

IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.1502 of 2013

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1. Satendra Mochi S/o Prasidha Mochi, R/o Village- Bauwan, P.S. Sigori, District- Patna.
 2. Braj Kishore S/o Bangali Das, R/o Village- Navarosepur, P.S. Barbiga, District- Nalanda
 3. Janardan Ram S/o Late Banhu Ram, R/o Village Mangraon, P.S. Rajpur, District- Buxar
 4. Deodayal Rekha S/o Late Ram Sirith, R/o Village- Garahani, P.S. Garahani, District- Bhojpur (Ara)
 5. Ram Kumar Ram S/o Late Nanhak Ram, R/o Village- Jonhi, P.S. Bikramganj, District- Rohtas
 6. Amarnath Ram S/o Lte Dalku Ram, R/o Village- Bijahari, P.S. Orasan, District- Ghazipur (U.P.)
 7. Srinivas Ram S/o Ram Sakhi Ram, R/o Village- Bhadaula, P.S. Kudra, District- Kaimur
 8. Shree Prasad S/o Sri Rameshwar Kumar, R/o Village-Karsa, P.S. Bikram, District- Patna

.... Petitioner/s

Versus

1. The State of Bihar.
2. The Principal Secretary, H.R.D. Department, New Secretariat, Patna
3. The Director, Primary Education, H.R.D. Department, New Secretariat, Patna.

.... Respondent/s

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Appearance :

For the Petitioner/s : Mr. Pratap Sharma

For the Respondent/s : Mr. Sajid Salim Khan with A.C. Sanjay Kumar

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CORAM: HONOURABLE MR. JUSTICE SHIVAJI PANDEY

ORAL JUDGMENT

Date: 29-08-2016

Heard learned counsel for the petitioners and learned
counsel for the State.

2. In this case, claim has been made by the petitioners
that they should be given promotion from Lower Subordinate Service
(hereinafter after mentioned as 'L.S.S.') to the Subordinate Education
Service (hereinafter mentioned as 'S.E.S.') from the date of vacancies

i.e. with effect from 1991 i.e. they should be given the retrospective promotion and seniority from the date of vacancy earmarked for members of Lower Subordinate Service.

3. The short fact of this case is, petitioners were appointed in Lower Subordinate Service (L.S.S. cadre) in the year 1991 on the post of Assistant Teachers in different Government basic schools.

4. The Personnel Administrative Department, Government of Bihar, vide letter no. 104 dated 09.01.1992, issued the executive instruction stipulating the promotion would be given from the date of vacancies and on 22/2/2007 decision was taken that 50 per cent vacancy of S.E.S. will be filled up by the persons of L.S.S., in that manner, 50 per cent quota was fixed for the promotees.

5. As per the policy decision of the State Government, 50 per cent seat of S.E.S. was to be filled up by promotion, but somehow and others, the Government did not carry out its own decision to fill up the vacancies meant for the promotees.

6. One Kumar Anand Ranjan, claiming to be General Secretary of L.S.S. intervened in LPA No. 460 of 2007, raised the claim that 50 per cent vacancy of S.E.S. has been earmarked for promotion from the L.S.S. cadre, but the Government has not taken any step for filling up the vacancy through promotees. In fact,



Intervention Petition was filed in C.W.J.C. No. 4257 of 2007, which was rejected. When the order was passed against them, they along with others have filed L.P.A. No. 434 of 2007 and this Court in Letters Patent Appellate jurisdiction considered the plea of the petitioners and passed the order, thereby recorded that 50 per cent post of S.E.S. has been marked for the L.S.S. and 50 per cent vacancy of S.E.S would be filled up by the direct recruitment. For a long period, the quota rule was not followed. The Court, on the basis of statement made in the supplementary counter affidavit, where sufficient vacancies have been shown to be vacant against 50 per cent of the post of S.E.S., expected, the State shall expedite the process of promotion of members of L.S.S. against the vacancy available for them in S.E.S. and directed for filling up the vacancies through promotion within six months. It will be relevant to quote paragraph 8 of the said judgment, which is as follows:-

“On a careful reading of Annexure-2 it is found that the decision contained therein provides for reserving 50 per cent of posts for promotion from LSS and not 50 per cent of the vacancies. The figures of promotions and direct recruitment given by the State in the past as mentioned in supplementary counter affidavit referred above, disclose that quota rule has not been followed strictly in the past and hence, the

present stand of the State in paragraph 16 of the supplementary counter affidavit that now again the vacancies are sufficient to take care of promotion to the post of LSS against 50 per cent of the posts in SES appears to be quite a just and proper stand.”

7. When the order of this Court was not complied with, petitioners approached this Court in M.J.C. No. 4988 of 2011 and thereafter, the order of Division Bench was complied with by issuing Notification no. 898 dated 26.3.2012 and Notification No. 1186 dated 11.05.2012 granting promotion to the persons from the L.S.S. cadre to the S.E.S. and they have been made entitled from the date of joining of their posts.

8. The counsel for the petitioners has raised a grievance that petitioners were deprived of the promotion from a very long period. They have been given promotion in S.E.S. cadre, vide Memo No. 898 dated 26.03.2012 (Annexure-5) and vide Order no. 1186 dated 11.5.2012 but wrongly deprived of granting promotion and seniority from due date as their promotion and seniority should be counted from the date the vacancies were available, not from the date of passing the order inasmuch when this Court in L.P.A. No. 434 of 2007 gave direction for taking action within six months, the action could be fructified after a lapse of long period i.e. about two years

when they felt the heat of contempt proceeding. In such view of the matter, either petitioners should be given the benefit of promotion from the date of vacancy or from the date the Court passed the order for filling up the vacancy.

9. The counsel for the petitioners has placed reliance on the Notification no. 2679 dated 29.12.2011 by which the large number of persons have been given the benefit of promotion from the retrospective date and has also placed reliance on another Notification of the State Government, vide Notification no. 1805 dated 8.7.2014 (Annexure-7) whereas the counsel for the State submits petitioners cannot be given the benefit of promotion with the retrospective effect, as the Government has taken decision of granting the promotion prospectively except in an exceptional circumstances. The State has placed reliance on the letter dated 26.04.2007 (Annexure-A to the counter affidavit) where the Director 'Administration'-cum-Deputy Secretary has taken a view that granting promotion with retrospective date will cause financial burden unnecessarily upon the exchequer of the State without taking work from the persons concerned. He has also pointed out, vide Notification no. 2679 dated 29/12/2011, the persons have been granted monetary benefit from the date of joining. Merely because vacancies were available, would not be ipso facto, made him entitled for promotion but subject to suitability as well as

crossing the Kala Awadhi as well as on the recommendation of Departmental Promotion Committee. Petitioner has no right for promotion but has right for consideration of promotion and there is no allegation that any junior to them has been promoted and they have been left out.

10. The counsel for the petitioners has placed reliance on the judgments reported in **A.I.R. 1984 (SC) 1291 : (1984) 4 SCC 545** (*P.S. Mahal and others, v. Union of India and others*), **A.I.R. 1991 (SC) 1818** (*Ram Sewak Prasad v. State of U.P., and others*), **(2006) 6 SCC 673** (*Arvinder Singh Bains vs. State of Punjab and ors.*) and **(1991) Suppl. 1 SCC 334** (*State of Bihar and others vs. Akhoury Sachindra Nath and others*) whereas the State has placed reliance on the judgments reported in **(2007) 15 SCC 406** (*Nani Sha and others vs. State of Arunachal Pradesh and others*), **(2008) 1 SCC 747** (*R.K. Mobisana Singh vs. KH. Temba Singh and others*) and **(2013) 8 SCC 693** (*P. Sudhakar Rao and others vs. U. Govindra Rao and others*) and the State has submitted that if any promotion is granted retrospectively will cause immense prejudice to the persons, who have been appointed as direct recruit earlier.

11. The counsel for the petitioners submits that after the year 1991, no one from direct recruitment has been appointed and no one is going to be affected in any manner, even if the promotion is

granted to the petitioners from the date of vacancy.

12. Having considered the rival contentions of the parties, before deciding the issue involved in the present case, it will be proper to examine earlier judgment dealing with issue involved in the present case.

13. Hon'ble Supreme Court and this Court have dealt with the issue involved in the present case, as in **V.B. Badami vs. State of Mysore, (1976) 2 SCC 901**, the issue of inter se seniority between the direct recruits and the promotees was there. The cadre was consisted only of permanent post. In between December 2, 1957 and September 10, 1959 the total vacancies were 59 of which 39 were for promotees and 20 were for direct recruit. All posts, including posts reserved for direct recruits were filled up by promotees. There were in fact 59 promotees. Promotees 20 in excess of their quota were occupying post, as there was, however, no direct recruitment during that period. Again, between September 11, 1959 to September 10, 1965 the total number of vacancies were 208. Under the quota rule 71 were promotional vacancy and 137 were direct recruitment vacancies. There was in fact 168 promotees and therefore 97 promotees were in excess of their quota. Out of 137 direct recruitment quota only 20 were filled up during that period and the promotees, however, being 20 in excess were not entitled to confirmation against the vacancies



within the quota of direct recruits. Promotees were promoted on officiating basis during the period direct recruits were not available. When appointment was made in quota of direct recruit, they were sent for training for requisite period. On completion of period of training there was no renewal of temporary post. In gradation list, direct recruits were shown senior to the promotees. Promotees took and point that the direct recruits were appointed on temporary basis could not claim seniority that “vacancies” mean not only those in permanent post but also those in temporary post and therefore the quota rule applies in both the cases. The Court has held, direct recruits were appointed against the permanent vacancies and promotees has to be pushed down in view of the fact that direct recruits have been appointed against their quota and they are senior to the promotees. The Court has elaborately dealt with matter, in what manner, seniority would be counted in the case of quota rule. It will be relevant to quote paragraph 29 of the said judgment, which is as follows:-

“In working out the, quota rule, these principles are generally followed. First, where rules prescribe quota between direct recruits and promotees confirmation or substantive appointment can only be in respect of clear vacancies in the permanent strength of the cadre. Second, confirmed persons are senior to those who are officiating. Third, as between persons appointed in officiating capacity, seniority is to be counted on the length of continuous service. Fourth, direct recruitment is possible only by competitive



examination which is the prescribed procedure under the rules. In promotional vacancies, the promotion is either by selection or on the principle of seniority-cum merit. A promotion could be made in respect of a temporary posts or for a specified period but a direct recruitment has generally to be made only in respect of clear permanent vacancy either existing or anticipated to arise at or about the period of probation is expected to be completed. Fifth, if promotions are made to vacancies in excess of the promotional quota, the promotions may not be totally illegal but would be irregular. The promotees cannot claim any right to hold the promotional posts unless the vacancies fall within their quota. If the promotees occupy any vacancies which are within the quota of direct recruits, when direct recruitment takes place the direct recruits will occupy the vacancies within their quota. Promotees who were occupying the vacancies within the quota of direct recruits will either be reverted or they will be absorbed in the vacancies within their quota in the facts and circumstances of a case. ”

14. In the case of P.S. Mahal and others vs. Union of India and others (1984) 4 SCC 545, the question arose in what manner the seniority will be decided between two groups of Executive Engineers in Central Public Works Department of the Ministry of Works and Housing, Government of India, one group consisting of promotees from the grade of Assistant Executive Engineers and the other consisting of promotees from the grade of Assistant Engineers. The dispute between these groups in regard to the seniority was under consideration in the aforesaid judgment. The Court placed reliance on



A.K. Subraman v. Union of India, (1975) 1 SCC 319 that the seniority in the grade of Executive Engineers was liable to be fixed on the basis of length of continuous officiation in that grade. The Court has held that there is no inherent vice in the quota rule being operated through the rotational rule of seniority. Where the rotational rule of seniority is adopted, the relative seniority of promotees from different sources has to be determined on the basis of a roster maintained in accordance with the quota rule, so that when promotion of an officer is regularly made within his quota, he is fitted into the vacancy reserved for the promotees from his source and his seniority is reckoned from the date such when such vacancy arose, but the rotational rule of seniority is inextricably linked up with the quota rule and if the quota rule is not strictly implemented and there is large deviation from it regularly from year to year, it would be grossly discriminatory and unjust to give effect to the rotational rule of seniority. However, some light deviation from the quota rule may not be material, if there is enormous deviation, other considerations may arise. If the rotational rule of seniority is to be applied for determining seniority amongst officers promoted from different sources, the quota rule must be observed. The application of the rotational rule of seniority when there is large deviation from the quota rule in making promotions is bound to create hardship and injustice and result in impermissible



discrimination. The rotational rule of seniority is inextricably linked up with the quota rule and if the quota rule is not strictly implemented and there is large deviation from it regularly from year to year it would be grossly discriminatory and unjust to give effect to the rotational rule of seniority. It will be relevant to quote paragraphs 31 and 32 of the said judgment, which are as follows:-

“Para 31 We find that rule 2(iv) also suffers from the same infirmity. It provides for rotational rule of seniority based on the prevailing quota for determining inter se seniority between Assistant Engineers and Assistant Executive Engineers promoted to the grade of Executive Engineers from and after 22nd December 1959 subject to en bloc seniority being given to the Assistant Executive Engineers promoted to the 86 'carried forward' vacancies as set out in Rule 2(iii). Obviously, if Rule 2(iii) providing for en bloc seniority to be given to the Assistant Executive Engineers promoted to the 86 'carried forward' vacancies is unconstitutional and void as held by us in the preceding paragraph of this judgment, it must follow that the inter se seniority between Assistant Engineers and Assistant Executive Engineers promoted from and after 22nd December 1959 would be governed wholly by the rotational rule of seniority set out in Rule 2(iv). Now there can be no doubt that a rule of seniority based on rotation of vacancies according to the quota prevailing at the time would be constitutionally acceptable if the quota rule were strictly implemented, barring minor deviations. It is well settled as a result of several decision of this Court that there is nothing inherently wrong in working out the quota rule by adopting



the rotational rule of seniority. But, as pointed out by this Court in [*N.K Chauhan v. State of Gujarat*](#), (1977) 1 S.C.C. 308 (supra) quota is not 'so inter-locked with rota that where the former is expressly prescribed, the latter is impliedly inscribed". The quota rule does not inevitably invoke the application of the rotational rule of seniority. Even where a quota is prescribed for recruitment from different sources, there may be different modes prescribed for determining seniority of officers on entry into the cadre. In fact, right from 25th August, 1949 when the quota rule was introduced upto 22nd December, 1959, the seniority amongst Assistant Engineers and Assistant Executive Engineers promoted as Executive Engineers was governed not by the rotational rule but by the length of continuous officiation. It is therefore obvious that even where there is a quota rule governing recruitment to a cadre from different sources it is not necessary that there should be any particular rule of seniority. The Government may in its wisdom adopt an appropriate rule of seniority which may be based on length of continuous officiation or may follow a roster arranged in conformity with the quota rule so that seniority may be determined according to the rotation of vacancies under the quota rule. There may also be any other appropriate rule for determining seniority in a cadre. Indeed, as pointed out by Krishna Iyer, J. in *N.K. Chauhan's* case, myriad ways can be conceived "for determining seniority of officers on entry into a cadre." But whatever may be the rule of seniority adopted by the Government, it is well settled that it must satisfy the best of equality enshrined in Articles 14 and 16 of the Constitution. The question in each case would be whether on the facts and circumstances of the case, the rule of seniority prescribed by the Government meets the challenge of the

constitutional provision enacted in Articles 14 and 16.

Para 32 We have already pointed out that there is no inherent vice in the quota rule being operated through the rotational rule of seniority. Where the rotational rule of seniority is adopted, the relative seniority of promotees from different sources has to be determined on the basis of a roster maintained in accordance with the quota rule, so that when promotion of an officer is regularly made within his quota, he is fitted into the vacancy reserved for promotees from his source and his seniority is reckoned from the date when such vacancy arose. But this rotational rule of seniority can work only if the quota rule is strictly implemented from year to year. Some slight deviations from the quota rule may not be material but as pointed out by Palekar, J. in the Bishan Swarup Gupta's case, "if there is enormous deviation, other considerations may arise". If the rotational rule of seniority is to be applied for determining seniority amongst officers promoted from different sources, the quota rule must be observed. The application of the rotational rule of seniority when there is large deviation from the quota rule in making promotions is bound to create hardship and injustice and result in impermissible discrimination. That is why this court pointed out in A. K. Subarmans's case that

...when recruitment is from two or several sources, it should be observed that there is no inherent invalidity in introduction of quota system and to work it out by a rule of rotation. The existence of a quota and rotational rule, by itself, will not violate [Article 14](#) or [Article 16](#) of the Constitution It is the unreasonable implementation of the same which may, in a given case, attract the frown of the equality clause.

The rotational rule of seniority is inextricably linked up with the quota rule and if the quota rule is not strictly implemented and there is large deviation from it regularly from year to year, it would be grossly discriminatory and unjust to give effect to the rotational rule of seniority. We agree wholly with the observation of D.A. Desai, J. in [A. Janardhan v. Union of India](#) (1983) 3 S.C.C. 601 that

"where the quota rule is linked with the seniority rule; if the first breaks down or is illegally not adhered to, giving effect to the second would be unjust, iniquitous and improper".

This was precisely the reason why the Court in the first Bishan Sarup Gupta's case held that with the collapse of the quota rule, the rule of seniority set out in Rule 1(f) (iii) also went."

15. This judgment gives glimpse of principle of seniority that if the quota rule is strictly followed on year to year basis, the year of vacancy will be proper method reckoning the seniority amongst two groups of employees (direct recruit and promotees) but when there is a break for years together and the quota rule has not been followed, in such circumstances, granting the seniority on the basis of vacancy will create invidious discrimination, as it will be lead to a situation to a person who has come after a long period, would be given the benefit of seniority from back period even on the date when he was not born in the cadre itself which will be lead to an arbitrariness and cannot be approved on the touch stone of

Article 14 of the Constitution of India.

16. Same question arose in Akhouri Sachindra Nath and others (supra), the issue was considered, under the Rule 2 of the Bihar Public Works Department, 25 per cent of the posts in the Bihar Engineering Service, Class-II was filled up by the promotion, subject to availability of suitable hands and out of total vacancies in the Bihar Engineer Service, Class-II, 75 per cent of vacant posts as determined by the Government, be filled up by direct recruitment. Certain persons were appointed directly and after long lapse of time, in the quota of 25 per cent, promotees were given promotion in Class-II. The Government by the impugned orders granted the benefit of seniority to the promotees from the date of vacancies whereas direct recruits were claiming that the promotees cannot reckon seniority from that date, as they were promoted as Assistant Engineer i.e. Bihar Engineering Class-II much after the appointment of the direct recruits. This Court has held that no person can be given seniority with the retrospective effect from a date when he was not born in the cadre so as to adversely affect others. In that judgment, the Hon'ble Supreme Court has considered and distinguished the judgment of *V.B. Badami v. State of Mysore* (supra) and *Gonal Bihimappa v. State of Karnataka* (1987) Supp. SCC 207 and finally approved the judgment of this Court and held that no person can be given seniority with

retrospective effect from a date when he was not born in the cadre so as to adversely affect others. It will be relevant to quote paragraph 12 of the said judgment, which is as follows:-

“In the instant case, the promotee respondent Nos. 6 to 23 were not born in the cadre of Assistant Engineer in the Bihar Engineering Service, Class II at the time when the respondent Nos. 1 to 5 were directly recruited to the post of Assistant Engineer and as such they cannot be given seniority in the service of Assistant Engineers over the respondent Nos. 1 to 5. It is well settled that no person can be promoted with retrospective effect from a date when he was not born in the cadre so as to adversely affect others. It is well settled by several decisions of this Court that amongst members of the same grade seniority is reckoned from the date of their initial entry into the service. In other words, seniority inter-se amongst the Assistant Engineers in Bihar Engineering Service, Class II will be considered from the date of the length of service rendered as Assistant Engineers. This being the position in law the respondent Nos. 6 to 23 can not be made senior to the respondent Nos. 1 to 5 by the impugned Government orders as they entered into the said Service by promotion after the respondent Nos. 1 to 5 were directly recruited in the quota of direct recruits. The judgment of the High Court quashing the impugned Government orders made in annexures, 8, 9 and 10 is unexceptionable.”

17. The similar issue came for consideration in the case of **Ram Sewak Prasad vs. State of U.P. and others [A.I.R. 1991 SC 1818]** and the Court held that the seniority of a person in any category



of post shall be determined from the date of order of substantive appointment. The Court held that the petitioner was eligible under the rules to be appointment as Excise Inspector by way of promotion and he has been actually working in the said post continuously from that date and has been drawing the salary of the post of Excise Inspector. The Court has held that it was a fit case where the petitioner should have been appointed as Exercise Inspector under the 1983 Rules by giving him back date of appointment with effect from February 24, 1972. It will be relevant to quote paragraph 10 of the said judgment, which is as follows:-.

“Rule 21(1) of the 1983 Rules provides that the seniority of a person in any category of post shall be determined from the date of the order of substantive appointment. First proviso provides that if the appointment order specifies a particular back date with effect from which a person is substantively appointed then the said back-date shall be deemed to be the date of order of substantive appointment. It is thus obvious that Rule 21(1) of the 1983 Rules specifically permits substantive appointment to the cadre of Excise Inspectors with back date. The framers of the 1983 Rules were conscious that the cadre of Excise Sub-Inspectors was in existence from 1964 onwards and some of them were promoted to the post of Excise Inspectors much earlier to the enforcement of the 1983 Rules. In all probability the provision of back-date appointment was made in the 1983 Rules to do justice



to persons like the petitioner. The petitioner is eligible under the rules to be appointed as Excise Inspector by way of promotion. It is not disputed that the petitioner was appointed as Excise Inspector on February 24, 1972 and he has been actually working in the said post continuously from that date and has been drawing the salary of the post of Excise Inspector. This is a fit case where the petitioner should be appointed as Excise Inspector under the 1983 Rules by giving him back date appointment with effect from February 24, 1972.”

18. Again the issue came for consideration in **(2006) 6 SCC 673** (*Arvinder Singh Bains vs. State of Punjab and ors.*), the matter relates to seniority of direct recruits and promotees of Public Service Commission of the State of Punjab. The Court placed reliance on the Direct Recruit Class II Engineering Officers’ Assn. v. State of Maharashtra, (1990) 2 SCC 715, V.B. Badami case (supra), the Apex Court interpreted the Quota and Rota Rule for appointment of Promotees and Direct Recruits, and held that seniority would be decided on the basis of rule of appointment and seniority. It will be relevant to quote paragraphs 44, 55, 56 and 57 of the judgment, which are as follows:-

“Para 44 It has also been mentioned/admitted that in view of the above position and in view of legal advice by the Legal Remembrancer in Dec.1982 the Government decided to deviate from the long established practice of applying ROTA rule and started determining seniority from the date of appointment and that there was no other specific reason to



follow the new procedure for the determination of seniority of officers in the Service in the face of provisions of the 1930 and 1976 Rules being identical. It has been held by this Court that it is not justified for the Government to deviate from the long established without any specific reason. In this context, we may usefully refer to the decisions of this Court in [Direct Recruit Class II Engineering Officers' Association vs. State of Maharashtra and Others](#), (1990) 2 SCC 715 (5 Judges) This Court held as under: (SCC pp. 735-36 & 744-46, paras 23 and 47)

"23. Mr. Tarkunde is right that the rules fixing the quota of the appointees from two sources are meant to be followed. But if it becomes impracticable to act upon it, it is no use insisting that the authorities must continue to give effect to it. There is no sense in asking the performance of something which has become impossible. Of course, the Government, before departing from the rule, must make every effort to respect it, and only when it ceases to be feasible to enforce it, that it has to be ignored. Mr. Tarkunde is right when he says that in such a situation the rule should be appropriately amended, so that the scope for unnecessary controversy is eliminated. But, merely for the reason that this step is not taken promptly, the quota rule, the performance of which has been rendered impossible, cannot be treated to continue as operative and binding. The unavoidable situation brings about its natural demise, and there is no meaning in pretending that it is still vibrant with life. In such a situation if appointments from one source are made in excess of the quota, but in a regular manner and after following the prescribed procedure, there is no reason to push down the appointees below the recruits from the other source who are



inducted in the Service subsequently. The later appointees may have been young students still prosecuting their studies when the appointments from the other source takes place -- and it is claimed on behalf of the respondents that this is the position with respect to many of the direct recruits in the present case -- and, it will be highly inequitable and arbitrary to treat them as senior. Further, in cases where the rules themselves permit the Government to relax the provisions fixing the ratio, the position for the appointees is still better; and a mere deviation there from would raise a presumption in favour of the exercise of the power of relaxation. There would be still a third consideration relevant in this context: namely, what is the conclusion to be drawn from deliberate continuous refusal to follow an executive instruction fixing the quota. The inference would be that the executive instruction has ceased to remain operative. In all these cases, the matter would however be subject to the scrutiny of the Court on the ground of mala fide exercise of power. All the three circumstances mentioned above which are capable of neutralising the rigours of the quota rule are present in the cases before us, and the principle of seniority being dependent on continuous officiation cannot be held to have been defeated by reason of the ratio fixed by the 1960 Rules."

47. To sum up, we hold that:

(A) Once an incumbent is appointed to a post according to rule, his seniority has to be counted from the date of his appointment and not according to the date of his confirmation. The corollary of the above rule is that where the initial appointment is only ad hoc and not according to rules and made as a stop-gap arrangement, the officiation in

such post cannot be taken into account for considering the seniority.

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

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

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

(E) Where the quota rule has broken down and the appointments are made from one source in excess of the quota, but are made after following the procedure prescribed by the rules for the appointment, the appointees should not be pushed down below the appointees from the other source inducted in the service at a later date.

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

(G) The quota for recruitment from the different sources may be prescribed by executive instructions, if the rules are silent





on the subject. (H) If the quota rule is prescribed by an executive instruction, and is not followed continuously for a number of years, the inference is that the executive instruction has ceased to remain operative. (I) The posts held by the permanent Deputy Engineers as well as the officiating Deputy Engineers under the State of Maharashtra belonged to the single cadre of Deputy Engineers. (J) The decision dealing with important questions concerning a particular service given after careful consideration should be respected rather than scrutinised for finding out any possible error. It is not in the interest of Service to unsettle a settled position".

[Prafulla Kumar Das and Others vs. State of Orissa and Others](#), (2003) 11 SCC 614 at 626 (5 Judges) (already referred to in para 41 supra).

Para 55 [In Gonlal Bihimappa vs. State of Karnataka and Others](#), 1987 Supp. S.C.C. 207 (2 Judges) this Court held as under: (SCC pp. 214-15, 218 & 224-25, paras e, 10, 11 & 19)

"8. It is a well settled position in law that where recruitment is from two sources to a service, a quota rule can be applied fixing the limits of recruitment from the two sources. ([H.C. Sharma vs. MCD](#), (1983) 3 S.C.C. 567

10. Badami case referred to several authorities of the court and clearly drew out the judicial consensus on the point in issue by concluding that the quota rule had to be strictly enforced and it was not open to the authorities to meddle with it on the ground of administrative exigencies.

11. The scheme in force relating to the services for fixing inter se seniority takes into account the filling up of the vacancies in the service from the two sources on the

basis of the quota and, therefore, fixation of inter se seniority in the Gradation List has to be worked out on the basis of quota.

19. In a precedent-bound judicial system binding authorities have got to be respected and the procedure for developing the law has to be one of evolution. It is not necessary for disposal of these matters before us to go into that aspect except noticing the existence of distortion in the field. The rationalisation of the view in a way known to law is perhaps to be attempted some day in future. In the present batch of cases the law being clear and particularly the mandate in the rule being that when recruitment takes place the promotee has to make room for the direct recruit, every promotee in such a situation would not be entitled to claim any further benefit than the advantage of being in a promotional post not due to him but yet filled by him the absence of a direct recruit. One aspect which we consider relevant to bear in mind is that the promoted officer has got the advantage of having been promoted before it became his due and is not being made to lose his promotional position. The dispute is confined to one of seniority only. The advantage received by the promotee before his chance opened should be balanced against his forfeiture of claim to seniority. If the matter is looked at from that angle there would be no scope for heart-burning or at any rate dissatisfaction is expected to be reduced so far as the promotees are concerned."

Para 56 This Court in [*Devendra Prasad Sharma vs. State of Mizoram and Others*](#), (1997) 4 S.C.C. 422 (2 Judges) held as under: (SCC p. 423, para 2)



"2. In the matter of fixation of the inter se seniority under Rule 25(iii), the relative seniority of direct recruits and of promotees has to be determined according to the rotation of vacancies between direct recruits and promotees which shall be based on the quotas of vacancies reserved for direct recruitment and promotion under Rule 5. The Division Bench has pointed out in the impugned order the position as under:

"Clause (ii) of Rule 25 quoted above clearly stipulated that the seniority of the Service appointed at the initial constitution of the Service shall be determined by the Administrator in consultation with the Board. Since all the respondents have been appointed as members of the Service at the initial constitution of Service their seniority has to be determined by the Administrator in accordance with the said Rules."

Para 57 We shall now scan the three judgments cited by Mr. Ashok Panda:

(1) [*Ajit Kumar Rath vs. State of Orissa and Others*](#), (1999) 9 SCC 596 at 602-03, paras 13 & 14, (2 Judges):

"13. It was also contended on behalf of the respondents before the Tribunal, and is also reiterated here, that the respondents are entitled to reckon their seniority from 1970 to 1971 as they were appointed against the vacancies of those years. It is pointed out that the advertisement in 1970-71 for direct recruitment on the posts of Assistant Engineer was issued by the Public Service Commission on 6-12-1971 and the result was thereafter published which indicated that all the respondents had been selected. They were also directed to appear before the Medical Board. The order of

appointment was, however, passed on 3-1-1972. The respondents, therefore, claim seniority with effect from 1970 and 1971 on the ground that they were appointed against the vacancies of 1970 and 1971. They claim that their seniority may be ante-dated.

14. This plea is wholly unfounded and is liable to be rejected as without substance and merit. The law on this question has already been explained by this Court in [Jagdish Ch. Patnaik v. State of Orissa](#) (1998) 4 SCC 456 and it was categorically held that the appointment does not relate back to the date of vacancy."

2. Suraj Parkash Gupta and Others vs. State of J&K and Others, (2000) 7 SCC 561 at 599 (2 Judges)

"Point 4

Direct recruits cannot claim appointment from date of vacancy in quota before their selection."

3. [Dr. Chandra Prakash and Others vs. State of U.P. and Another](#), (2002) 10 SCC 710 at 726 (3 Judges) paras 41 & 42

"41 As far as the question of seniority is concerned, Rule 18 of the 1945 Rules reads as follows:

"Seniority.- Seniority in the service shall be determined by the date of the order of appointment in a substantive vacancy provided that if two or more candidates are appointed on the same date their seniority shall be determined according to the order in which their names are mentioned in the order of appointment."

42. Thus even under the Medical Services Rules, 1945, the determination of seniority under those Rules was from



the date of appointment against a substantive vacancy. It is clear that in accordance with the Rules, and as held by the High Court in Mathur case appointment could be temporary or permanent. But where the appointment is against a substantive vacancy, the year of appointment was determinative in fixing, seniority under the Rules. On this basis, calculations of the writ petitioners' seniority from the date of their initial appointment cannot be said to be incorrect. Furthermore, it has not been disputed that the writ petitioners have been continuing to serve and had till 1983 enjoyed all the benefits of regular service since their initial appointments like the writ petitioners in *Mathur* case. As held in [*Rudra Kumar Sain v. Union of India*](#), 2000 (8) SCC 25 at p.45, para 20:

"20. In service jurisprudence, a person who possesses the requisite qualification for being appointed to a particular post and then he is appointed with the approval and consultation of the appropriate authority and continues in the post for a fairly long period, then such an appointment cannot be held to be 'stopgap or fortuitous or purely ad hoc'".

19. In another case, the identical question was raised about the issue of granting retrospective promotion/seniority to the promotees from the date of vacancy available in their quota, in the case of **Nani Sha Vs. State of Arunachal Pradesh and others (2007) 15 SCC 406** there also the question arose about the 50 per cent direct recruitment for the promotees. Certain persons from direct recruits occupied the seat of the promotees while interpreting the Rule



of Arunachal Pradesh reckoning the seniority. The issue was raised about granting of retrospective promotion to the promotees, the Hon'ble Supreme Court has considered the judgment passed in **Akhouri Sachindra Nath case (supra), State of Bihar v. Bateshwar Sharma (1997) 4 SCC 442, State of Uttranchal vs. Dinesh Kumar Sharma (2007) 1 SCC 683** and held that the seniority is to be reckoned not from the date when the vacancy arose but from the date on which the appointment is made to the post, the Rules should be interpreted in such a manner, it will not be lead to prejudice to the others and violate the provisions of Article 14 of the Constitution of India. It will be relevant to quote paragraphs 15 and 16 of the said judgment, which are as follows:-

Para-15 “This Court in a reported judgment in State of Uttranchal & Anr. Vs. Dinesh Kumar Sharma has clearly held that the seniority is to be reckoned not from the day when the vacancy arose but from the date on which the appointment is made to the post. There this Court was interpreting Rules 17 and 21 of the U.P. Agriculture Group B Service Rules, 1995 and Rule 8 of the U.P. Government Servants Seniority Rules, 1991. This Court disapproved the stance taken by the High Court that the directions should have been given not from the date of appointment but with retrospective effect when the vacancy arose. The following observations in para 34 are speaking and would close the issue: (SCC pp. 691-92)

"34. Another issue that deserves 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. Here the respondent's contention is that since the vacancy arose in 1995-1996 he should be given promotion and seniority from that year and not from 1999, when his actual appointment letter was issued by the appellant. This cannot be allowed as no retrospective effect can be given to the order of appointment order under the Rules nor is such contention reasonable to normal parlance. This was the view taken by this Court in *Jagdish Ch. Patnaik vs. State of Orissa*, (1998) 4 S.C.C. 456.

Para-16 Lastly, the High Court has specifically rejected the claim of the appellants on another ground, namely, that the appellants were not borne in the cadre of the ACF on the date from which they have been given the seniority. We are in complete agreement with the High Court, particularly in view of the decision of this Court reported in *State of Bihar & Others vs. Akhouri Sachindra Nath* (1991) Suppl. 1 SCC 334 which decision was reiterated in the case of *State of Bihar & Ors. Vs. Bateshwar Sharma*. We do not want to burden this judgment with further reported decisions. However, the same view has been taken in another reported decision of this Court in *Uttranchal Forest Rangers' Assn., (2006) 10 S.C.C. 346 (Direct Recruit) & Ors. Vs. State of U.P. & Ors.* where in paragraph 18 this Court has taken a view that no retrospective promotion or seniority can be granted from a date when an employee has not even been borne in the cadre so as to be adversely affecting those who were appointed validly in the meantime.



20. The issue of seniority between the direct recruitment and the promotees and retrospective regularisation of Ad hoc promotees came for consideration in the case of **R.K. Mobisana Singh vs. KH. Temba Singh and others)** reported in (2008) 1 SCC 747. That case was related to Assistant Engineer in the Public Works Department of Manipur. In that service 40 per cent of posts was to be filled up by the direct recruit from the open market and 60 per cent was to be filled up from the promotion. The question arose in what manner, the seniority will be reckoned. The writ petition was filed by the promotees before the High Court raising a grievance that in the said seniority list, although they were shown as Assistant Engineers, having been appointed against the vacant posts in the promotee quota under clear vacancies which were available in 1981 itself, they were appointed on ad hoc basis. According to them, although they were promoted to the post of Junior Engineer on ad hoc basis in or about 1981, they had been shown as junior to direct recruits which were appointed in 1986. The single Judge of the High Court noticed that in some of the cases, regularisation with retrospective effect had been directed to be given. It took note of the contention of the writ petitioners that they fulfilled the eligibility criteria for promotion, but since at the relevant time, the Commission became defunct, they were promoted on ad hoc basis against the available vacancy meant for



promotees. The Court recorded that the Review Committee failed to discharge its duties, as a result whereof the impugned seniority list failed to demonstrate, the correct seniority was drawn in accordance with law. The question which arose for consideration before the Hon'ble Supreme Court was as to whether the ad hoc promotions granted to the employees from the post of Section Officer (Grade I) to the post of Assistant Engineer in PWD of the Government of Manipur could have been directed to be regularised with retrospective effect so as to effect the inter se seniority between the direct recruits and the promotees. The Court has considered the Direct Recruit Class II Engineering Officers' Assn. v. State of Maharashtra [(1990) 2 SCC 715] and ultimately held that in terms of office memorandum, no retrospective effect could be given to the order of regularisation passed in favour of the promotees, as in absence of any seniority rules operating in the field, the State was required to evolve reasonable and proper policy for granting promotion and seniority. It will be quote paragraphs 29, 39, 42 of the said judgment, which are as follows:-

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

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

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

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

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

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

(F) Where the rules permit the authorities to relax

the provisions relating to the quota, ordinarily a presumption should be raised that there was such relaxation when there is a deviation from the quota rule.

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

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

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

21. The issue was considered and decided by this Court in the case of **P. Sudharkar Rao and others vs. U. Govinda Rao**



and others (2013) 8 SCC 693 there also the question of direct recruits and promotees came for consideration vis-a-vis granting of promotion from the retrospective effect. The Hon'ble Supreme Court has considered the large number of cases and held that the statutory rules can be given to retrospective operation but the retroactivity must meet the test of Article 14 and Article 16 of the Constitution of India and must not adversely catch upon the entitlement of seniority of others. Retrospective seniority cannot be given to an employee from a date when he was not even borne in the cadre. So also, seniority cannot be given with retrospective effect so as to adversely affect others. Seniority amongst members of the same grade must be counted from the date of their initial entry into the grade. Further, the mere existence of a vacancy is not enough to enable an employee to claim seniority. The date of actual appointment in accordance with the required procedure becomes important in such a case. When a quota is provided for, then the seniority of an employee would be reckoned from the date when the vacancy arises but would apply when rota and quota rule is followed ceremoniously. It will be better to quote paragraphs 44, 45, 46, 49, 50 and 51 of the said judgment, which are as follows:-

44. "As far as the impact of the retrospective operation of the executive instructions or statutory rules on the seniority of employees is concerned (including the Junior Engineers

before us), this issue is now settled by a few recent decisions of this Court. There is no doubt that retrospective operation can be given to statutory rules such as the Andhra Pradesh Engineering Service Rules. But, the retroactivity must still meet the test of [Article 14](#) and [Article 16](#) of the Constitution and must not adversely trench upon the entitlement of seniority of others.

45. Without intending to multiply precedents on this subject, reference may be made to a decision rendered by this Court more than two decades ago. [In State of Bihar v. Akhouri Sachindra Nath](#), it was held that retrospective seniority cannot be given to an employee from a date when he was not even born in the cadre. So also, seniority cannot be given with retrospective effect so as to adversely affect others. Seniority amongst members of the same grade must be counted from the date of their initial entry into the grade. It was held: (SCC pp. 342-43, para-12)

“12 In the instant case, the promotee respondents 6 to 23 were not born in the cadre of Assistant Engineer in the Bihar Engineering Service, Class II at the time when respondents 1 to 5 were directly recruited to the post of Assistant Engineer and as such they cannot be given seniority in the service of Assistant Engineers over respondents 1 to 5. It is well settled that no person can be promoted with retrospective effect from a date when he was not born in the cadre so as to adversely affect others. It is well settled by several decisions of this Court that amongst members of the same grade seniority is reckoned from the date of their initial entry into the service. In other words, seniority inter se amongst the Assistant Engineers in Bihar Engineering Service, Class II will be

considered from the date of the length of service rendered as Assistant Engineers. This being the position in law respondents 6 to 23 cannot be made senior to respondents 1 to 5 by the impugned government orders as they entered into the said service by promotion after respondents 1 to 5 were directly recruited in the quota of direct recruits. The judgment of the High Court quashing the impugned government orders made in Annexures 8, 9 and 10 is unexceptionable.”

46. This decision was cited with approval, a few years ago, along with the decision rendered in [*Keshav Chandra Joshi v. Union of India*](#), (1992) 2 S.C.C. 241, This Court held that when a quota is provided for, then the seniority of the employee would be reckoned from the date when the vacancy arises in his/her quota and not from any anterior date of promotion or subsequent date of confirmation. It was observed that injustice ought not to be done to one set of employees in order to do justice to another set. It was said in [*Uttaranchal Forest Rangers' Assn. \(Direct Recruit\) v. State of U.P.*](#) (2006) 10 S.C.C. 346, on referring to these judgments that: (SCC p. 364, paras 37-38)

“37. We are also of the view that no retrospective promotion or seniority can be granted from a date when an employee has not even been borne in the cadre so as to adversely affect the direct recruits appointed validly in the meantime, as decided by this Court in [*Keshav Chandra Joshi v. Union of India*](#) held that when promotion is outside the quota, seniority would be reckoned from the date of the vacancy within the quota rendering the previous service fortuitous. The previous promotion would be regular only from the date of the

vacancy within the quota and seniority shall be counted from that date and not from the date of his earlier promotion or subsequent confirmation. In order to do justice to the promotees, it would not be proper to do injustice to the direct recruits.....-

38. This Court has consistently held that no retrospective promotion can be granted nor any seniority can be given on retrospective basis from a date when an employee has not even borne in the cadre particularly when this would adversely affect the direct recruits who have been appointed validly in the meantime.”

49. In a separate but concurring opinion, Aftab Alam, J. reiterated the position but referred to some more precedents on the subject. It was then said: (*Reevan Singh case, (2011) 3 S.C.C. 267 SCC p. 286, para 63*)

“63. To the decisions referred to on this point in the main judgment I may add just one more in *Suraj Parkash Gupta v. State of J&K [(2000) 7 SCC 561]*. The decision relates to a dispute of seniority between direct recruits and promotees but in that case the Court considered the question of antedating the date of recruitment on the ground that the vacancy against which the appointment was made had arisen long ago. In SCC para 18 of the decision the Court framed one of the points arising for consideration in the case as follows: (SCC p. 578)

‘18. ... (4) Whether the direct recruits could claim a retrospective date of recruitment from the date on which the post in direct recruitment was available, even though the direct recruit was not

appointed by that date and was appointed long thereafter?”

This Court answered the question in the following terms: (*Suraj Parkash Gupta* case (2000) 7 S.C.C. 561, SCC p. 599, paras 80-81)

“Point 4

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

80. We have next to refer to one other contention raised by the respondent direct recruits. They claimed that the direct recruitment appointment can be antedated from the date of occurrence of a vacancy in the direct recruitment quota, even if on that date the said person was not directly recruited. It was submitted that if the promotees occupied the quota belonging to direct recruits they had to be pushed down, whenever direct recruitment was made. Once they were so pushed down, even if the direct recruit came later, he should be put in the direct recruit slot from the date on which such a slot was available under the direct recruitment quota.

81. This contention, in our view, cannot be accepted. The reason as to why this argument is wrong is that in service jurisprudence, a direct recruit can claim seniority only from the date of his regular appointment. He cannot claim seniority from a date when he was not borne in the service. This principle is well settled. [*In N.K. Chauhan v. State of Gujarat*](#), Krishna Iyer, J. stated: (SCC p. 325, para 32)

Later direct recruit cannot claim deemed dates of appointment for seniority with effect from the time when direct recruitment vacancy arose. Seniority will depend upon length of service.

Again, in [*A. Janardhana v. Union of India*](#) (1983) 3 S.C.C.

601 it was held that a later direct recruit cannot claim seniority from a date before his birth in the service or when he was in school or college. Similarly it was pointed out in *A.N. Pathak v. Ministry of Defence* that slots cannot be kept reserved for direct recruits for retrospective appointments.”

50. The facts of the appeals before us show that at least some of the Supervisors were given retrospective seniority on the date when they were not even eligible for appointment as Junior Engineers. The precedents referred to above show that this is impermissible. In addition as pointed out by the High Court, there is no indication of the vacancy position, that is, whether the Supervisors could be adjusted in the grade of Junior Engineers from the date on which they were given notional retrospective seniority. There is also no indication whether the quota of vacancies for Supervisors was adhered to as on the date on which they were given notional retrospective seniority. The case law suggests that this is an - important factor to be considered. Finally, it is quite clear that the grant of retrospective seniority to Supervisors has adversely impacted on the promotion chances of Junior Engineers by bringing them down in seniority. This too is impermissible.

51. From the various decisions referred to and from the facts of the case, it is clear that to pass the scrutiny of [Article 14](#) of the Constitution, the seniority of Supervisors should be reckoned only from the date on which they satisfied all the real and objective procedural requirements of the Andhra Pradesh Engineering Service Rules and the law laid down by this Court. This has not happened in the present appeals creating a situation of unreasonableness and unfairness.”



22. On conspectus aforesaid judgment, it is very much clear when there is no rule of granting retrospective promotion or seniority, it will not be viable to grant retrospective promotion/seniority from back date will lead to invidious discrimination with respect to other group of employees who are occupying seat. V.B. Badami case (supra) is not applicable to the fact of this case, in the present case this Court while deciding the case in L.P.A. No. 460 of 2007 has held that though the 50% posts reserved for promotion from L.S.S. but the quota rule has not been followed strictly in the past, admittedly, all the petitioners were granted promotion vide Memo No. 898 dated 26.03.2012 and vide Notification no. 1186 dated 11/5/2012. If the contention of the petitioner would be accepted that they should be granted the promotion from the date of vacancies, certain absurdity will lead on two grounds, first they are intending to get a counting of seniority from the date when themselves have not taken birth in S.E.S.. Seniority will only be counted from its birth, not from the anterior date. The second absurd situation will be there that certain persons, direct recruits if the seniority would be given from the date of vacancies, certainly it will be cause prejudiced to them, who were appointed in the S.E.S. much prior to the birth of these petitioners and those persons are not before this court ultimately their seniority will

be affected in such situation, this Court cannot accept the plea to grant relief of seniority from the date of vacancies. Thirdly there is no such Rule postulates of granting promotion or seniority from retrospective date, inasmuch there is no one junior who has been granted promotion and petitioners have been left out. Petitioners have entered into L.S.S. service in the year 1991, if their contention is accepted would lead to absurd situation in sense they will be promoted from year they entered in service, which cannot be countenanced.

23. In such view of the matter, this Court does not find any merit in the present application and the same is, accordingly, dismissed.

(Shivaji Pandey, J)

Mahesh/-

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