of the order in *Sandeep Singh* case which were quite possibly neither perceived nor present on the mind of the Supreme Court. The application worded innocuously had devastating effects on the rights of his client and others similarly situated which were not apprised of to the Supreme Court when it made the order without truly being made to understand the ramifications. The entire length and breadth of the litigation past and present were concealed in the application of the State Government and persons likely to be affected, as the petitioner/s were and who were not made party before the Supreme Court for them to be heard and were seriously injured by what seemed apparently an innocent order. He submits that after the order was obtained it was twisted out of proportion and implemented in a surreptitious manner so as to give a colour that the officers who were part of *Sandeep Singh* case had also been granted the same benefit as given to VSH in *Hooda-1* whereas directions of the Supreme Court in *Sandeep Singh* case were categorically prospective and lucid enough as not to admit any ambiguity sufficient to merit a clarification/modification of the judgment which became final in

2002. It is urged that this act of the likely beneficiaries was in cahoots with interested functionaries and vested interests in Government was eminently a deception practiced on the Court and deserves condemnation for overreaching the judicial process. From the record produced it is pointed out that one of the four appellants in *Sandeep Singh* case made a representation to Chief Secretary, Haryana on July 29, 2008 where rather interestingly he pleaded that:-

“But, at the time of hearing and disposal of our case, the counsel representing us made a prayer for grant of monetary benefits with retrospective effect i.e. w.e.f. at par with our batchmates already appointed in 1996-97. The said prayer was declined by observing that the benefits shall accrue with prospective effect. Moreover, monetary benefit has nothing to do with the benefit of seniority and the order is also totally silent about the seniority aspect.

Perhaps, misinterpreting the aforesaid observation, the beneficiaries of the judgement are being discriminated against by placing us apart from our batchmates, in the seniority list now framed. The aforesaid act of injustice is also contrary to numerous instructions circulated by the Govt. The same can be done by having the matter clarified from LR/Court.

Hence, I would humbly request that justice be done to me/us (batchmates) by obtaining clarification of the matter from the LR Haryana/Court.”

216. Thereupon, the Law and Legislative Department, Haryana put up a note dated August 28, 2008 advising Government that a clarification be sought from the Supreme Court in *Sandeep Singh* case by moving an application. The note reads:-

“As the order dated 9.11.2002 passed by the Hon'ble Supreme Court in Civil Appeal No.7422 of 1999 alongwith SLP(C) No.8707 of 2000, WP(C) 392 and 449 of

2000 is silent with regard to the placement of four appellants named therein with the candidates appointed as a result of the competitive test held in the year 1993 pursuant to the advertisement dated 24.12.1992, therefore, in order to decide the representation of Shri Lalit Siwach, HCS, it would be most appropriate if further clarification in this regard is sought from the Hon'ble Apex Court itself by moving a Civil Misc. Application in consultation with the learned Standing Counsel who defended the aforesaid appeals before the Hon'ble Supreme Court."

217. In these circumstances, the Chief Secretary to Government of Haryana, Chandigarh wrote to the Standing Counsel of the State in the Supreme Court to seek a clarification with respect to placement of the four candidates appointed in HCS, the petitioners/appellants before the Supreme Court in *Sandeep Singh*.

218. In the application presented before the Supreme Court, the salient aspects on which clarification was sought was that reserved category candidates of the batch, 1989/1992, in spite of being lower in merit than the four representationists have been given fitment along with the batch and place above them in the cadre; Ajay Malik and Arvind Malhan were identically situated as the said four; Ajay Malik and Arvind Malhan were fitted in the cadre to HCS [EB] along with their 1989 batch; Ajay Malik and Arvind Malhan were reallocated to HCS in 2004-05, that is, more than four years after Sandeep Singh and three others in *Sandeep Singh* case; these four candidates were making repeated representations to Government to act as per service rules and its instructions for giving them fitment to the post in the cadre along with their batchmates as per their position in the merit list prepared by the Commission; the memorialists

claimed that denial of fitment as per merit in their batch was unjustified, illegal and violative of the right to equality; However, in *Sandeep Singh*, the Supreme Court gave the benefit of its order prospectively i.e. from the date of appointment. On these premises, clarification was sought of the order dated November 09, 2000 passed in *Sandeep Singh's* case by filing IA 4 of 2008 in the disposed of matter, that is, Civil Appeal No.7422 of 1999.

219. Mr Bali submits that on a reading of this application filed in 2008 many vital issues/facts were not disclosed and a consent order was obtained from the Supreme Court on February 9, 2010 by sleight of hand with no objection by the counsel for the opposite party to allow the application as per clause 1 (i) of the prayer clause which is adverse to the interest of the petitioners in cases 1, 2 and 4 and passed without making them parties as likely to be affected persons. Mr Bali submits that this is a consent order which is not a declaration of law and questions as to why such a serious departure was warranted in the teeth of the reasoning in *Sandeep Singh* case where the Supreme Court passed a conscious and binding order denying anti-dated benefits to the four parties to that case. Irrefragably, seniority was one such benefit. His client's were seriously harmed and wronged by a civil conspiracy hatched by some vested interests in State government and the beneficiaries with the State conveniently helping out. The Supreme Court was not assisted advised of full facts as to the ramifications of such an apparently innocuous but loaded application when granted by a consent order.

220. This has led to the impugned order dated April 16, 2010, vide

which the seniority of respondents No.11 and 12 also was re-fixed and they were declared senior to the petitioner/s in total contravention of the judgment and specific directions/order passed by the Supreme Court in *Sandeep Singh* case which could have no retrospective effect on seniority which had to be counted from the date of substantive appointment under Court directions. To this extent, the order dated April 16, 2010 is impugned as illegal and ab initio void. Mr Anupam Gupta appearing for VSH etc. is not the counsel for respondents No.11 and 12 and has vociferously distanced his case from that of Sandeep Singh and company. Having read the order in *Sandeep Singh* case I would say that Mr Bali is correct in his submission that the clarificatory order dated February 9, 2010 passed by the Supreme Court was obtained by the State against vested, accrued and settled rights of the petitioner/s who could not be disadvantaged without being heard and even if they were, the Supreme Court decision in *Sandeep Singh* case was final and binding between the parties. If they were heard I should imagine the order may not have been passed when the factual position was apprised. I have carefully perused the application preferred by the State and find that it was couched in an incomplete statement of facts and the litigation hithertofores was not disclosed and to that extent the impugned order dated April 16, 2010 deserves to be set aside and the petitioner/s declared senior to the appellants and petitioners/appellants in *Sandeep Singh* case [four in number]. It can be said with certitude and irrefragably so that order dated February 2, 2010 passed on the Interlocutory Application was by overreaching the Supreme Court and deceit was practiced. Their fitment

as per their position in the joint/common merit list prepared by the Commission stood ruled out by the verdict in *Sandeep Singh's* case itself as no such benefit of fitment was granted. The consent order dated February 9, 2010 cannot also be seen as one passed or presumed under Article 142 of the Constitution.

221. In the anatomy of service in a department of government, seniority is a shared right in the vertebral column of the cadre forming its backbone, with each vertebrae being a rung in the ladder logic, which is rule-based in its language rather than just a procedural right. Shared, in the sense that it is not personal to anyone while each member is governed by a common principle settled in rules which prescribes the mode and manner in which seniority is to be drawn, say from date of appointment, as in the present case. In that sense each and every member of the service has a right and a substantial stake in the seniority list drawn in accordance with rules. Rules and seniority lists are inseparable otherwise a seniority list will lose meaning and be worth the dustbin. Horizontal steps in the seniority list are merit positions secured in the same service and make the vertical climb to promotion to higher services unless others have a right to enter via promotions by operation of rota and quota where rules allow, which is not the case. In the present case, rotation of vacancies was abrogated by amendment of rule 20 leaving appointments alone as the static point to measure seniority of each person. Even this is how the State understood the rules rationally. On this point even the Courts agreed. All said and done two persons cannot be seen to stand on one horizontal step in the ladder of seniority without conflict. Rules, after all, are meant to

remove conflict and not add to it or cause confusion. This is the logic of a seniority list in the setting of rules and maintaining harmony in service careers. To that extent it is a right in *rem* in the sense against the world but definitely within the cadre that makes for the service. No gainsaying, rights in *rem* can only be declared by regular Courts and Tribunals since declarations then are good against the whole world. A fictional fitment on a rung does not mean two can merrily stand on one. The one who law permits to put his foot first and it comes to rest on a rung during the uninterrupted construction of a seniority list, with no other person available in competition or in sight laying claim, and occupies it in accordance with law, he should not be pushed down or displaced unless rule itself commends otherwise due to its application or to set the balance right on discovery of misapplication in its implementation in terms of rules. Only a statutory rule can displace such person by virtue of its statutory and binding force. Executive instructions under Article 162 of the Constitution cannot go that far as to create rights in conflict with rules of service. They remain subordinate to rule and are not meant to be read in replacement of them. It is trite law that they can be only supplemental in nature for curing or bridging gaps left in the rules, to tide over a problem encountered and which has no other solution except what the policy-maker thought fit in acting harmoniously by balancing conflicting interests of the members of service with the least inconvenience. However, rule 20 of the rules would have to be given primacy in this case and not because I say so, but because the rules do, this court agreeing but shackled by *Hooda-1* which is no longer good law. Surgical intervention

in the spine can be only curative but not performed *de hors* the scalpels of rules to break the bone or the morale of the existing cadre who are already members of the service and that by a retrospective intrusion without the affected party being heard on the rule position or whether he may want to have his say on a matter for the protection of his rights. The right of hearing lies before the State first and then in Court during litigation when competing interests are resolved by decree. The question is really one of breaking the spirit of those who were unwary of the road ahead and the surprises which lay in store for them which they could never even have dreamt of in their wildest dreams. This is confirmed when the State in its affidavit dated September 12, 2013 reveals that officers appointed between 1992 to 1999 were not informed in their appointment letters that their joining will be subject to any pending litigation. Had that been done it would have made a world of a difference and resulted in no remorse or rancour. It would have also given them an opportunity to join and participate in court proceedings to defend their rights which they thought were being invaded, in case they wanted to. The purpose of framing rules is to avoid conflict and not to fan it and to ensure that no one should be taken by surprise. This is also the sacred principle on which governance works. The precepts are for all to see and for individuals to shape their future conduct, their hopes and their aspirations in the service of the State. In such a case, a distinction will have to be drawn between appointment and seniority and that such a marriage, if the two are always conceived to have been, was not made in heaven and can be divorced by operation of rules, given that seniority is not a fundamental or constitutional issue,

even assuming that appointment is, as declared in *Hooda-1* and that part affirmed in *Hooda-2* on principles of arbitrariness and Article 14. I think that the two are not always inseparable Siamese twins. There can be cases where appointment is given but seniority to the detriment of others is not. I think *Hooda-1* gave such a dispensation when the Supreme Court did not speak of, or order seniority to run directly from date of appointment when conscious that there had been meanwhile Advertisement No 7 in November 1992 etc. for recruitment to service in HCS in Register B and were likely to be affected, as Group B and C were not parties before the Court. Had they been parties the matter would have been entirely different, if they were heard they would be bound by orders. It was the duty of VHS to have made likely to be affected persons parties to the case before receiving final orders. Not having done so they remain at their own peril and, therefore, principle of res judicata will not obstruct which can operate only between parties litigating on point adjudged. Therefore, it appears that *Hooda-1* is in personam and binding only parties that were heard, including the State of Haryana which can no longer have any say in the matter having done what it could by enacting the 2002 Act.

222. This to my mind is where the principles of sub silentio and *audi alteram partem* come into play and deserve to be thoroughly understood in all their subtleties in the context of rights of Group-B & Group-C officers which were likely to be jeopardized. *Hooda-1* conferred appointment under the 1957 circular and that direction is protected absolutely as affirmed by *Hooda-2* while upholding the *vires* of the Act/2002. There can be no gainsaying that both cases, i.e. *Hooda-1* and

Hooda-2 deal with appointments exclusively and their ratio has to be understood in that sense since *Hooda-2* also does not speak of consequential seniority when the Supreme Court may so easily have said so, as in *Sat Pal or Neelima Shangla* cases. Leaving not an iota of doubt or scope for interpretation and which onerous and difficult task has fallen on this court placing it in the accompanying discomfort. This has been no pleasant task.

223. In *M. Nagaraj*, (2006) 8 SCC 212, [*supra*] Kapadia, J. spoke for the Constitution Bench as were never spoken before from the highest judicial altitude and in such weighty words:-

"Constitutional adjudication is like no other decision-making. There is a moral dimension to every major constitutional case; the language of the text is not necessarily a controlling factor. Our constitution works because of its generalities, and because of the good sense of the Judges when interpreting it. It is that informed freedom of action of the Judges that helps to preserve and protect our basic document of governance"

224. The Act/2002 in 1st Proviso to Section 4 (3) took away everything from those persons who were appointed in excess of advertised vacancies/posts since August 29, 1989 except salaries and pecuniary benefits earned during the period but not all non-pecuniary benefits accompanying appointment. And more importantly the Act saved previous services rendered in State government before persons came to be appointed in excess, therefore, the Act revived lien on past appointments under the State Government to facilitate restoration of the status quo ante with a right to continued employment in the lower services, say ETOs, Tehsildars etc. The Supreme Court in *Hooda-2* did not hold that VSH etc.

(Group-A) were not sitting in excess of advertised vacancies and, therefore, the Act did not apply to them in all respects. The Court assumed that the petitioners therein were in excess but saved their appointments with retrospective effect as it would be “unreasonable, harsh, arbitrary and violative of Article 14 of the Constitution.” because “the law does not permit the legislature to take back what has been granted in implementation of the court's decision.” These are very significant words which appear to the mind of this court to be the pulsating heart of the binding precedent. In such riot of facts and legal principles involved in this case, the key words appear to be “granted in implementation” of court orders, which deserve to be understood strictly and to be given full effect. The major fallout of *Hooda-2* is that the basis of the Punjab 1957 instructions stand removed so also *Hooda-1*. They stand written off the face of law with effect from August 29, 1989. They are rendered non-existent since then in Haryana which was the only link to seniority which snapped because of the Act and Government did not give till much later. The 1957 instructions gave an opportunity but not an encashable right to reallocation of cadre and cadre seniority in a different service but restricted itself to appointments within the time-frame and that too with no holds barred *vis-à-vis* limitations in Article 137 of the Limitation Act, 1963. VSH for good measure did not rely on the 1957 and 1972 instructions in his pleadings with consequential prayers in his first writ flight in 1994 nor had annexed the circulars in the writ papers, where there was no mention of them. He came back wiser to this Court in 1996 after being returned by the Supreme Court in VHS's first round of litigation

when the SLP No 20328/94 was disposed of on October 13, 1995 permitting him to file a proper petition in the High Court while denying prayer for amending CWP 6057/1994. Then armed with the 1957 circular in the second round in CWP 2557/1996 with Amarjit Singh Mann and Dinesh Singh Yadav joining who had become parties to SLP No 20328/94 through impleadment interlocutory application No 3 of September 4, 1995. Realistically speaking, VSH, Mann and Yadav riding pillion sought the benefit of the circulars in question for the first time in litigation after 1996 after declaration of the result of the combined examination in March 1991, delay becoming a legal issue but overruled in *Hooda-1* the basis of which has been removed except what was restored in *Hooda-2*.

225. In **High Court of Delhi and Another v. A.K.Mahajan and Ors.**, (2009) 12 SCC 62 the Supreme Court had occasion to deal with an adverse retrospective amendment of service rules and while doing so considered the ruling in *Hooda-2* and its ratio and observed:

“In Virender Singh Hooda and Ors. v. State of Haryana and Anr. reported in (2004) 12 SCC 588, this Court recognized the power and competence of the Legislature to make a valid law and make it retrospectively, so as to bind even past transactions. In para 67 and 68, the Court explained the aspect of retrospectivity and came to the conclusion that there was nothing wrong if the Legislature had removed the basis of the decision of this Court by repealing the circulars. It further observed that: “...the candidates have the right to the posts that are advertised and not the ones which arise later for which a separate advertisement is issued. A valid law, retrospective or prospective, enacted by the legislature cannot be declared ultra vires on the ground that it would nullify the benefit which otherwise would have been

available as a result of applicability and interpretation placed by a superior Court.

The decision in the case of Chairman, Railway Board (cited supra)[1997(6) SCC 623, Chairman, Railway Board & Ors. Vs. C.R. Rangadhamaiah & Ors.] was specifically considered in para 70 of the judgment. The Court reiterated the observation made in that case that a Rule, which seeks to reverse from an anterior date a benefit which has been granted or availed of e.g. promotion or pay scale, can be assailed as being violative of Articles 14 and 16 of the Constitution to the extent it operates retrospectively. We have already pointed out that it is only to this extent that the retrospectivity can be challenged. However, for that there has to be a tangible benefit awarded like promotion or pay-scale or a rate of pension. Such is not the state of affairs in the present case. The Court also made reference to the decision in State of J&K v. Triloki Nath Khosa reported in [AIR 1971 SC 1], wherein it was held that impugned Rules did not recall a promotion already made or reduce a pay-scale already granted.

In the decision in N.T. Devin Katti and and Ors. v. Karnataka Public Service Commission and and Ors. reported in [AIR 1990 SC 1233], the Court was considering the right of the candidates to be considered. The question in that case was that as to which Rules were applicable, particularly, when there were amendments in the Rules after the advertisement was issued. The Court clearly held that under such circumstances, normally the existing Rules on the date of advertisement would be applicable, however, if there is an amendment in the Rule with retrospective effect, then it would be the amended Rules, which would be applicable. The Court observed that it was on the date of the advertisement that the right of the candidate crystallizes. However, the Court observed that he had no absolute right in the matter. The Court further observed:

...If the Recruitment Rules are amended retrospectively during the pendency of selection, in that event selection must be held in accordance with the amended Rules.

The Supreme Court further observed that:-

“a candidate, on making application for a post pursuant to an advertisement does not acquire any vested right of selection, but if he is eligible and is otherwise qualified in accordance with the relevant rules and the terms contained in the advertisement, he does acquire a vested right of being considered for selection in accordance with the rules as they existed on the date of advertisement. He cannot be deprived of that limited right on the amendment of rules during the pendency of selection unless the amended rules are retrospective in nature.”

“This judgment was relied upon further in case of Marripati Nagaraja and Ors. v. Government of Andhra Pradesh and Ors. reported in 2007(11) SCC 522. This Court observed:

“The State, in exercise of its power conferred upon it under the proviso to Article 309 of the Constitution is entitled to make rules with retrospective effect and retroactive operation. Ordinarily, in the absence of any rule and that too a rule which was expressly given a retrospective effect, the rules prevailing as on the date of the notification are to be applied. But, if some rule has been given a retrospective effect which is within the domain of the State, unless the same is set aside as being unconstitutional, the consequences flowing therefrom shall ensue. In such an event, the applicable rule would not be the rule which was existing, but the one which had been validly brought on the statute book from an anterior date....”

226. This would require reading of para. 24 in **Chairman, Railway Board & Ors. Vs. C.R. Rangadhamaiah & Ors.**, (1997) 6 SCC 623. The said para. 24 is as follows:-

"24. In many of these decisions the expressions "vested rights" or "accrued rights" have been used while striking down the impugned provisions, which had been given retrospective operation, so as to have an adverse effect in the matter of promotion, seniority, substantive appointment, etc. of the employees. The said expressions have been used in the context of a right flowing under the relevant rule, which was sought to be altered with effect from an anterior date and thereby, taking away the benefits available under the rule in force at that time. It has been held that such an amendment having retrospective operation which has the effect of taking away a benefit already available to the employee under the existing rule is arbitrary, discriminatory and violative of the rights guaranteed under Articles 14 and 16 of the Constitution. We are unable to hold that these decisions are not in consonance with the decisions in Roshan Lal Tandon (AIR 1967 SC 1889), B.S. Yadav (AIR 1969 SC 118) and Raman Lal Keshav Lal Soni (1983(2) SCC 33)."

227. Therefore, it follows by the logic of the aforesaid judgments that it is only "vested rights" or "accrued rights" which are "tangible benefits" awarded by courts based on pre-existing rule which may not be taken away by retrospective amendment. Was seniority a tangible benefit given in Hooda-1 or Hooda-2? This is the core question arising in these cases in search of a direct answer from what was actually handed down in the two cases read with First Proviso to sub-section (3) of section 4 of the Act, 2002 and the provisions of the Punjab Civil Service (Executive Branch) Rules, 1930 as applicable in the State of Haryana prior to their repeal in 2008. Inferential reasoning does not normally apply to court decrees. What is executable is what the Court actually gives with reference to prayers made. In case, seniority is neither prayed for nor expressly decreed then it

would not become per se executable or implementable by the civil authorities as a legal obligation or compulsion. Seniority rights must flow from an existing rule itself. The existing rule was Rule 20. The date of appointment is actual and physical appointment under Rule 20 and on a substantive, clear and notified vacancy. If fictions were created as Mr Anupam Gupta argues, then the legal fiction must be accurately created and discernible without any long winded debate to fathom all consequences to follow as flowing from the fiction and to be taken to their logical end. A clear and vivid right has to be created for legal fictions to follow naturally.

228. Things do not stop here. In the matter of reallocation of cadres in the same combined examination, the Constitution Bench ruling of the Supreme Court in **Shankarsan Dash v. Union of India**; 1991 (1) SCC 47 has to be profitably read which is a leading verdict on the points it covers on the question of reallocation of cadres and upward movement from lower to superior service in a combined examination. The ruling has been followed since its pronouncement and applied to similar situations in a large number of cases. The authoritative ratio in *Shankarsan Dash* proceeds on the postulate that when the process of selection and appointment stands completed then what would happen to the rights of persons whose names are in the waiting list or close enough for such a person to lay claim to a superior service where vacancies remain unfilled on account of shifting up or by reallocation of service. This claim has been negated as one not creating rights on persons in the lower service covered by the same recruitment drive to be shifted up due to vacancy remaining

unfilled for any reason in the superior service. The recruitment process having become Law 23 of the Rules of Cricket, or a dead ball then unfilled vacancies of past selection as a result of non-joining of candidates would have to be put in the trough of vacancies for fresh selection process by future direct recruitment so that the unfilled vacancies become available to be filled in accordance with non-discriminatory and equal opportunity clauses in Articles 14 and 16 of the Constitution by effulgence of rights of consideration cropping up meanwhile for open competition. In *Shankarsan Dash* the factual position had resulted from an examination held by the UPSC in October, 1977 for appointment to various services including the IPS and the Police Services Group B, the combined examination of which was held in October, 1977 and the result declared in May, 1978. A combined merit list of IPS and Police Services Group B was announced which included the name of Shankarsan Dash, the petitioner therein, who did not make the merit to the IPS and was offered DANIPS in Police Services Group B which he had accepted and had joined on the post. When several candidates did not accept appointment offers in Group B, the petitioner's position improved and ultimately, he found himself on the top of the list. Subsequent to the recruitment process of June, 1977 in which Shankarsan Dash appeared, 14 new vacancies arose meanwhile in the IPS due to a few selected candidates not joining the premier service. It was then a claim was laid by Shankarsan Dash etc. in Court for fitment on those vacancies which had drawn a blank and it was this request which was rejected while holding that a candidate whose name appears in the merit list acquires no indefeasible right to appointment if a vacancy arose

by non-joining of some candidate.

229. Service jurisprudence evolved by the Supreme Court from time to time postulates that all persons similarly and identically situated should be treated similarly and question of seniority should be governed by rules [See **State of Karnataka & Ors. v. C. Lalitha**, (2006) 2 SCC 747]. The question then arises is as to whether the present Group A officers while appointed to lower services were similarly situated in rank and status as the first 7 who occupied 7 cadre posts advertised in 1989 in HCS, but the ones below them claimed appointment through the 1957/1972 circulars. The two sets form separate and distinct classes and not a single homogeneous class though belong to the same broad group of competitors/applicants but separated by the thin line of merit determined by the Commission and accordingly demarcated according to advertised vacancies in different services by single advertisement divided in separate independent blocks in multiple recruitments clubbed for convenience in a common examination. It is thus merit category-wise which divides the sets in a combined examination process each according to their performance. I have very serious doubt whether the 1957 Punjab circular and the 1972 Haryana circular deal with combined written examinations followed by interviews for induction into several group services at all, being general in nature issued by the Punjab Public Service Commission. If in an independent advertisement several vacancies of one post are notified for direct recruitment through one examination process then a waiting list is capable of being formulated and activated to fill vacancies left unfilled for any reason in the same stream of service. That too, to fill up left over

vacancies or even if they are filled up in time and vacancies have arisen from the date of recommendations of the Commission/Board within 6 months, then the 1957 circular can be usefully applied to rapidly meet the exigencies of public administration as explained in *Prem Singh* case without awaiting a next recruitment which may take a while. But the 1957 circular does not appear to apply to satisfy the many complications involved in reallocation of cadres through written combined examinations/interviews for entry into various grouped but independent services governed by different set of rules of service recruited in one go by a single competitive test followed by interviews for nothing more than administrative convenience. The 1957 circular is based on pre-partition circulars of 1937 [which have not seen the light of day till date] and which instructions of 1957 were scrutinized in *Hooda-2* and the following trenchant observations which came from the Supreme Court in para. 16 of the report, which read:-

“This circular did not visualize much less deal with the contingency of the selection process taking a very long time, i.e. more than one year and at times several years due to litigation or other unforeseen reasons and the consequential effect on the claims of candidates who become eligible in the meanwhile and who have a right to be considered under Article 14 and 16(1) of the Constitution for appointment against vacancies which arise in the years subsequent to the year of the advertisement in question. These circulars were issued at a time when the law declared in Hoshiar Singh (1993) and other cases were not known.

One more aspect which was not considered either in Virender Singh Hooda, Sandeep Singh's etc. cases is that the Haryana Civil Services (Executive Branch) Rules,

1930, contemplate annual competitive examination for selection of candidates for Register 'B'. These statutory rules confer a statutory right on candidates who become eligible in the subsequent year to be considered for vacancies which arose subsequent to the advertisement given in the previous year. This statutory right could not be and was not intended to be taken away by the circulars dated 22.3.1957 and 26.5.1972. It is well settled that administrative circulars cannot override the right to equality conferred by Articles 14 and 16(1) of the Constitution or a statutory provision like Rule 9 of the said Executive Branch Rules, 1930".

230. The circulars of 1957 and 1972 have been reduced to a dead letter. They stand repealed by Act/2002. The Act stands upheld except to the limited extent indicated in *Hooda-2* to save appointments. The Government of Haryana for the first time made a sharp and pointed departure from the Punjab circular and its own circular of 1972 and laid down its policy in the October 1993 instructions and especially para. 5 thereof found reproduced in para. 36 above. The Government said: “*Therefore, these instructions [1957] would not be applicable where the selection is made through written examination and interviews, whether for one service or combined services. In such cases, no waiting list shall be prepared.*” then the remaining vacancies would be carried forward for fresh recruitment. Single service was roped in by the circular.

Reallocation of Service-short review of case law

231. In the past, the Supreme Court had numerous occasions to deal with cases involving reallocation of services in combined examinations for selection to various posts in three different fact situations in at least three leading cases which require to be looked into. These are:- **Anurag Patel**

vs. UPPSC, (2005) 9 SCC 742, **Union of India vs. Satya Prakash**, (2006) 4 Scale 60 and **Rajesh Kumar Daria vs. Rajasthan Public Service Commission**, JT (2007) 10 SC 154.

232. In *Anurag Patel*, the facts were this; the Uttar Pradesh Public Service Commission conducted a Combined State Services/Upper Subordinate Services (Preliminary) Examination in the year 1990. Altogether 358 posts in various categories were filled up. The issue before the Court was where candidates belonging to the Backward Classes as were entitled to reservation in selection in respect of 57 posts in various categories, out of a total number of 358 posts, and had secured higher rank in the merit list then some of the general candidates would get selected in the lower services against the reserved post even though they are higher in merit than the general category candidates. The Commission followed UP Government instructions dated October 19, 1992 which laid down:-

"Allocation/section of the candidates successful in the combined examinations held for more than one service ought to be made treating each service separately. If any candidate belonging to reserved category, succeeds on merits, without availing himself/ herself of the facility of relaxation in norms and exemption in age limit prescribed for the general candidates, on the basis of his preference, he will not be adjusted against the vacancy/post of the reserved quota. On the contrary, if any candidate belonging to the reserved category, finds place in the selection list, after having availed himself/herself of the facility of relaxation in norms and exemption in age limit prescribed for the general candidates, on the basis of his preference, he ought to be adjusted against the vacancy/ post of the reserved quota."

233. The Court found an anomaly which had caused serious prejudice to candidates who applied for posts in the reserved category, yet they got

selection to the general posts as they were meritorious and were entitled to get selection along with the general candidates. However, their merit and ability did not pay any dividends as they got appointment only to lesser important posts because of the instructions. Strangely, Anurag Patel was a member of the Backward Class and got appointed as Deputy Collector having secured 97th rank in the select list whereas 3rd respondent Rajesh Kumar Chaurasia had secured 76th place in the select list but was appointed as Sales Tax Officer. There were eight other persons belonging to Backward Classes who approached the Allahabad High Court contending that they were entitled to get postings in higher cadre of service as the persons who secured lower rank in the select list were given appointment to the higher post. The instructions of the UP Government compelled them to join posts earmarked for Class-II services. The anomaly happened as the candidates who secured higher marks than the 3rd respondent were adjusted against the vacancies that arose in the general category for various other posts such as Treasury Officers/Accounts Officers and Sales Tax Officers etc. The High Court held that the authorities should have prepared the candidates who are to be appointed on general merit as also candidates who are to be appointed as against the reserved vacancies and while making appointments the inter se merits of the reserved candidates should have been considered and they should have been given the option treating each service separately. As this exercise was not followed, less meritorious candidates got appointment to higher posts whereas more meritorious candidates had to be satisfied in the posts of lower category. The High Court held that this is clear injustice to the

persons who are more meritorious and directed that a list of all selected Backward Class candidates shall be prepared separately including those candidates selected in the general category and their appointments to the posts shall be made strictly in accordance with merit as per the select list and preference of the person higher in the merit list will be satisfied first and appointment given accordingly, while preference of a person lower in the merit will be seen only later. The Supreme Court found no error or illegality in the directions issued by the Division Bench of the High Court and dismissed the appeals by directing the State to carry out the exercise of reallocation within a fixed time-frame. It was also directed that the affected officers shall be given reasonable opportunity of being heard and to the extent possible the State shall give accommodation to such officers.

234. In the next case, **Union of India vs. Satya Prakash**, (*supra*) the Union Public Service Commission in terms of Civil Services Examination Rules, 1996 made selection to various categories of posts [IAS, IFS, IPS etc.] to be filled by direct recruitment. The appeals were concerned only with the OBC category candidates. Three candidates from the OBC category were included in the general merit list which recommended 737 candidates besides 36 OBC candidates were also included in the general merit list on the recommendations of the Commission. 174 vacancies were earmarked for OBC category candidates. However, 138 OBC category candidates were offered appointments while the rest 36 were denied job offers. The sole question before the Supreme Court revolved around the issue whether those OBC candidates; who were selected on merit and were placed in the list of open general candidates, could still, for the purpose of

placement (preference) be considered to be OBC candidates thereby exhausting the quota reserved for relaxed OBC candidates for allocation of service. The Supreme Court answered that the controversy was no longer *res integra* in view of the judgment in **Indra Sawhney vs. Union of India**, 1992 Supp (3) SCC 217 (p. 735 para. 811) where the Constitution Bench held that "reservations under Article 16(4) do not operate like a communal reservation. It may well happen that some members belonging to, say, Scheduled Castes get selected in the open competition field on the basis of their own merit; they will not be counted against the quota reserved for Scheduled Castes; they will be treated as open competition candidates."

235. In addition, the Supreme Court applied the principles evolved in **R.K. Sabharwal & Ors. vs. State of Punjab & Ors.**, (1995) 2 SCC 745 where another Constitution Bench considered the question of appointment and promotion and roster points *vis-à-vis* reservation, that reserved category candidates can compete for non-reserved post and in the event of appointment to the said post their number cannot be added and taken into consideration for working out the percentage of reservation. The law was expanded in **Union of India vs. Virpal Singh Chauhan**, (1995) 6 SCC 684 where the Supreme Court held that while determining the number of posts reserved for Scheduled Caste and Scheduled Tribes, the candidates belonging to reserved category but appointed or promoted on rule of merit (and not by virtue of rule of reservation), shall also not to be counted as reserved category candidates and their seniority shall run from the panel position based on slab systems where rule of reservation would apply to

bring eligible candidates from the reserved category into the panel by an accelerated method by empanelment by quota together with general category candidates. Preferences of services and options given by candidates from the reserved category would not bind them to the options and their merit achieved in open competition would have to be respected by opting a preference, the quota reserved for OBC category candidates does not exhaust.

236. **Rajesh Kumar Daria vs. Rajasthan Public Service Commission**, (*supra*) case also involved OBC candidates in the backdrop of horizontal reservation of female category reservation under Article 15 of the Constitution. The recruitment in question was to the Rajasthan Judicial Services. There was reservation for women candidates up to 20% category-wise in the direct recruitment. Non-availability of eligible and suitable women candidates would not result in carry forward of vacancies to subsequent years as the reservation was treated as horizontal reservation i.e. the reservation of women candidates shall be adjusted proportionately in the respective category in which the women candidate belongs. In para.9 the Supreme Court summed up the problem presented before it which reads as follows:-

“9. In this case, the number of candidates to be selected under general category (open competition), were 59, out of which 11 were earmarked for women. When the first 59 from among the 261 successful candidates were taken and listed as per merit, it contained 11 women candidates, which was equal to the quota for 'General Category - Women'. There was thus no need for any further selection of woman candidates under the special reservation for women. But what RPSC did was to take only the first 48 candidates

in the order of merit (which contained 11 women) and thereafter, fill the next 11 posts under the general category with woman candidates. As a result, we find that among 59 general category candidates in all 22 women have been selected consisting of eleven women candidates selected on their own merit (candidates at Sl.Nos.2, 3, 4, 5, 9, 19, 21, 25, 31, 35 & 41 of the Selection List) and another eleven (candidates at Sl.Nos.54, 61, 62, 63, 66, 74, 75, 77, 78, 79 & 80 of the Selection List) included under reservation quota for 'General Category-Women'. This is clearly impermissible. The process of selections made by RPSC amounts to treating the 20% reservation for women as a vertical reservation, instead of being a horizontal reservation within the vertical reservation."

"10. Similarly, we find that in regard to 24 posts for OBC, 19 candidates were selected by RPSC in accordance with merit from among OBC candidates which included three woman candidates. Thereafter, another five women were selected under the category of 'OBC - Women', instead of adding only two which was the shortfall. Thus there were in all 8 women candidates, among the 24 OBC candidates found in the Selection List. The proper course was to list 24 OBC candidates as per the merit and then find out number of woman candidates among them, and only fill the shortfall to make up the quota of five for woman."

237. The Supreme Court found the grievance of the appellants [male candidates] justified that the selection process adopted by the Commission was contrary to the reservation policy contained in Rule 9 (3) of the Rajasthan Judicial Service Rules, 1955 which rule reads:-

"Reservation for women candidates shall be 20% category-wise in the direct recruitment. In the event of non-availability of the eligible and suitable women candidates in a particular year, the vacancies so reserved for them shall be filled in accordance with the normal procedure and such vacancies shall not be carried forward to the subsequent year and the reservation treated as horizontal reservation,

i.e. the reservation of women candidates shall be adjusted proportionately in the respective category to which the women candidate belongs."

238. Faced with the dilemma in the matter of grant of relief or whether the entire selection should be set aside or whether all the appellants should be granted relief, the Court exercised its jurisdiction under Article 142 of the Constitution to do complete justice as was done in *Sat Pal* case (*supra*) which also is a service matter. *Daria* was decided on July 18, 2007. It happened that ninety seven candidates were appointed in the year 2002 and had been serving as Judicial Officers for more than five years. There was a subsequent selection leading to appointments in between in the year 2005. Furthermore, all the selected candidates were not impleaded as parties in *Daria* case. Even from amongst the original 10 writ petitioners only 7 carried the appeals to the Supreme Court. In these circumstances, the Supreme Court observed that it did not propose to disturb the selection list dated December 30, 2001 in the year 2007 even though it was faulty or interfere with the appointments already made in pursuance of it. The Supreme Court limited its examination to relief which could be granted to the appellants before it. The Court trenchantly observed that even if the selection list had been prepared by applying horizontal reservation properly, only Rajesh Kumar Daria and appellants 3 and 6 in the connected appeal [Mohan Lal Soni & Sunil Kumar Gupta] will get selected. The other appellants were not eligible to be selected and that is how the three were granted appointments without disturbing the selections and appointments already made.

239. In granting relief, the Supreme Court separated the cases of

Sunil Kumar Gupta and Mohan Lal Soni on the one hand and Rajesh Kumar Daria on the other. Appellants 3 and 6 were directed to be appointed but their seniority for all purposes was ordered to be counted only from the date of actual appointment whereas the case of Rajesh Kumar Daria was differentiated though he secured less marks than Mohan Lal Soni and was also not selected because of selection of excess women candidates but was treated preferentially and his appointment was given from 2001 selection list because he had got selected in the subsequent 2005 examination and was appointed in the Rajasthan Judicial Service on February 12, 2005. It was considering this fact and in the interest of justice that he was given retrospective seniority by the Supreme Court but without monetary benefits. It was ordered that seniority would count for the purposes of promotions and pensionary benefits. The directions are of some importance to the case in hand and are reproduced:-

"12.1) Sunil Kumar Gupta (general category candidate with 184 marks) and Mohan Lal Soni (OBC candidate with 169 marks), who ought to have been selected in the 2001 selection list, and who were denied appointment in view of excess selection of women candidates, shall be deemed to have been selected by RPSC. As a consequence, necessary letters of appointment shall be issued to them. Their seniority for all purposes will however be counted only from the date of actual appointment."

"12.2) Rajesh Kumar Daria (OBC candidate with 171 marks) was also not selected because of the selection of excess women candidates. He ought to have been selected and appointed in the 2001 selection. We are told that Rajesh Kumar Daria got selected in the subsequent 2005 examination and was appointed in the Rajasthan Judicial Service on 12.2.2005. Considering the above fact, we direct

that he should be given his position in the 2001 selection list. Interests of justice would be served if he is placed as the last candidate in the 2001 selection list. As he worked from 12.2.2005, we make it clear that such retrospective seniority will not entitle him to any monetary benefits, but will only be counted for promotions and pensionary benefits."

240. It would be seen that reallocation of cadres was normally worked in the background of rules of reservation and not usually amongst the general category alone where merit and ability becomes the decisive factor. Here, reallocation would not help as explained in *Shankarsan Dash* case by the Constitution Bench. This means that each candidate takes his place according to merit in posts advertised category-wise. It appears from past precedents that reallocation of services is possible only when rule of reservation is disturbed where a reserved category candidate is higher in merit than the last general category candidate selected making where for upward movement by deducting one post from the reserved quota in advertised vacancies.

Fitment, Rank vs. Seniority- An opinion.

241. Fitment is not necessarily seniority. It is based on seniority. First, the seniority is to be determined in accordance with rules and then the question of fitment can arise [cf. **Union of India vs. S.D. Gupta**, JT 1996 (2) SC 643]. Seniority in a single cadre presents little complications. Where recruitment to service is through different sources and the rules prescribe a roster, either by rota-quota or otherwise, then if seniority is based on a rotation of posts/vacancies and quota system then the question of fitment can arise. Fitment has to be within quota, therefore, fitment of rota and quota and determination of inter se seniority are distinct things.

Fitment in the order of seniority would be determined with reference to rota and quota prescribed. The issue can be further compounded where service rule requires year-wise recruitment as under rule 9. Then each year becomes a distinct unit of recruitment, each earlier year taking precedence over the subsequent by passage of time. In such a case, fitment would have to be year-wise though appointments may come later. In this way, appointees are required to be fitted according to rules, see **M.S.L. Patil, Assistant Conservator of Forests, Solapur v. State of Maharashtra**, (1996) 11 SCC 361. Where a person cannot be fitted into an inter se seniority list it is possible that he may remain outside the cadre, see **Dr. Rashmi Srivastava vs. Vikram University**, (1995) 3 SCC 653. See also **A.K. Subraman vs. Union of India**, (1975) 1 SCC 319, **A. Janardhana vs. Union of India**, (1983) 3 SCC 601 and **P.S. Mahal vs. Union of India**, (1984) 4 SCC 545. It can thus be said that one can be fitted on a roster point according to rotation of vacancies but still be given seniority from the date of appointment. The case in point is *Arvinder Singh Bains vs. State of Punjab* though in a different rule setting. The question "next below" does not necessarily indicate how inter se seniority would be fixed especially in a case of year-wise recruitment; a question not dealt with in *Hooda-1* but noticed in *Hooda-2* which would make a material difference as to the construction of the directions issued in *Hooda-1*. "Rank", "Fitment" and "Seniority" are birds of a feather but have gained by usage in service law precedents different meanings, the most distinct of which is seniority. The term seniority as used by the Supreme Court in *Sat Pal*, *Neelima Shangla* and *Rajesh Kumar Daria* cases where jurisdiction was

consciously exercised under Article 142, neither inferentially in *Neelima Shangla* case or directly in the other two but still the Supreme Court did not in *Hooda-1* use the word "seniority" while it issued directions for consideration for appointment. Therefore, fitment and seniority are not readily inter-changeable as Mr Anupam Gupta would argue they are. In any case, seniority is neither a fundamental nor a constitutional issue nor a constitutional value and has nothing to do with Article 16 especially when in *Hooda-2* the Supreme Court emphatically declared that the Act/2002 was not violative of Articles 14 & 16 of the Constitution. If the Act is not violative of Articles 14 & 16 of the Constitution and given that Article 14 consists of two parts of arbitrariness and unfair discrimination as explained by the Supreme Court in **Om Kumar vs. Union of India**, (2001) 2 SCC 386 then it cannot be said that what was preserved in direction (3) of *Hooda-2* were only appointments and such things as were implemented by the civil authorities of the directions in *Hooda-1*.

Re:-where party not heard-decision not binding.

242. We cannot individualize justice especially when the rights of numerous likely to be affected persons are involved as against the few who approach court for relief. Where rights in *personam* are taken to Court for adjudication and relief is granted and third party rights are not affected then those rights declared are binding and may not be questioned in ancillary or incidental proceedings or by direct action. However, if rights in *rem* are involved then the decision of the Court can be binding inter-parties but not so as to affect the rights of others prejudicially. As I said seniority is a shared right where the statutory principle laid down for

composing the list has to be adhered to equally for all, each playing on a level field. All disputes relating to rights in *rem* are required to be decided by Courts and when declared are enforceable in *rem*. Over many decades of precedents a principle seems to be established and well embedded in various jurisdictions including in service law that where a party is not heard and is likely to be vitally affected by the decision then the decision rendered will not be binding on such a person. For this reason, it appears quite plainly that the Supreme Court in the clarification application had granted liberty over the seniority issue to be agitated before the High Court and it is for this reason alone that the present matter had been heard at length to decipher the inter se rights between the parties and to declare the principle on which seniority has to be drawn in terms of rule 20 etc. of the 1930 rules. There could be cases in service law where a selection is challenged then it may not be possible, where the selection involves a large number of candidates, to hear them all and, therefore, the Court insists that at least some of the persons in a representative capacity, if not all, are necessary parties required to be heard; See **Prabodh Verma and others vs. State of U.P.**, (1984) 4 SCC 251 [p. 28, 50] and **Tridip Kumar Dingal and others vs. State of West Bengal and others**, (2009) 1 SCC 768. But this is not a selection matter and, therefore, that principle would not strictly apply as it would in a selection process brought to judicial review.

243. In **Udit Narain Singh Malpaharia vs. Board of Revenue**, AIR 1963 SC 786 the Supreme Court held that a person who is likely to suffer from the order of the Court and has not been impleaded as a party has a

right to ignore the order as it is in violation of principles of natural justice.

244. For the extended proposition, see also **Public Service Commission, Uttaranchal vs. Mamta Bisht**, (2010) 12 SCC 204 [for principles enshrined in Order 1 Rule 9 CPC, necessary parties, are applicable to writ proceedings. "More so, proviso to Order 1, Rule 9 of the Code of Civil Procedure, 1908...provides that non-joinder of necessary party be fatal. Undoubtedly, provisions of CPC are not applicable in writ jurisdiction by virtue of the provision of Section 141 CPC but the principles enshrined therein are applicable. (Vide *Gulabchand Chhotalal Parikh v. State of Gujarat* (AIR 1965 SC 1153), *Babubhai Muljibhai Patel v. Nandlal Khodidas Barot* ((1974) 2 SCC 706) and *Sarguja Transport Service v. STAT* (AIR 1984 SC 88)"]. Cf. **Shiv Kumar Tiwari (dead) by LRs. vs. Jagat Narain Rai**, (2001) 10 SCC 11 where in para. 6 of the report the Supreme Court observed on the point:

"Such a judgment could not be pressed into service to the detriment of the rights of the first respondent and it requires no serious exercise to place on record the position of law that the judgment/decreed/order of courts or any other authority binds only the parties to it, or their privies when it concerns the rights of parties and such proceedings purport to adjudicate also rights of contesting parties by means of an adversarial process. Even assuming that the communication of the Deputy Director proceeded to accept its binding nature — it could not have been legitimately made to the detriment and prejudice of the first respondent and it is futile for the appellant or the management to base any right on that alone. The plea that the Department or the first respondent should have filed an appeal, though not parties to the suit, at any rate, does not lie in the mouth of either the appellant or the management to be taken. Though it would have been open

to them to file an appeal with the leave of the court, there is no duty or obligation cast on them so to do on pain of distress when in law they could also legitimately ignore, as not affecting them.”

245. There are other decisions of the Supreme Court where parties were not heard by Court then what that might entail and orders passed declared not to be binding on third parties. These are; **A.M.S. Sushant and others vs. M.Sujatha and others**, (2000) 10 SCC 197, **M.V. Ravindranath and others vs. Union of India**, (2000) 10 SCC 474 and **State of Assam vs. Union of India and others**, (2010) 10 SCC 408 where again in the last case the Supreme Court held:

“14. The State of Assam has raised several grounds in their petitions for special leave. However, at the time of hearing of these appeals, the learned Senior Counsel for the State of Assam contended that the State of Assam was not arrayed as a party to the proceedings and without impleading the State and without affording an opportunity of hearing, the Division Bench ought not to have passed an adverse order against the State. He further contended that the State of Assam was a necessary party to the lis before the High Court and the non-impleadment was contrary to the well-settled principle of natural justice, namely, audi alteram partem.

15. In aid of his submission, the learned Senior Counsel has placed reliance on the law laid down by this Court in Udit Narain Singh Malpaharia v. Board of Revenue [see supra], wherein it was held that in proceedings for a writ of certiorari, it is not only the tribunal or authority whose order is sought to be quashed but also the parties in whose favour the said order is issued, are necessary parties and that it is in the discretion of the court to add or implead proper parties for completely settling all the questions that may be involved in the controversy either suo motu or on the application of a party to the writ or on

application filed at the instance of such proper party.

16. We respectfully agree with the observations made by this Court in Udit Narain case and adopt the same. We may add that the law is now well settled that a necessary party is one without whom, no order can be made effectively and a proper party is one in whose absence an effective order can be made but whose presence is necessary for a complete and final decision of the question involved in the proceeding.”

246. A case of some interest on the point is **State of Himachal Pradesh vs. Kailash Chand Mahajan**, (1992) Supp 2 SCC 351, where the other side of the coin was examined i.e. of cases where it would not be fatal to hear a party and the three following passages would make the understanding clearer. The Supreme Court observed:

" 103. The contention of Mr Shanti Bhushan that the failure to implead Chauhan will be fatal to the writ petition does not seem to be correct. He relies on State of Kerala v. Miss Rafia Rahim¹¹. That case related to admission to medical college whereby invalidating the selection vitally affected those who had been selected already. Equally, the case Padamraj Samarendra v. State of Bihar¹², has no application. This was a case where the plea was founded in Article 14 and arbitrary selection. The selectees were vitally affected. The plea that the decision of the court in the absence of Chauhan would be violative of principle of natural justice as any adverse decision would affect him is not correct.

104. On the contrary, we think we should approach the matter from this point of view, viz., to render an effective decision whether the presence of Chauhan is necessary? We will in this connection refer to A. Janardhana v. Union of India¹⁸ it is held as under: (SCC p. 626, para 36)

“Approaching the matter from this angle, it may be noticed that relief is sought only against the Union of India

and the Ministry concerned and not against any individual nor any seniority is claimed by anyone individual against another particular individual and therefore, even if technically the direct recruits were before the court, the petition is not likely to fail on that ground.

105. What was the first respondent seeking in the writ petition? He was questioning the validity of the Ordinance and the Act whereby he had been deprived of his further continuance. What is the relief could he have asked for against Chauhan? None. The first point is Chauhan came to be appointed consequent to the suspension of the first respondent which suspension had come to be stayed by the High Court on June 12, 1990. Then, again, as pointed out by the High Court it was "till further orders". Therefore, we hold the failure to implead Chauhan does not affect the maintainability of the writ petition"

247. In **Dalbir Singh v. State of Punjab**, (1979) 3 SCC 745, at page 755: Hon'ble Justice A.P. Sen, J., though in minority on the main engaging issue before the Court in a criminal case involving capital punishment and sentencing, culled out on academic authority and from English law precedent the basic principles of the theory of precedents which are of universal application and have been applied in numerous cases that have followed involving the quest for ratio decidendi in decided cases:-

"According to the well-settled theory of precedents every decision contains three basic ingredients:

"(i) findings of material facts, direct and inferential. An inferential finding of facts is the inference which the Judge draws from the direct or perceptible facts;

(ii) statements of the principles of law applicable to the legal problems disclosed by the facts; and

(iii) judgment based on the combined effect of (i) and (ii) above.

For the purposes of the parties themselves and their privies, ingredient (iii) is the material element in the

decision for it determines finally their rights and liabilities in relation to the subject-matter of the action. It is the judgment that estops the parties from reopening the dispute. However, for the purpose of the doctrine of precedents, ingredient (ii) is the vital element in the decision. This indeed is the ratio decidendi. [Quoting from R.J.Walker & M.G.Walker: The English Legal System, Butterworth, 1972, 3rd Edn., pp 123-125]. It is not everything said by a judge when giving judgment that constitutes a precedent. The only thing in a judge's decision binding a party is the principle upon which the case is decided and for this reason it is important to analyse a decision and isolate from it the ratio decidendi. In the leading case of Qualcast (Wolverhampton) Ltd. v. Haynes, (1959) 2 All ER 38, it was laid down that the ratio decidendi may be defined as a statement of law applied to the legal problems raised by the facts as found, upon which the decision is based. The other two elements in the decision are not precedents. The judgment is not binding (except directly on the parties themselves), nor are the findings of facts. This means that even where the direct facts of an earlier case appear to be identical to those of the case before the court, the judge is not bound to draw the same inference as drawn in the earlier case."

248. In **Union of India v. Dhanwanti Devi**, (1996) 6 SCC 44, at page 52 the Supreme Court held:

"9...Every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there is not intended to be exposition of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. It would, therefore, be not profitable to extract a sentence here and there from the judgment and to build upon it because the essence of the decision is its ratio and not every observation found therein. The enunciation of the reason or principle on which a question before a court has been

*decided is alone binding as a precedent. **The concrete decision alone is binding between the parties to it, but it is the abstract ratio decidendi, ascertained on a consideration of the judgment in relation to the subject-matter of the decision, which alone has the force of law and which, when it is clear what it was, is binding.** It is only the principle laid down in the judgment that is binding law under Article 141 of the Constitution. A deliberate judicial decision arrived at after hearing an argument on a question which arises in the case or is put in issue may constitute a precedent, no matter for what reason, and the precedent by long recognition may mature into rule of stare decisis. It is the rule deductible from the application of law to the facts and circumstances of the case which constitutes its ratio decidendi.*

10. Therefore, in order to understand and appreciate the binding force of a decision it is always necessary to see what were the facts in the case in which the decision was given and what was the point which had to be decided. No judgment can be read as if it is a statute. A word or a clause or a sentence in the judgment cannot be regarded as a full exposition of law. Law cannot afford to be static and therefore, Judges are to employ an intelligent technique in the use of precedents.

249. The decisions on the point can be multiplied ad infinitum but go unnoticed presently only to avoid further weight on the settled legal proposition of law under consideration and its applicability to the facts of the present case, on point of right of hearing before taking decision to be binding on non-parties and that only the 'concrete decision' binds those who are privy to the decision, the ratio when in *rem* on a point decided by the Supreme Court remains binding as explained inter alia in *Prabhjot Singh Mand v. Bhagwant Singh*, (2009) 9 SCC 435 explaining in turn the judgment in *Arvinder Singh Bains (supra)*, interpreting rule 18 and 20 of

the Punjab Civil Service (Executive Branch) Rules, 1976 in the context of promotion of State Civil Service officers i.e. PCS (EB) to the IAS, Punjab cadre. Where rule of recruitment and seniority was interpreted by Court the decision would be binding *erga omnes*, for and against everyone.

250. Indisputably, Group-B and Group-C officers were not heard while *Hooda-1* and *Sandeep Singh* cases were decided or cases by this Court, inter alia on amended rule 20, year-wise recruitments and their effect, the 1957 circular's applicability on combined competitive examinations, merit differential in reallocation of cadres, non-existence of waiting lists, principles laid down in *Hoshier Singh* case admitting of exceptions as carved out in *Prem Singh* case etc. etc. It cannot, therefore, be said that the petitioner/s Group-B & C officers are bound by the decision in *Hooda-1* and they appear to be free to *de novo* argue their case for retention of seniority from the date of substantive appointments, the date from which they became members of the service in HCS with VSH group coming in much later through Court orders to which they were not parties. They have a right to assert that legal fictions when created by Court cannot affect their rights to seniority as those fictions are in *personam* only for the purposes of securing appointment at best based on the 1957 circular which was general in nature as found in *Hooda-2*. Had Group-B officers been made parties in *Hooda-1* then the issue of inter se seniority could have been decided finally by the Supreme Court after hearing both sides and the neutral state, a party but all sides bound by rules of service. The Supreme Court then surely have been in comfortable position to settle the dilemma where nine officers were appointed through

Court orders against nine vacancies advertised on November 24, 1992, leaving a strange situation where 18 people came to hold 9 substantive vacancies for which there is no precedent at hand to resolve the conflict of interests. It is this fact situation which has given rise to considerable controversy between the parties to which Mr Anupam Gupta, learned Senior counsel has had really nothing much to urge or offer, even upon a pointed query put more than once, except to press that *Hooda-1* was a decision which created legal fictions and the logic of the legal fiction has to be taken to its empirical end and all consequences flowing therefrom are to be imagined by the Court to give full effect to the fiction and, therefore, the words “fitted”, “next below” the persons and ‘appropriate posts’ can point to only seniority and nothing else and not just embellishments. I am, however, unable to read fictional seniority with the appointments in *Hooda-1* since the stage of contested seniority was not reached as in the present case. This Court is thus of the considered view that Group-B and C officers are not bound by the decision in *Hooda-1* and can ignore it by weight of precedent aforequoted and this aspect was not dealt with and considered in any of the earlier decisions relied upon.

The Legislative intent must be respected/honoured:

251. The will of the legislature is supreme and should be fulfilled by all means including assistance by the Court. When the Act, 2002 has been upheld in *Hooda-2* as constitutional and within the contours of Articles 14 and 16 of the Constitution then full effect must be given to what the legislature ordained and what it took away except what was later saved and preserved by the Supreme Court in *Hooda-2*. The Supreme Court did

not, if I read the judgment correctly, restore all attendant benefits in express words other than restoring loss of employment and, therefore, the predominant issue was survival, as would appear to follow from the collective reasoning culled out from the judgment read as an integrated whole and not in patches because its canvas is large, where reason connects reason in the richness of ideas woven together to make a flowing fabric. That is why the Supreme Court held that only those benefits as were ordered in *Hooda-1* which had not been implemented were still available to decree, which means that the intention of the legislature and of the executive still had to be respected as the legislation was not prepared for a moment to restore or give anything back to the class for whom the Act was designed, as all their past and present rights were withdrawn by virtue of proviso to Section 4[3] of the Act. This is why what was actually given by the Supreme Court in *Hooda-1* has to be strictly read and construed in what it actually gave since there can hardly be any dispute that the decision is no longer good law or a binding precedent to be followed after its basis stands removed and the Act upheld as not a usurpation of judicial power. Besides, *Hooda-1* has suffered constriction in *Hooda-2* in view of the observations made as reproduced above on its weaknesses but the correctness of which could not be doubted. Therefore, the will of the legislature cannot be neglected or sidelined which in reductio is that it meant to give cipher to a class of persons who were appointed in conflict with law, the legislature not contemplating or anticipating what may later be kept preserved in *Hooda-2* in residue insofar as disengagement from services were concerned. No

other bonuses, relaxations or concessions were conferred or secured. Thus, the directions in *Hooda-2* are the operating protections which have to be given full and meaningful effect of what was actually intended and nothing more than that and to balance those of whom whose rights were seriously jeopardized with the rights of those who were likely to be the affected parties, re. Seniority, who may not even have visualized, while legal battles were being fought behind their back that there could be disadvantaged in the future. The Supreme Court in *Hooda-2* did not give, in as many words, the consequential seniority, while it could have, in indentation of the will of the legislature, exercised either under Article 136 or Article 142 of the Constitution of India, which is not the case. Ordinarily, government policy in service matters have to be strictly construed in text and context otherwise it may overstep constitutional boundaries. The legislature must needs to be supreme, ref: *Second Treatise of Civil Government*, John Locke (1690); *Chap. XIII. Of Subordination of the Powers of the Commonwealth*:

“Sec.150. In all cases, whilst the government subsists, the legislative is the supreme power: for what can give laws to another, must needs be superior to him; and since the legislative is no otherwise legislative of the society, but by the right it has to make laws for all the parts, and for every member of the society, prescribing rules to their actions, and giving power of execution, where they are transgressed, the legislative must needs be the supreme, and all other powers, in any members or parts of the society, derived from and subordinate to it.”

252. In its foreword, seniority is a shared right and not a personal right of any one person due to presence of rules and especially rule 20

which prescribes how seniority inter se would be worked out and accordingly fixed and not fitted and ranked. The situation which has arisen in the present case is unparalleled in service law jurisprudence and calls for honouring scrupulously what was given by court orders alone and what was not intended. Because of the ruling in *Hooda-2* removing the underlying principles in *Hooda-1* is that the decision cannot again be rendered on its facts due to legislative intervention to correct a malady and a pernicious practice and bring it in tune with the constitutional philosophy of Part III in Article 16 (1) and 14 where lies relative equality of opportunity subject to what Vivian Bose, J. had to say in *Anwar Ali* case that the “*true content is not to be gathered by simply taking the words in one hand and a dictionary in the other, for the provisions of the Constitution are not mathematical formula which have their essence in mere form.*” The 1957 instructions stand repealed w.e.f. August 29, 1989 by the Act/2002. VSH group may have to rest content with holding back their jobs in government in HCS and with nothing more 'tangible', seniority being an intangible by-product of rules of service. Seniority, I am inclined to think is not a tangible right as say money is, pension is, rights leading to monetary benefits etc. *Hooda-2* does not also give them a tangible right to enter the IAS through the back door on the strength of fallacious seniority and by default as such a situation neither was contemplated nor was accordingly fashioned in the aforesaid judgments. I also do not heartily agree with Mr Anupam Gupta that there is no real difference between the 7th and 8th candidate in this case. Merit is circumscribed by boundaries which are real and not seamless. The

question is also not of who is superior to whom or inferior to whom since all men are born equal but are separated by fortuitous circumstances of luck and bad luck, such as is inherent in a merit list and in ordinary human affairs. There is always a slender line dividing all walks of life in appointment and disappointment. It is often in the old platitude said that a miss is as good as a mile. Almost having done something is the same as not having done it at all, since in both cases the thing does not get done. Here we can aptly invoke the doctrine of fortune where no legal principle is of any help. Even as I say this, public employment is not to be given on the principle say of rounding-off of marks, changing class and category. Value of merit in combined competitive examinations is not a philosophical or constitutional question or a legal principle, just like seniority is not a constitutional issue or a constitutional value as expounded by Mr Anupam Gupta himself and that too so articulately. Merit is the boundary line of a competitive test separating one set of persons from the other who are less fortunate than the other, by accident of merit, which has really nothing to do with the discipline of law. While dealing with the case in which a question arose as to award of grace marks and moderation by the “scaling system” the Division Bench of this Court in LPA No.314 of 2012 decided on November 27, 2012 of which I was the author member observed:

“Before parting, we may add that grace marks and moderation cannot be lightly dealt with and bestowed, worked or added to change merit position in a world of razor sharp competition. Merit position cannot be seen as a mere personal right of a competitor, though it may be personal achievement or lack of it. This is not far to see as it

has public law element in it, amidst a sea of valuable third party rights emerging, jostling and elbowing each other to secure precious public appointments and free and paid seats in educational institutions in the dreary war of attrition, each aspirant clinging to decimals and fractions. It is very serious business. Not even rounding off is permissible or contemplated by law to alter the class or division itself, say from Second to First in matters of public appointment etc., unless statutory rule permits to the contrary, the validity of which would also have to be tested in the event of judicial review.”

Direction (4) in Hooda-2 re-visited to view past precedents on the subject matter.

253. In Civil Appeals No.3937 and 3938 of 2001 arising out of the decisions of the Division Bench in appeal in *Hooda-2* received direction (4) from the Supreme Court:

“The directions of the High Court in favour of respondents Ajay Malik and Arvind Malhan, subject-matter of Civil Appeals Nos. 3937-38 of 2001, are maintained. For the same reason, Jagdish Sharma and Mahavir Singh being higher in merit than Lalit Kumar and Virender Lather would also be entitled to similar treatment.”

254. In my humble view and with the greatest respect, direction (4) in *Hooda-2* (supra) has to be read in conjunction with paragraphs 67 & 68 of the judgment to connect the reasoning in both those paragraphs in order to harmonize the five ultimate directions in para.73. They read as follows:

"67. The result of the aforesaid discussions is that retrospectivity in the Act cannot be held to be ultra vires except to a limited extent which we will presently indicate. It is not a case of usurpation of judicial power by the legislature. The legislature has removed the basis

of the decision in Hooda [(1999) 3 SCC 696] and Sandeep Singh[(2002) 10 SCC 549] cases by repealing the circulars. The Act is also not violative of Articles 14 and 16 of the Constitution. The candidates have right to posts that are advertised and not the ones which arise later for which a separate advertisement is issued. A valid law, retrospective or prospective, enacted by the legislature cannot be declared ultra vires on the ground that it would nullify the benefit which otherwise would have been available as a result of applicability and interpretation placed by a superior court. A mandamus issued can be nullified by the legislature so long as the law enacted by it does not contravene constitutional provisions and usurp the judicial power and only removes the basis of the issue of the mandamus.

68. *Despite the aforesaid conclusion, the Act [proviso to Section 4(3)] to the extent it takes away the appointments already made, some of the petitioners had been appointed much before the enforcement of the Act (ten in number as noticed hereinbefore) in implementation of this Court's decision, would be unreasonable, harsh, arbitrary and violative of Article 14 of the Constitution. The law does not permit the legislature to take back what has been granted in implementation of the court's decision. Such a course is impermissible."*

255. It would then be necessary to juxtapose the directions in *Hooda-I* hereafter:-

"Therefore, we have no hesitation in directing the respondents to consider the cases of the appellants for appointment to posts of Haryana Public Service (Executive Branch). However, it is made clear that the appellants shall be fitted to the post ranking below to those who had been selected along with the appellants at the time of recruitment made pursuant to result declared on June 19, 1992. The appellants will be fitted in appropriate posts and they will accord appropriate scale of pay by giving them the benefit of increments, if any,

but they will not be entitled to any monetary benefits for the period for which they have been kept out of employment. Let such action be taken by the Government expeditiously but not later than a period of three months."

256. As discussed in the earlier part of the judgment, the rulings in CWP No.17792 of 1999, CWP No.5037 of 2000, CWP No.10397 of 1999 (Messrs Sujan Singh, Pushpinder Singh and Pardeep Godara referable to SLP No.13859 of 2001 against the judgment was dismissed on October 12, 2001) & CWP No.2157 of 2000 (Mr Ashok Kumar Garg) were *Hooda-1* based decisions. But the word 'seniority' was a part of the directions and used for the first time. Their basis also stands removed for reasons in *Hooda-2*.

257. It is also of singular importance that when *Sandeep Singh* case was decided on November 09, 2000 two appeals i.e. CA No.7422 of 1999 including an appeal arising out of SLP(C) No.8707 of 2000 and two WPs (C) No.392 and 449 of 2000 the Supreme Court granted appointments prospectively i.e. from the date of appointment. The appellants/petitioners were Messrs Sandeep Singh, Virender Dahiya, Virender Lather and Lalit Kumar and their seniority can only run from November 09, 2000 and not retrospectively. All the four officers belonged to Allied Services who competed against the 12 vacancies, 9 general and 3 reserved, advertised on November 24, 1992 of which the result was declared on March 16, 1996 and appointments of Group-B officers followed to HCS [EB] in 1997. Neither of them could make it against the vacancies advertised in HCS [EB] and could be selected only in Allied Services.

258. The attested copy of the roster register of HCS [EB] as on August 01, 2014 in its 17 rounds of recruitment reveals that the last direct recruits from Register-B till *Hooda-1* was decided on April 13, 1999 were Mr M.Pal and Mr Mukesh Kumar at seniority positions 246 & 247, both inducted in 1998. After Mr Mukesh Kumar one Mr Ram Kumar Beniwal was inducted in 2000 from Register A-1. Thereafter, VSH group have been fitted in vacancies earmarked for Register-B without indicating the year of vacancy. Their names are placed in the 9th and 10th round of recruitment cycles from different sources. The names of Messrs Ashok Kumar Garg, Mahavir Singh, Jagdish Sharma, Ajay Malik and Arvind Malhan are placed in the 11th round at Sr. Nos.287, 288, 289, 291 and 292 also without indicating year of vacancy in the roster register. As a matter of fact from the 11th to the 15th round, the year of vacancy is not indicated. The last person inducted is Mr Sumit Kumar from Register-C at Sr. No.420. The name of Mr Kulwant Kumar Kalsan (petitioner in main case CWP No.21564/2012) from Register-B falls at Sr. No.193. It may be noticed that the view of the Advocate General, Haryana expressed in his letter dated June 09, 2005 advises Government that in view of the decision of the Supreme Court in **Union of India vs. S.S. Uppal** (*supra*) the date of occurrence of vacancies has absolutely no relevance for the purpose of fixing seniority. The seniority rules come into operation only on the appointment of an employee to the service where amended rule 20 would apply w.e.f. October 01, 1992 and not from the date of occurrence of vacancies. The rotation system in the unamended rule was discarded to make way for the new order to emerge and before appointments were

offered to any of the parties in the present cases, including the 7 general category candidates selected from the recruitment process initiated in 1989 culminating in appointments offered in December 1992.

259. In **Rajasthan Public Service Commission vs. Chanan Ram**, 1998 (4) SCC 202 and **P.Ganeshwar Rao vs. State of Andhra Pradesh**, 1998 (Supp) SCC 740 the Supreme Court held though on different facts that where recruitment rules undergo amendment prior to filling up of the advertised posts, the amended rules would apply. It may be lastly mentioned, but is of no relevance to this case, that the Punjab Civil Service (Executive Branch) Rules, 1930 have been repealed by the Government of Haryana and replaced by the Haryana Civil Service (Executive Branch) Rules, 2008.

260. For the many reasons recorded above and on giving my anxious and thoughtful consideration on the unique issues involved in this set of cases with respect to inter se seniority of the officers of HCS(EB), party to the present proceedings, I hold in summary, apart from the internal findings in the judgment next above and as they occur following reasoning on conclusions reached, that:-

(i) Two disparate and contradictory principles of seniority cannot be applied to draw a common inter se seniority list in the same cadre and in the same service, one dependent on rule 20 of the PCS (EB) Rules 1930 as amended on October 27, 1992 before came the appointments of the 1989-1992 batch in December 1992 and before the start of the process of recruitment for Register-B under the advertisement dated November 24, 1992; whilst the other dependent on a mere legal

fiction (not with respect to appointments but with regard to seniority) which was not ordained by the legislature in the 2002 Act, then I am inclined to think that the baton of seniority was not passed on as an accrued or vested right when all rights were taken back by 1st Proviso Section 4 (3) of the Act then what remains is what is left in *Hooda-2* saving appointments alone as the legislative action only to the extent it took away the appointments was found "harsh, excessive, arbitrary and violative of Article 14 of the Constitution". The legislature took away appointments, seniority etc., that is, not virtually but literally everything. *Hooda-2* restored appointments alone. It does not follow *a priori* that seniority was restored. The legislative Act was not washed off completely in all that it withdrew unless saved and granted specifically in *Hooda-2*. When the correctness of *Hooda-1* was held not open to debate, it is to be understood in the sense with respect to appointments alone since mandamus once issued by court could not be recalled by legislature otherwise that would amount to usurpation of judicial power which was impermissible. This has to be seen in the larger canvas in *Hooda-2* when the Act was upheld as not violative of Articles 14 and 16 of the Constitution and not an encroachment over judicial power.

(ii) Rule 20 in the light of rule 17 of the Rules was correctly interpreted by Hon'ble Permod Kohli, J. in CWP No.1945, 3549, 5791 and 9712 of 2007 in the judgment delivered on August 3, 2010 holding that seniority in HCS would count from the date of appointment under amended rule 20 as affirmed in the internal appeal on the construction of rule but relief was refused in the presence of directions in *Hooda-1*. The

scope of relief as to seniority stands drastically altered by the Act, 2002 and *Hooda-2* which now occupy the field. The rules create no legal fiction, neither a dichotomy nor envision two modes of settlement of seniority, which would, if allowed to be departed from result in unfair discrimination of the disputing officers [Kalsan and company, Group-B and Group-C Officers] under one set of rules and if separated by two principles would run afoul of Article 14, the very Article that was relied on for the appointment of 7 Allied service officers to HCS on principles of equal treatment with VSH etc. Equality on both sides must be maintained to endure, one for notional appointment, the other for real seniority from actual dates of appointment as reasoned in the judgment above.

(iii) The Act of 2002 was declared constitutional in *Hooda-2* and consistent with Articles 14 and 16 of the Constitution. The Supreme Court saved appointments but granted in express words no other pecuniary or non-pecuniary benefit which was not “tangible” as explained in *Chairman, Railway Board & Ors. Vs. C.R. Rangadhamaiah & Ors.*, (supra) which ruling was considered in *Hooda-2*. Only vested and accrued rights could not be taken away by legislation. Seniority was not one such tangible fundamental right protected by Part III of the Constitution of India which was non-impartible unless expressly conferred in *Hooda-1* and preserved in *Hooda-2*.

(iv) There is no gainsaying that the basis of *Hooda-1* stands removed by the Act/2002 and *Hooda-1* and *Sandeep Singh* cases and all the intervening cases decided on the basis of *Hooda-1* are no longer good

law as declared by the Act and upheld in its vires in *Hooda-2* and consequently all judgments and orders which rely on them are unenforceable except to the extent indicated in *Hooda-2*. So also the decisions of this Court applying *Hooda-1* after *Hooda-2* which have neither noticed nor applied principles laid down in *Hooda-2* are not binding on the rights of the petitioners in cases 1, 2 and 4. The 1957 and 1972 circulars stand repealed by the aforesaid Act. The intention of the Haryana legislature in enacting the 2002 Act was not to confer any benefit at all on those who were appointed beyond advertised vacancies after August 29, 1989 or even to continue such persons in service who gained access through excess appointments beyond the advertised posts/vacancies but saved with a right to reinstatement in previous service with continuity and without recovery. The Supreme Court declared the 1st Proviso to section 4(3) as “unreasonable, harsh, arbitrary and violative of Article 14 of the Constitution” only to save the appointments by restoration. Employing Article 14 to save appointments was not on principles of unfair discrimination as between two persons or a class of persons but mainly the twin facet of proportionality and unreasonableness which is a well settled part of Article 14. What was meant I think in Direction (3) in *Hooda-2* was that the 1st Proviso to Section 4(3) was not proportionate to the mischief sought to be remedied by the enactment which was otherwise found to be a valid piece of legislation in all other respects. Proportionality is a doctrine in current judicial use as a tool and safeguard against excessive legislation. The direction, to my mind, has to be read in this manner to save appointments from being dispensed with

but not saved *erga omnes*, for all and everything, except for the harshest event which is discovered out of proportion to the cause. In doing this I think the Supreme Court in *Hooda-2* exercised its jurisdiction under Article 142 without actually saying so in as many words.

(v) Direction (4) in *Hooda-2* appears clear and emphatic when it directs that what cannot be taken away from a mandamus issued by court is this; “the law does not permit the legislature to take back what has been granted in implementation of the Court's [*Hooda-1*] decision.” It follows *a priori* what was not implemented on a fair construction of the directions so far as fitment etc. are concerned in *Hooda-1* is rendered in a state of flux and thus unexecutable. The State Government complied with the order by making appointments as per Court orders but did not understand or implement the directions in *Hooda-1* as one which granted seniority through Register B or the directions were *erga omnes*, for all and for everything. This position remained well past the judgment in *Hooda-2* delivered in October 2004, with the circulation of the impugned seniority list on December 12, 2006. Direction (iv) has to be read in my humble view in conjunction with paragraphs 67 and 68 of the judgment in *Hooda-2* guarded by the words “*in view of the aforesaid discussion our conclusions are as under;*” and “*except to the extent indicated above,...*” in paragraph 73.

(vi) In *Hooda-1* the Supreme Court did not clearly use the word seniority as known in service jurisprudence and limited the directions to fitment next below the batch and on appropriate posts. Fitment and seniority do not appear to this court to mean one and the same thing at the

same time in service law in a composite cadre governed by single set of service rules, 1930 while allowing graduation from seniority in Allied services to a different seniority in a superior service governed by separate set of rules of service of which they became members but were borne on the cadre strength from the respective dates of appointments retrospectively and notionally.

(vii) When VSH and nine other Allied service officers were appointed to service and were de facto reallocated to HCS by Court orders they were inducted to service under Rule 5 retrospectively by the State Government in compliance of *Hooda-1* etc as averred in the State's affidavit without having regard to amended Rule 20 then they appear to stand on non-rule territory and on no man's land where there is no guidance available or found from any legal principle with respect to seniority to grant them the consequential seniority following appointments except to be guided by the judicial conscience and informed gut reactions of what appears to court just, fair and equitable. The relief provided by Article 226 of the Constitution is a discretionary one. A writ may neither issue nor an order made merely because it is lawful to do so. The writ court sits in equity where the rules of prudence preside and occupy the field of vision when known legal principles may not come to the rescue or be of any intrinsic help to cull out the relief or to deny it. Equity in its brightest and the most sublime form is a jealous mistress which may not want to share its bed and be betrayed by pedestrian rules, shackled by plebeian legal principles which may be found insufficient whilst venturing to do unconventional justice in a case. It is often said that

a case to be decided *ex aequo et bono*, overrides the strict rule of law and requires instead a decision based on what is fair and just, given the circumstances.

(viii) *Hooda-1* is silent as noticed in *Hooda-2* on the issue of year-wise recruitment under Rule-9 of Register-B, recruitment through Rule-5, direct rule laying down the method of determination of seniority of members of the Service posited in amended Rule 20, principles underlying *Hoshiar Singh* case, effect of the instructions dated October 28, 1993 with respect to combined competitive examinations and extinguishment of waiting lists and is therefore not a binding precedent on each of these issues or their cumulative effect, notwithstanding that *Hooda-1* is no longer good law w.e.f. August 29, 1989.

(ix) In CWP No.17792 of 1999 and CWP No.5037 of 2000 the petitioners were Ajay Malik and Arvind Malhan, where the Division Bench of this Court applied *Hooda-1* and the following directions were issued on September 08, 2000 similar to the ones given 2002 for the next lot:

“Keeping in view these factors, necessarily the petition must be allowed. It is directed that the respondents will consider the cases of the petitioners for appointments to the post of Haryana Civil Service (Executive Branch). They would be ranked as per their seniority in the merit list in pursuance of the result declared on 19.6.1992. They would be given appropriate posts and be accorded appropriate pay scales by giving them the benefit of the increments but they shall not be entitled to the arrears. The directions should be complied within three months.”

Be that as it may, Direction (4) *Hooda-2* with respect to Ajay

Malik and Arvind Malhan and consequently Jagdish Sharma and Mahavir Singh have to be read in the light of preceding paragraphs 71 and 72 where the Supreme Court observed: “we have held that the appointment given to these three cannot be taken back. It would be iniquitous to deny relief to Ajay Malik and Arvind Malhan when it has been granted to other candidates who are lower in merit position than these two respondents. In this view despite the conclusion as aforesaid on the question of law, the direction contained in the impugned judgment of the High Court does not call for any interference qua the respondents in these appeals.” Jagdish Sharma and Mahavir Singh were appointed under Court orders in CWP No.7281 of 2000 jointly filed by them claiming parity of treatment with Group-B Officers the examination for whom was held in October 1993 with result declared on January 21, 1996. The relief granted by this Court on July 3, 2004 was as follows:-

“For the reasons stated above, the instant petition is allowed. The respondents are directed to consider the case of the petitioners for appointment the petitioners to H.C.S. (Executive Branch) within a period of two months from today in terms of the directions issued by the Supreme Court in Sandeep Singh's case (supra). The respondents shall be at liberty to impose the conditions which have been incorporated in the letter of appointment of Ashok Kumar Garg (Annexure A-6).”

In sharp departure of the earlier Division Bench decisions in Malhan and Dinesh Yadav cases in 2000-2001, seniority was not granted while directing consideration for appointment in Jagdish Sharma and Mahavir Singh case next above referred by the co-ordinate bench, headed by Hon'ble M.M.Kumar, J. [as his Lordship then was] which directions

have been maintained in direction (4) in *Hooda-2* where the word 'seniority' was not made part of the directions handed down. It may be noted that when the Special Leave Petition filed by the State in Ashok Kumar Garg's case was decided on August 16, 2002, the 2002 Act had been notified in the Official Gazette on March 27, 2002. The letter of appointment issued to Garg was therefore made conditional on the result of the writ petitions pending before the Supreme Court. In short, what was protected in *Hooda-2* were appointments which appointments are not open to challenge in any Court of law while we are here concerned with the contested issue save and limited and confined to assignment of consequential seniority on such appointments reflected in the impugned seniority list – 2006 drawn as per *Hooda-1* or *Hooda-1* based decisions of which these cases are all about and nothing more.

(x) The Act 2002 took away all benefits granted and flowing from appointments on posts in excess of the advertised vacancies in combined competitive examinations including the appointments themselves leading to disengagement from service in HCS. The Act has been upheld as not violative of Articles 14 & 16 of the Constitution of India in *Hooda-2* nor is it an encroachment on judicial power. Where all rights are taken back then the ones restored in *Hooda-2* are appointments alone as that was found to result in harshness and oppression and unreasonable by standards of Article 14, given that reasonableness is a facet of the equality clause. I find nothing spoken on seniority, directly or indirectly, in *Hooda-2* as part of those rights that stand preserved in the aftermath of the 2002 Act. Statute and rule may find no place when

fundamental rights are involved as Courts have often said but those rights would stretch only to restoration of appointments by court orders in the present cases but not all that may follow suit inferentially; seniority not being a fundamental right but only a civil right and of no fundamental or constitutional value. Judicial conscience does not permit grant of non-pecuniary and 'intangible' benefits other than what is directly granted by mandamus and implemented from directions in *Hooda-1* as considered in *Hooda-2*, confined to what is actually left in remainder of the employment deprivation by the offending First Proviso to Section 4 (3) of the Act and what was retracted by legislative sanction. Otherwise, it would be as though the Act were never passed into the law.

(xi) The Constitution Bench ruling in *Sankarsan Dash* case is the governing law on reallocation of services and cadres. *Neelima Shangla* case stands confined to its own facts in *Sankarsan Dash*. When the law laid down therein is applied then reallocation is impermissible even for the topper in the lower service, then such a person cannot be boarded up through court orders. The 1957 circular has been held to be general in nature in *Hooda-2* and does not deal with reallocation of services or to be seen as breaking away from the confines of advertised vacancies fixed for various services in a combined competitive examination. The principles of law laid down in *Sankarsan Dash* effectively militate against the concept of running merit lists in combined examinations or the creation of waiting lists not required to be maintained by sanction of law or rules as a source of recruitment by reallocation from lower to higher service.

(xii) The 1957 Punjab Circular is anachronistic and archaic and

was rendered effete and inconsistent with the constitutional scheme of appointments to public service after the declaration of law in *Hoshiar Singh v. State of Haryana* [1993] read with the limited exception carved out in *Prem Singh v. Haryana State Electricity Board* [1996] as noted in para. 101 supra, which binding decisions were remarkably both Haryana cases and the governing law on the proposition of appointments in excess of advertised number of vacancies even before appointments were offered to any of the contesting parties in the present set of cases either through selection process or by court orders, notwithstanding the circular/s having being repealed by the Act, 2002 retrospectively and the vires of the Act upheld in *Hooda-2* as being within the fold of Articles 14 and 16 of the Constitution of India and not a usurpation of judicial power in removing the basis of *Hooda-1*. It is significant that G.T. Nanavati, J., was an Hon'ble member of the Division Benches that decided *Prem Singh* and *Hooda-1* cases. In any case, the 1957 circular has to be read in the context of a single competitive examination for recruitment to a single post but not for various services grouped in a combined competitive examination which is a different ball game to be read in the light of a new chapter opened by the April 15th/18th, 1959 instructions reproduced in para. 41 above which gave birth to combined competitive examinations for various services grouped together for convenience in making recruitments and have not been noticed in any of the earlier decisions involving the fate of the parties. Merit has thus to be read as one earned by the dint of placement on individual merit against posts advertised for each of those services put in various but albeit hermetically sealed compartments for the

general category in a train carrying candidates for direct recruitment governed alone by their score/merit position and preferences of service and if such preferences allow upward and downward movement, but not otherwise.

(xiii) It is beyond cavil that when the 1957 Circular was issued direct recruitments for Register-B to the PCS (EB) in Joint Punjab were not conducted in combination with any other or Allied service. The candidates competed exclusively for berths in the PCS (EB), the premier State Civil Service. It is in this way that vacancies arising within six months of the recommendations of the Commission have to be understood in the same stream when rules require recruitments to be made year-wise by drawing names from the same merit list prepared by the Commission to fill vacancies. It has been Mr Anupam Gupta's argument that law has to be understood in the context of the times when it was made and the mischief sought to be remedied. There were notably fewer aspirants to public service in 1957 than at present. There was resurgence in governance in nascent India and manpower was required post-haste to meet the burgeoning demands of recruiting officers/officials in newly established departments with government holding a firm grip on the lives and civil liberties and rights of citizens when only one decade passed since independence. The 1957 Circular may have brought appointments to VSH group and restoration of those appointments after the Act 2002 saved in *Hooda-2* but that will not bring the cherished consequential seniority in HCS to carry them to the Indian Administrative Service, the circular having been repealed in 2002 with retrospective effect from August 29,

1989 which became the foundation of the appointments that followed. The 2002 Act has indirectly resurrected and impliedly revived the line of judicial thinking of the Division Bench of this Court in CWP No.2557 of 1996, the judgment in which case was rendered on April 01, 1997 but was reversed in appeal in *Hooda-1* which decision has lost its precedential value.

(xiv) At any rate, VSH group can take no more than what stands implemented in *Hooda-1* by the State Government before the pronouncement of *Hooda-2* in 2004 and to have no more than what remains of their rights after *Hooda-2* and strictly what it restored to them after the Act which took away all and everything and relegated them to their previous service. Only appointments were saved not because the Act was unconstitutional but the First Proviso to Section 4 (3) was found harsh and oppressive etc. Seniority was not one such benefit returned to the status quo. *Hooda-1* is res judicata on the issue of appointments being saved in *Hooda-2*.

(xv) VSH and his two companion petitioners were offered appointments via the 1957/1972 circulars in *Hooda-1* while the rest 7 came via Article 14 by court orders to prevent unfair discrimination which the Constitution jealously protects and guarantees to every citizen not just against State action but by final mandamus once issued. Be that as it may, the tide of retrospective appointments was stemmed by the Supreme Court in *Sandeep Singh* case. To that extent Mr Anupam Gupta is right that *Hooda-1* and *Sandeep Singh* cases are somewhat irreconcilable even when the term seniority was not specifically used in the latter case while

applying doctrine of parity of treatment in claiming similar dispensation. But they have to be harmonized. The only possible way to attempt a reconciliation of the two rulings is to create a level playing field on the touchstone of Article 14 by detaching appointments from the concept of seniority, one fundamental in nature while the other not quite. When appointments to public posts are offered and accepted the right to serve becomes a fundamental right which can be only curtailed by the provisions of the Constitution or by the statutory rules of service enacted under the proviso to Article 309 of the Constitution or by personal misconduct justifying dismissal or removal from service. However, seniority not being a fundamental right or a constitutional issue of any constitutional value it will remain within the margins of the statutory service rules in venturing to decide the conflicting claims inter se seniority positions. The beneficiaries of *Hooda-1* and *Sandeep Singh* cases and cases falling in between including *Sujan Singh* case, which are declared as no longer good law in *Hooda-2* and the petitioners in cases 1, 2 & 4 deserve to be governed by one principle, the principle enshrined in amended rule 20, that is, for their respective seniorities to run from the dates of appointments since appointment and seniority were clubbed in *Sandeep Singh* case and not because the word seniority was made part of the directions but because appointments were granted prospectively by the Supreme Court on principles of parity and thus the seniority of 4 of the 10 officers who were appellants in *Sandeep Singh* case, would not accrue before appointments came under Court orders. This is for the reason that in *Hooda-1* the Supreme Court did not directly command the State to

include seniority in any of the directions handed down by choosing different but analogous words. It will have to be assumed that the Court was conscious of the rule position on seniority and the mandate of year-wise recruitments and non-presence of Group B & C officers as serious impediments in the way to the relief of seniority. If Court was not conscious or apprised of those legal precepts then VSH etc. have treaded dangerous ground when the Kalsan group and Group C officers were neither party nor were heard when the judgment was passed and to that extent the judgment can be said to pass sub silentio. Therefore, VSH group may have to be 'fitted' in 'appropriate posts' 'ranking below' the initial 7 appointees in the roster register but that will not confer on them an accrued or vested right to seniority from the dates of notional appointment. In absence of clear cut directions in *Hooda-1* with respect to seniority, when one single word "seniority" would have concluded the matter and abridged this judgment to a few pages, for absence of which the same cannot be read into the directions by deeming fiction just as appointments can be. A fine example in judicial craftsmanship to serve the ends of justice is *Sat Pal* case (supra) where seniority was granted with appointment by the Supreme Court expressly invoking Article 142 of the Constitution to bypass a perfectly fair order passed in contempt proceedings by the Jammu & Kashmir High Court which was plainly without jurisdiction since positive directions and relief, as is well settled, could not be given in contempt jurisdiction. However hard I try to agree with Mr Anupam Gupta, the dictates of my judicial conscience restrains me from giving something which was not granted or to see in court orders

when not expressly directed on seniority and to visit adverse civil consequences on the very valuable rights of others who have been trapped by the element of surprise, not being forewarned or forearmed on joining service in HCS (EB) that there appointments are subject to any pending litigation. Seniority after seven years of 1992 was not rule-wise and resultantly or inexorably meant or unambiguously spelled out in *Hooda-1*, while appointments were, but then with much water having flown down the bridge irreversibly, with valuable rights of others settling down in between only to be disturbed contrary to their legitimate expectations. If seniority was doubtless present from the beginning then it may have obviated the debate for months together before this Court on the smouldering issue of inter se seniority. At more than one point in the discussions during the hearings Mr Gupta candidly confessed that he was really addressing in this case the judicial conscience of the Court. I am reminded of a line from T. S. Eliot's poem 'The Love Song of J. Alfred Prufrock' which goes: "That is not what I meant at all; That is not it, at all" and would take the liberty to replace "I" with the words "the Court" to recognize and implement what the Courts have in fact meant, intended and granted by a writ of mandamus. Seniority is not a matter to be beaten around the bush. It can only result, in one way or the other, from crystal clarity brought to bear on a cumulative analysis of the entire case law on the subject matter leaving not even a preponderant doubt in the mind of a person of ordinary intelligence on which side to lean. To achieve this, I am inclined to think, that in order to equitably balance out the competing and conflicting interests of the parties to this *lis* it would be just and proper to

afford to all the contesting parties a level playing field based strictly on service rules in their onward march to the IAS, for that All India Service to promote suitable and experienced officers in the overriding public interest. It is not a mere declamation that extraordinary situations may call for extraordinary measures.

261. For the manifold reasons recorded above on a wide range of contentions raised before this court on all sides and after giving thoughtful consideration to those, in the four cases, this Court issues a writ of certiorari quashing partially the impugned final seniority list dated December 12, 2006 (P-16) qua the parties to the present petitions and the impugned order dated April 16, 2010 (P-24) also falls as they both are not based on rule of seniority determined from date of appointment by applying amended rule 20. Consequently, CWP No.21564 of 2012 is allowed. CWP No.22211 of 2011 is also allowed. Messrs Ashok Kumar Bishnoi and Narender Singh and respondents No.2 to 10 are directed to be treated alike so far as their seniority is concerned on the principles already declared by Permod Kohli, J. in the judgment dated August 03, 2010 on the construction of amended rule 20 in Part-1 of the judgment; Part-2 of the same judgment in CWP 3549 of 2007 and three connected petitions decided on August 3, 2010 and, therefore, that part in appeals, in which present Group B and Group C officers were not party to or involved in the litigation, also pass sub silentio for want of considering the impact and effect of the provisions of the Act, 2002 and the decision of the Supreme Court in *Hooda-2* with respect to *Hooda-1* and the vires of the Act without which material a complete ruling may not have been possible of being

rendered in the scheme of the rules. CWP No.7791 of 2012 is allowed and the seniority list dated April 16, 2010 *vis-à-vis* the five petitioners and the private respondents therein is set aside. Sandeep Singh etc would take their seniority only from dates of appointment as per the directions in their own case i.e. *Sandeep Singh* case (supra). CWP No.20080 of 2012 is dismissed on the principles and reasoning recorded above. Therefore, appointments will relate back notionally by *Hooda-I* since they are not to be disturbed even with a lever long enough, but this is not true of the right to inter se seniority in the cadre of the HCS which rests on the cornerstone of the edifice constructed on the foundations of rule 20 as amended on October 01, 1992 and the PCS (EB) Rules, 1930 read organically as a whole and for it to be counted from the dates of actual appointments as they came to HCS (EB); including by court orders in the special and peculiar facts and circumstances of the case which are unmatched in any past precedent so far as the moot proposition is concerned, save and limited to seniority, which proposition is therefore *res integra*, untouched by dictum or binding decision. Resultantly, the impugned order dated December 13, 2006 in Case 3 above, i.e., CWP No.20080 of 2012 is left to stand.

262. A writ of mandamus is, therefore, issued to the State Government/official respondents to re-draw the seniority list of HCS (EB) officers as are parties to the present cases, in terms of this judgment by keeping in view amended rule 20 of the Punjab Civil Service (Executive Branch) Rules, 1930 as applicable to Haryana, [before they were repealed and replaced in the year 2008 by new rules] with seniority assigned from

the respective dates of actual appointments to service as they occurred, that is, when each of them came to be borne for the first time on the HCS cadre as members of the service.

263. Before parting, I would especially like to thank my Secretary Mrs Manju Mittal for the many days and hours laboured over many week-ends painstakingly, meticulously and ever willingly to put the judgment together, which I dare say, must have been no mean task.

Note: Extracts from judgments wherever quoted and underlined or bold-faced are only for emphasis and not part of reported text.

In the end, the parties are left to bear their own costs.

April 01, 2015
manju

(RAJIV NARAIN RAINA)
JUDGE