

IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.9639 of 2008

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1. Ajay Kumar Verma, son of Late Ramchandra Prasad Verma, Resident of Chandra Kutir Sarswasti Lane, East Lohanipur, P.S. Kadamkuan, Dist. & Town Patna.
 2. Anil Kumar, Son of Late Kameshwar Prasad, Resident of LIG-79, Kankerbagh, P.S. Kankerbagh, District and Town Patna.

.... Petitioner/s

Versus

1. The State of Bihar through the Principal Secretary, Agriculture Department, Government of Bihar, New Secretariat, Patna.
2. Director Agriculture, Department of Agriculture, Government of Bihar, New Secretariat, Patna.
3. Joint Director (Plant Protection), Agriculture Department, Government of Bihar, Mithapur Farm, Mithapur, Patna.
4. Dy. Director (Administration), Directorate of Agriculture, Government of Bihar, New Secretariat, Patna.
5. Dinesh Chandra Dwivedi, Father name not known, Resident of Village Chaksalem, P.S. Patori, Dist. Darbhanga.
6. Gansh Prasad, Father name not known, C/o Joint Director (Plant Protection), Agriculture Department, Government of Bihar, Mithapur Farm, Mithapur, Patna.
7. Satish Chandra Jha, C/o Joint Director (Plant Protection), Agriculture Department, Government of Bihar, Mithapur Farm, Mithapur, Patna.
8. Ajit Kumar Saran, C/o Joint Director (Plant Protection), Agriculture Department, Government of Bihar, Mithapur Farm, Mithapur, Patna.
9. Satyendra Kumar Choudhary, C/o Director (Plant Protection), Agriculture Department, Government of Bihar, Mithapur Farm, Mithapur, Patna.

.... Respondent/s

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Appearance :

For the Petitioner/s : Mr. Bimlendu Shekhar Thakur
Mr. Priyank Deepak
For the Respondent/s : Mr. (AAG6)

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CORAM: HONOURABLE MR. JUSTICE SHIVAJI PANDEY

RESERVE JUDGMENT

Date: 11/12/2017

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

In the present case, petitioners are challenging the final
gradation list, contained in memo no.3843 dated 5.6.2008 by



which respondent nos. 5 to 9 who have been absorbed in the cadre of Plant Protection Inspector-cum-Surveillance Inspector/Pest and Disease Reporter (hereinafter mentioned as Surveillance Inspector) in the year 2003 has been illegally shown senior to these petitioners who entered into the cadre in the year 1993, further prayer has been made, to declare the petitioners as senior to respondent nos. 5 to 9 as petitioners have entered into service much earlier than respondent nos. 5 to 9. Further prayer has been made that respondents be directed not to take any action including grant of promotion on a higher scale on the basis of the illegal gradation list dated 5.6.2008 (Annexure-1).

Petitioners were appointed as Pest and Diseases Reporter in the office of the Joint Director, (Plant Protection) Agriculture Department, Government of Bihar vide notification dated 16.1.1993 (Annexure-4) on the basis of the recommendation of the Sub-ordinate Service Selection Board where the name of Ajay Kumar Verma petitioner no.1 and name of Anil Kumar, petitioner no.2, appear at sl. no.1 and sl. no.12 respectively. A seniority list of Pest and Disease Reporter/Surveillance Inspector/Plant Protection Inspector dated 5.8.1994 (Annexure-5) was published where Ajay Kumar Verma petitioner no.1 has been shown at sl. no. 36, where entire details has been



mentioned, the date of entry in the service has been shown as 16.1.1993. Anil Kumar, Petitioner no.2 is at sl. no. 96 the date of entry in service has been mentioned as 16.1.1993 vide letter no.542 and thereafter another gradation list dated 16.4.2003 (Annexure-6) was prepared where Ajay Kumar Verma, petitioner no.1 has been shown at sl. no.19 whereas, Anil Kumar, petitioner no.2 has been shown at sl. no.29. It would be relevant to mention here that both seniority lists do not reflect the names of respondent nos. 5 to 9. Respondent nos. 5 to 9 were earlier working under Tobacco Development Scheme which was quite different and distinct cadre. The Government of Bihar after due consideration decided to abolish the said post of Tobacco Development Scheme and finally the Government abolished and decided to absorb their services in cadre of Surveillance Inspector and accordingly vide order dated 17th October, 2003 (Annexure-7) absorbed them in the aforesaid service subject to verification of their qualification. The Joint Director vide letter dated 15.12.2003 (Annexue-8) informed the Director, Agriculture to have received instruction to accommodate respondent nos. 5 to 9 in the cadre after verification of qualification requested the Director to take decision and decide their place of posting. After verification it was found that respondent nos. 5 to 9 were



possessing the qualification of B.Sc. Zoology i.e. requisite qualification. Accordingly vide letter dated 9.3.2004 they were absorbed and posted in the vacant post of Surveillance Inspector at different places in the Agriculture Department. In this manner respondent nos. 5 to 9 entered into cadre of Surveillance Inspector on and after 17th October, 2003 whereafter a provisional seniority list was published by Deputy Director Administration dated 29th January, 2008 (Annexure-9 series) wherein respondent nos. 5 to 9 in block have been shown senior to petitioner nos. 1 and 2.

Petitioners have raised objection on 19.2.2008 (Annexure-10) taking plea that they were/are already in service much earlier than to respondents as they have been brought in the cadre in 2003 much after entry of petitioners in the service so they cannot rank senior to petitioners. They have sent reminder vide letter dated 19.2.2008 (Annexure-10 series) to Joint Director of Agriculture requested to rectify the mistake committed by the respondent authority. Ultimately final gradation list was published on 5.6.2008 (Annexure-1) wherein in block respondent nos. 5 to 9 have been shown senior to the petitioners. They have wrongly been ranked senior reckoning past service rendered in the Tobacco Development Scheme.



Learned counsel for the petitioner submits that respondent nos. 5 to 9 cannot be shown to be senior as their entries in the cadre is much later as petitioners have entered into service in 1993 whereas respondent nos. 5 to 9 have entered into service by way of adjustment and absorption in their cadre in 2003. It has further stated that they were never informed that respondent nos. 5 to 9 will rank in senior to petitioners. For the first time petitioners could know about status of respondent nos. 5 to 9 on issuance of provisional gradation list. They instantly filed objection but their objection were ignored, was not taken into consideration, respondent nos. 5 to 9 in block have wrongly been shown senior to the petitioners. It has further been submitted that they had no information or knowledge about the period rendered under Tobacco Development Scheme will also be counted for deciding the seniority. The action of respondents authorities are illegal, violative of Article 16 of the Constitution of India and malady crept in the seniority list requires to be corrected.

Learned counsel for the Union of India and private respondents have taken common plea that while taking them in service vide letter dated 26th April, 2007 it has been made clear while fixing the seniority (Annexure-A) past service as in the Tobacco Development Scheme will be taken into account,



petitioners have never challenged this letter unless this order goes, they cannot rank senior and any challenge after a long delay is required to be debunked but during argument neither the State nor the private respondents have pointed out that this letter was ever brought to the notice of the present petitioners, inasmuch as learned counsel for the State of Bihar has placed reliance on Government Circular No.15784 dated 26.8.1972 (Annexure-18 P.124) and specially in clause 3(iii) which stipulates that where an incumbent is transferred from one service to another on his own request, services rendered by him in the previous posts/service will not be counted for seniority. But in case such transfer has been effected following a policy decision taken by Government, their past services in the previous post shall be counted for seniority on that basis it has been submitted that their absorption in the new cadre was not at their request but as per the decision of the Government so past service will also be counted for seniority. Petitioners have filed I.A. No.3080 of 2015 by way of amendment petition brought certain additional fact for deciding the issue of seniority. Another I.A. No.6491 of 2015 has been filed by the petitioners thereby challenged the order dated 26.4.2010 making a prayer to declare the order is illegal, not sustainable in law and vide order dated 18.2.2016 the I.A.



No.3080 of 2015 has been allowed but no order has been passed with regard to I.A. No.6491 of 2015.

Counsel for the petitioners in support of his submission has placed reliance on the order passed in C.W.J.C. No.17414 of 2013 and another judgment in the case of *Rajni Kant Ojha Vs. State of Bihar* reported in *2016 (1) PLJR 33 (SC)*. Another judgment the petitioners placed reliance in the case of *Union of India (UOI) & Ors. Vs. K. Savitri & Ors.* reported in *(1998) 4 SCC 358*.

Learned counsel for the private respondents in support of their contentions has submitted that it is completely a stale claim. The issue of seniority has already been settled long ago, in view of the fact that letter dated 26.4.2007 has never been challenged in which it has specifically been mentioned, the past service rendered in Tobacco Development Scheme would be reckoned for the purposes of seniority now they cannot raise the issue and challenge the same. In support his submission he has placed reliance on the judgment in the case of *Rajani Kant Ranjan & Ors. Vs. The State of Bihar & Ors.* reported in *2015(4) PLJR 723*, *Vijay Kumar Kaul & Ors. Vs. Union of India & Ors.* reported in *2012 (4) PLJR 34 SC* and *Chennai Metropolitan Water Supply & Sewerage Board & Ors. Vs. T.T. Murli Babu* reported in *(2014) 4 SCC 108*.



In the present case, the only issue is to be decided in what manner the seniority of the petitioner vis-à-vis the private respondents has to be reckoned as there is no disputing fact that as it is admitted fact that the petitioner has entered into the service of Surveillance Inspector in the year 1993 whereas the private respondents were earlier in the cadre of Tobacco Development Scheme which was decided by the Government to abolish and ultimately they have entered into the cadre of Surveillance Inspector on 15.12.2013. The point for consideration is as to whether the past services of the respondents in the Tobacco Development Scheme will be counted for the purpose of seniority or their seniority will be reckoned from the date they entered in to the cadre of Surveillance Inspector. As in the present case, the State as well as private respondents have taken a plea that it is the Government decision and, on that basis, they have entered into the cadre of Surveillance Inspector in terms of Annexure-18 Clause 3(iii), the period will be counted but, it is also a fact that both the cadres are quite different and distinct. The person gets seniority in his own ladder i.e. the seniority is counted from the date of his entry in service and if any person is absorbed from another cadre, certainly he cannot rank senior to those persons who were already in service. This is no longer in res intigra as this issue has already been gone into in the judgment passed in the



case of *Rajni Kant Ojha Vs. State of Bihar* reported in *2016 (1) PLJR (SC)* 33 wherein the Hon'ble Apex Court has held that the benefit of past service can not be given as both were in different cadres, they were not appointed in the common process of selection, they have worked in different department and different cadre and there was no connectivity of service of the petitioner and the private respondent and the Court has held that the circular, on which reliance has been placed, does not apply in the present case and quashed the order of this Court and directed for redrawing the seniority. It is relevant to quote the relevant portion of the aforesaid judgment which reads as follows:-

“Having given our thoughtful consideration to the rival submissions advanced at the hands of the learned Counsel, we are satisfied, that the private Respondents cannot claim any benefit for determination of their seniority under the 1993 rules. Rule 18 of the 1993 Rules, relied upon, could have been invoked if the rival parties were direct recruits to the same cadre in the same department. Even though, originally the Appellants and the private Respondents were direct recruits from a common process of selection, but they were engaged in different cadres of different departments. After the appointment of the private Respondents as Assistant Consolidation Officers, in the Revenue and Land Reforms Department, they ceased to have any nexus with the Supply Inspectors appointed to the Food Supply and Commerce Department. Having been so appointed, there remained no connectivity between the two, insofar as the issue of seniority is concerned.”

I myself has decided this issue in CWJC No. 17414 of



2013 (Bihar Intermediate Education Council Employees Association, Patna & Anr. Vs. The State of Bihar & Ors.), there the question also arose in what manner the seniority will be given to those who are the new comer and this Court has held that the new comer cannot take benefit of his past service, that can only be given the benefit for the purpose of his retiral dues and for the A.C.P. with seniority in the cadre, the same will be prepared in such manner those, who has entered in the service, will rank senior to those who has entered in the service later on. Relevant portion of the aforesaid order reads as follows:-

“17. Tamil Nadu Education Department Service Association case (supra) Hon’ble Supreme Court has considered the parameters of judicial review and limits of interference with respect to decision of the Government based upon the advice of the Expert Committee. In the case of Tamil Nadu Education Department Ministerial and General Sub-ordinate Services Association (supra), the Tamil Nadu State had schools at the various levels, primary, middle and high, run by the public sector consisting of Panchayats, District Boards and Government. Panchayat Schools were absorbed by District Boards, eventually those schools were taken over by the Government. The Government vide its executive order decided to keep the personnel so absorbed as a separate service in the Education Department named the Tamil Nadu Educational Subordinate Service. In the similar manner the ministerial services related to non-teaching staff was also kept separate. This arrangement did not provide promotional



avenue to those employees who were earlier the employees of the District Board. That caused hurt burning led to agitation, representation and interpellations in the legislative proceeding in the House. The Government again rearranged the employees who were absorbed and the employees who were already on the role of the Government. Originally Government servant were classified as A wing and those who were absorbed were classified as B wing employee. In such way, arrangement was made to create avenue for promotion for the employees who have been absorbed. Later on the Government has taken a decision for fusion of two wings employee in a proper ratio and created single cadre.

18. The manner and method adopted for the fusion was challenged ultimately reached to Apex Court. The question of past service was also raised in the sense, whether past services rendered by the group of employees who were working in different undertaking absorbed and became Government servant would earn credit of their past services would be reckoned for their seniority. As the manner and method of fusion was challenged the Court refused to interfere and stipulated that in Service Jurisprudence integration is a complicated administrative problem, in doing broad justice. would cause some bruise to a few, cannot be ruled out. Some play in the joints, even some wobbling, must be left to Government without fussy forensic monitoring, since the administration has been entrusted by the Constitution to the executive, not to the court. All life, including administrative lift, involves experiment, trial and error, but within the leading strings of fundamental rights and absent unconstitutional excesses, judicial correction is not right. The Court has further said that there may be a better formula could be evolved, but the court cannot substitute its wisdom for government's save



to see that unreasonable perversity, mala fide manipulation, indefensible arbitrariness and like infirmities do not defile the equation for integration and the Court has refused to interfere in the matter. The Hon'ble Court has further said that the court should not go for a quarrel if administrative policy is revised. In the administrative policy, mathematical precision is not possible, Court can not analyze minute administrative detail. The Court can interfere, in a case of arbitrariness, discrimination, mala fide and ulterior motive and the Hon'ble Court refused to interfere with the policy decision of Government even though there was some variation and contradiction. It will be relevant to quote relevant portion of paragraph nos. 8, 9, 12 and 16 of the aforesaid judgment:

"8.May be, a better formula could be evolved, but the court cannot substitute its wisdom for Government's save to see that unreasonable perversity, mala fide manipulation, indefensible arbitrariness and like infirmities do not defile the equation for integration. We decline to demolish the order on this ground. Curial therapeutics can heal only the pathology of unconstitutionality, not every injury.

9. The more serious charge is that length of service for fixing seniority has inflicted manifest injustice on the 'A' Wing i.e. regular Government staff, being born in arbitrariness and fed on mala fides. It is fair to state the generalities and then proceed to particularities. Here we must realise that all the schools having been taken over by the State directly the personnel had to be woven into the basic fabric. Some relevant formula had to be furnished for this purpose so that the homogenisation did not unfairly injure one group or the other. In 1970 Government chose not to integrate but to keep apart.



Later, this policy was given up. We cannot, as court, quarrel if administrative policy is revised. The wisdom of yesterday may obsolesce into the folly of today, even as the science of old may sour into the superstition now, and vice versa. Nor can we predicate mala fides or ulterior motive merely because Assembly interpellations have ignited re-thinking or, as hinted by Counsel, that the Education Minister's sensitivity is due to his having been once District Board teacher. Democratic processes-both these are part of such process-are not anathema to judges and we cannot knock down the order because Government have responded to the Question Hour or re-examined the decision at the instance of a sensitive minister.

12.The crux of the matter is what is implicit but not explicit in the order, that in the process of integration and drawing up of combined seniority lists the services of the quondom District Board employees vis-a-vis the Government School employees District Board service has been reckoned. Can this be done by a prudent person or is it outrageous to equate District Board service with Government service? That is the question an answer to which disposes of these writ petitions.

16. Aware of our jurisdictional limitation we do not agree that the court can analyse such minutiae to fault the policy and quash the order of Government, i.e. G.O. No. 1968. For argument's sake, let us assume that there is a volte face on the part of the Government in shifting its stand in the matter of computation of seniority with reference to length of service. Surely, policy is not static but is dynamic and what weighed with the Government when panchayat institutions were amalgamated with the District Board institutions might have have given up in



the light of experience or changed circumstances. What was regarded as administratively impractical might, on later thought and activist reconsideration, turn out to be feasible and fair. The court cannot strike down a G.O., or a policy merely because there is a variation or contradiction. Life is sometimes a contradiction and even consistency is not always a virtue. What is important is to know whether mada fides vitiates or irrational and extraneous factor fouls. It is impossible to maintain that the length of service as District Board employees is irrational as a criterion. Let us assume for argument's sake that the mode of selection by the District Boards is not as good as by the Public Service Commission. Even so it is difficult to dislodge the Government's position that the teachers with mostly the same qualifications, discharging similar functions and training similar students for similar examinations cannot be equated from a pragmatic angle without being condemned as guilty of arbitrariness."

19. In the case of Gurmail Singh (supra), the appellants were in service as Tubewell Operators in the Irrigation Branch of the Public Works Department. The Government transferred all the tubewells in this Branch to the Punjab State Tubewell Corporation a Company wholly owned and managed by the State Government. Consequent of this decision a notification was issued to the effect that the posts sanctioned for Tubewell Circle, Irrigation Branch, Punjab was no longer needed in public interest. Accordingly all the posts were abolished. Later on notices were served upon the persons who were absorbed in Punjab State Tubewell under Section 25 –F of the Industrial Dispute Act terminating their services. That was challenged having not followed the provisions of Section 25 F of the



Industrial Dispute Act. One question fallen in consideration in what manner they would be treated in the Corporation, would the past services be reckoned for their seniority as they were treated to be a fresh entry in the Corporation which cause a heartburning to the petitioner and similarly situated persons. The Court has said that the employees employed in the Corporation from earlier cannot be put to disadvantage on account of absorption of Tubewell operator who were retrenched by the Government and absorbed in the Corporation, the result would be that all persons who were absorbed later will be junior in service to the Tubewell Operator who were in the Corporation from the earlier period. The Hon'ble Supreme Court did not find any fault with the action in treating them as new entrant except giving them the benefit of the past service for the retiral benefit as well as granted pay protection. All employees were made entitled of their past services for the purposes of computation of their pay and for retirement benefits only would not be counted for claiming seniority over the existing employees of Corporation. If the period would be permitted to be counted would result in, injustice to those employees whose seniority is based on their terms and conditions of service with the Corporation had entered into service long ago before the present transfer proposal came to be implemented. The Hon'ble Supreme Court held retrenched employee can either claim compensation or seniority, not both. It will be relevant to quote paragraph nos. 11, 17 and 18 of the aforesaid judgment:

“11. This leaves for consideration the principal question in this case as to whether in circumstances such as these, the State is under an obligation to protect the terms and conditions of service of the tubewell operators. The State's case is that it had transferred its tubewells to the



Corporation. The operators, therefore, became surplus and they were retrenched. Retrenchment compensation was duly paid to them. It is suggested that the State's obligation came to an end with this. It was under no obligation to find any fresh or alternative employment to the workers. However, being a welfare State, it did arrange for such alternative employment. It was obviously under the State's directions that the Corporation went out of its way to confer a favour on the appellants by agreeing to take them into its service. It is submitted that the Corporation had its own terms and conditions of service for its employees and could not change those terms and conditions of service for the benefit of those few employees whose services had been taken over as an act of commiseration. It would be unfair on the part of the Corporation to give the appellants benefit of their earlier service in the Government and made them senior to other employees who had been serving in the Corporation right from the beginning. It is, therefore, submitted that the two chapters of service of the appellants, one with the Government and the other with the Corporation are two separate and independent chapters. The first chapter has come to a close because the State Government was not able to continue to operate the tubewells by itself. The second chapter has commenced with a totally independent offer by the Corporation to the erstwhile Government servants of an employment in the Corporation. This is a fresh employment subject to the normal rules and regulations of the Corporation. The appellants have no right to claim any continuity of service in the circumstances.

17. Looking at the facts of this case in the above



perspective, it appears to us that the State Government has acted arbitrarily towards the appellants. It is true that the State Government was incurring losses and decided to transfer the tubewells to the Corporation. This decision would have been the most unexceptionable, prudent and perhaps the only decision that the Government could have taken, if it had decided to completely cut itself off thereafter from any responsibility or liability arising out of the operation of the tubewells. But that the Government did not do. As pointed out earlier, the State Government, although transferring the tubewells, undertook to recoup any losses that the Corporation might incur as a result of the transfer. The result, therefore, was that, despite the transfer of tube- wells to the Corporation the Government continues to bear the losses arising from this activity. But, while doing so, it has abridged the rights of the appellants by purporting to transfer only the tubewells and retrenched the appellants from service as a consequences. A grievance has been made that, while several other members of staff belonging to the irrigation department such as engineers, clerks, etc. have been sent on deputation to the Corporation, the State has only chosen to retrench the service of as many as 498 tube- well operators. This differential treatment may not amount to discrimination as contended by the appellants because those others belonged to categories of Government staff which could come back to Government service in the event of the Corporation finding their services unnecessary at a future date, for one reason or another as they were persons with general qualifications who could be fitted into the other work of the irrigation branch. The tubewell operators, however, could not have been sent on



deputation because there was no possibility at all of their being fitted into the irrigation branch later, in case the Corporation could find no use for them because, once the tubewells had been transferred for good to the Corporation, the Government could find no openings for them in the service. While, therefore, we do not agree with the appellant that the State Government discriminated against the appellants as compared with the other members of the staff by sending them on deputation but not the appellants, we think that this treatment meted out to the other staff shows that the Government did not hesitate to burden the Corporation with the liability of their salary etc. while serving on deputation which would only augment the losses, if any, that the Corporation would incur by operating the tubewells. But when it came to the case of the appellants, the Government has considered it fit to retrench their services, simultaneously making some arrangement or issuing some directions enabling the Corporation to absorb them as if they were fresh recruits. The assurance that they would be paid according to their original scales of pay and at their original leaves of pay came as a later development only because of the pending litigation. It was very fair on the part of the State Government to decide that, as the tubewells would be operated by the Corporation, it would be prudent to run them with the help of the appellants rather than recruit new staff therefore and that the Government should bear the burden of any losses which the Corporation might incur as a result of running the tubewells. But having gone thus far, we are unable to see why the Government stopped short of giving the appellants the benefit of their past services with the



Government when thus absorbed by the Corporation. Such a step would have preserved to the appellants their rightful dues and retirement benefits. The conduct of the Government in depriving the appellants of substantial benefits which have accrued to them as a result of their long service with the Government, although the tubewells continue to be run at its cost by a Corporation wholly owned by it, is something which is grossly unfair and inequitable. This type of attitude designed to achieve nothing more than to deprive the employees of some benefits which they had earned, can be understood in the case of a private employer but comes ill from a State Government and smacks of arbitrariness. Acting as a model employer, which the State ought to be, and having regard to the long length of service of most of the appellants, the state, in our opinion, should have agreed to bear the burden of giving the appellants credit for their past service with the Government. That would not have affected the Corporation or its employees in any way except to a limited extent indicated below and, at the same time, it would have done justice to the appellants. We think, therefore, that this is something which the State ought to be directed to do.

“18. We would, however, like to clarify that the sole purpose and object of our above direction is that the appellants should be entitled to count their past service with the Government for the purpose of computation of their salary, length of service and retirement benefits with the Corporation. This, however, should not result in the appellants' claiming any seniority over the staff which the Corporation has otherwise engage right from its commencement in 1970. To permit such a claim would



result in injustice to those employees whose seniority is based on their terms and conditions of service with the Corporation which had been entered into a long time before the present transfer proposal came to be implemented. Though, as we have mentioned earlier, seniority in service is not of much importance in this case as there is no avenue of promotion to tubewell operators, the question of seniority still becomes crucial in case the Corporation should close down any of the tubewells or decide on the retrenchment of its staff by reorganising the operation of tubewells in such a way that some of the staff may become surplus. In such an event, if the appellants are given the benefit of their length of service with the Government for all purposes, some of the present employees of the Corporation may become liable to be retrenched as junior in length of service to some of the appellants. Clearly, this should not be allowed to happen and the Corporation staff should not suffer merely because the appellants, who have been subsequently inducted into the Corporation, are given all the benefits of the length of their service with the Government. There can be no question of any of the appellants being considered senior to such operators on the Corporation's establishment. In fact we cannot give such a direction without giving such operators an opportunity of being heard. We would, therefore, like to make it clear that, while the appellants will have, for purposes of computation of their salary, length of service and retirement benefits the advantage of counting the period of their service with the Government, this will not enable them to claim any seniority over the former employees of the Corporation.”



20. In the case of K. Savitri (supra) the question was specifically framed by the Hon'ble Supreme Court as to whether employees having been rendered surplus in the parent department, on being redeployed under the provisions of the Central Civil Services (Redeployment of Surplus Staff) Rule, 1990 can claim the benefit of the counting of past services rendered by them for the purpose of seniority or experience in the redeployed organization. The Court has specifically held that past services cannot be counted for the purposes of seniority in the new organization, equally the past experience also would not count as the so-called past services rendered will not be service in the grade. It will be relevant to quote relevant portion of paragraph 10 of the aforesaid judgment:

“10. Coming now to the question whether the said past services can be counted as experience for promotion, it appears that under Recruitment Rules for various posts in the All India Radio called All India Radio (Class III Posts) Recruitment Rules, 1964 (hereinafter referred to as 'the Recruitment rules) as amended from time to time the post of Head Clerk is filled up by promotion to the extent of 50% from amongst the Clerk Grade II/Clerk Grade I/Stenographer with a minimum of five years of service in the grades on the basis of a qualifying departmental examination and the criteria for promotion is seniority-cum-fitness. In that view of the matter, since the past services of redeployed surplus employee cannot be counted for his seniority in the new organisation, equally the past experience also would not count as the so-called past services rendered will not be service in the grade.”

21. In the case of Dwijen Chandra Sarkar (supra) the question arose for past service while discharging the duty in the Government later on appellant was transferred to the Post and



Telegraphs Department will be counted for the purposes of seniority in the matter of granting promotion. Hon'ble Supreme Court considered 1983 circular where the word "except seniority" stipulated therein has been interpreted except seniority past service will be counted for other benefit and held that they would get the time bound promotion but not seniority. It will be relevant to quote paragraph nos. 14, 18 and 19 of the aforesaid judgment:

"14. The words "except seniority" in the 1983 circular, in our view means that such a benefit of a higher grade given to the transferees will in no way effect the seniority of employees in the P & T Department when the turn of the P & T employees comes up for promotion to a higher category or post. The said words 'except seniority' are intended to see that the said persons who have come from another department on transfer do not upset the seniority in the transferee department. Granting them higher grade under the scheme for time-bound promotion does not therefore offend the condition imposed in the transfer order. We are, therefore, of the view that the appellants are entitled to the higher grade from the date on which they have completed 16 years and the said period is to be computed on the basis of their total service both in the Rehabilitation Department and the P & T Department.

18. Hence the transfer order and concerned circular of 1983 which required that the past service should not count for seniority, cannot have any bearing on eligibility for time bound promotion. Seniority and time bound promotions are different concepts. as stated above.

19. For the above reasons, we hold that the past service of the appellants is to be counted for the limited purpose of eligibility - for computing the number of years of



qualifying service, to enable them to claim the higher grade under the scheme of time-bound promotions.”

22. *In the case of Panchraj Tiwari (supra) Supreme Court has considered the issue of Junior engineer working in the Rural Electricity Cooperative Society who was later on merged with the Madhya Pradesh State Electricity Board. The question of their status in the Madhya Pradesh State Electricity Board came for consideration in the matter of their designation, position, age of superannuation and pensionary benefit. The Court has further held that after merger they become part and parcel of services of the Electricity Board. The Court has taken a view, once service is merged with another service, the merged service gets its birth in the integrated service and loses its original identity. There cannot be a situation, where even after merger, absorption or integration, such services which were merged or absorbed, still retain their original status. The Court has further held that the absorbed employees of the Rural Electricity Cooperative Societies shall be placed with effect from the date of their absorption as juniors to the junior most employee of the Electricity Board in the respective category and they shall be considered for further promotion as per the rules/regulations of the Electricity Board. It will be relevant to quote paragraph 14 and 17 of the aforesaid judgment:*

“16. Chances of promotion are not conditions of service, but negation of even the chance of promotion certainly amounts to variation in the conditions of service attracting infraction of Articles 14 and 16 of the Constitution of India. No employee has a right to particular position in the seniority list but all employees have a right to seniority since the same forms the basis of promotion.



“17. In the above circumstances, we set aside the judgment in appeal. The absorbed employees of the Rural Electricity Cooperative Societies, having due regard to their date of appointment/promotion in each category in the respective societies, shall be placed with effect from the date of absorption, viz., 15.03.2002 as juniors to the junior-most employee of the Electricity Board in the respective category. Thereafter, they shall be considered for further promotions as per the rules/regulations of the MPSEB. All other principles/conditions of absorption shall remain as such. However, it is made clear that on such promotions, in the exigencies of service, the employee concerned would also be liable to be transferred out of the circle, if so required.”

23. Similar issue came for consideration before Hon’ble Supreme Court in the case of State of Haryana and another v. Deepak Sood and others in Civil Appeal No.4446 of 2008, arising out of SLP © No.14099 of 2006 there also after closure of the service of Octroi Branch of the Municipal Corporation they were absorbed in the Education Department of Haryana. They have also claimed that the period that they have discharge in the Octroi Branch for Municipal Committee should be counted for the purposes of granting benefit of ACP. The State resisted took the plea, past service would not be counted for any other purpose. The Division Bench has taken a view that surplus employee of Municipal Corporation who were absorbed in Education Department will not get the seniority but all other benefit would be given to them. That was challenged before Hon’ble Supreme Court placing reliance on the earlier judgment of the Hon’ble Supreme Court has held that those who have come on transfer or absorption led to fusion of their services, in the new



organization and they will be entitled to all benefits counting their past services except for seniority. It will be relevant to quote relevant portion of the aforesaid judgment:

"A similar question came up before this Court in the case of (1) Dwijen Chandra Sarkar and another versus Union of India and another reported in AIR 1999 SUPREME COURT 598. In almost identical situation a person was transferred to another department on administrative grounds and his past service of 16 years was not counted. He challenged the same and matter ultimately reached before this Court and this Court after considering the matter came to the conclusion that granting them higher grade under the Scheme for time bound promotion does not therefore, offend the condition imposed in the transfer order. It was observed by this Court, "We are, therefore, of the view that the appellants are entitled to the higher grade from the date on which they have completed 16 years and the said period is to be computed on the basis of their total service both in the Rehabilitation Department and the P & T Department."

Their Lordships referred to earlier judgments given by this court i.e. in the case of Renu Mullick versus Union of India 1994 (1) SCC 373. In this case also in identical situation the benefit was given to incumbent likewise in Raksha Mantri versus V.M. Joseph reported in 1998(5) SCC 305 and in the case of A.P. State Electricity Board versus R. Parthasarathi reported in 1998 (9) SCC 425. The same principle was re-affirmed recently in the case of State of Maharashtra & Ors. Vs. Uttam Vishnu Pawar (2008) 2 SCC, 646 to which one of us(A.K.Mathur, J.) was a party, wherein in para 13 it was observed as under :-



"Therefore, in view of the consistent approach of this Court, it is no more res integra that the incumbent on transfer to the new department may not get the seniority but his experience of the past service rendered will be counted for the purpose of other benefits like promotion or for the higher pay scale as per the Scheme of the Government."

Therefore, in the series of judgments given by this Court the view has been taken that in case of a transfer/absorption from one department to another or from public sector to State though the benefit of the seniority may be denied to the incumbent but not for other benefits like pay fixation and for the pensionary benefits. Therefore, when the benefit of past service rendered in the parent department was given for fixation of pay and pensionary benefits, there is no reason why the past service should not be counted for grant of ACP Grade. Consequently, we are of the view that the view taken by the Division Bench of the High Court in the impugned judgment and order is correct and there is no ground to interfere in this appeal. Consequently, this appeal is dismissed but with no order as to costs."

24. On conspectus of aforesaid judgment it is very much clear that on absorption in new establishment or organization, it can best said that the past services will or may be counted for the ACP and pensionary benefit, not the benefit of reckoning the period for seniority.

25. Let us examine the judgment cited by learned counsel for the petitioners. In the case of Roshan Lal Tandon (supra) Hon'ble Supreme Court has held that though direct recruits or promotees are brought by different sources but after integration they have no longer separate status and they



cannot be discriminated for the purposes of promotion to the higher grade. This judgment is not applicable as question is quite different and distinct as in paragraph of the judgment Hon'ble Court says that when promotees and direct recruits were appointed to the higher grade it constitute one class. The recruits from both sources were integrated into one class and discrimination could not, thereafter, be made in favour of recruits from one source as against the recruits from the other source also. To put it differently, once the direct recruits and promotees are absorbed in one cadre, they form one class and they cannot be discriminated for the purpose of further promotion to the higher grade. So this judgment is completely not application to the present case.

26. In the case of Nirmal Kumar Choudhary (supra) there were three different wings of engineering in the Department of Agriculture in Bihar i.e. Irrigation, River Valley Projects and Minor Irrigation. The State of Bihar amalgamated the cadres of employees of the former two wings and subsequently the Directorate of the Minor Irrigation was made permanent. After amalgamation seniority list was published, dispute raised before the Hon'ble Supreme Court. There the Court has held that in the absence of rules, the more equitable way of preparing the combined gradation list would be to take the total length of service in the common grade as the basis for determining inter se seniority. Hon'ble Supreme Court has held that seniority will be decided on the basis of length of service, not on the basis of date of their confirmation. The fact that case is quite different to the fact of the present case as in the present case there is Legislative Act that Council has been abolished and later on their employees were adjusted in the Board. The issue decided by the Hon'ble Supreme Court does not apply to the present case.



27. *In the case of Vinay Kumar Verma (supra) there was merger of cadres by an executive order, merged the cadre of District Engineer with Rural Engineering Cell of the Public Works Department, both were integrated and became one organization. In paragraph 13 of the judgment cognizance of the fact has been taken that by the impugned order incumbents of the posts were brought into the cadre along with the posts. It has been held that conditions of service of the existing members of service are not being altered or affected to their prejudice in any manner. So it is not a case of outsider has come and caused the prejudice to seniority or the service condition of the existing members and approved the policy decision by an executive order. This case is not applicable to the present case.*

28. *In the case of Priya Ranjan Sharma (supra) the petitioner was employee of the Bihar State Road Transport Corporation and on account of poor financial condition of the Corporation prompted the State Government to come out with a scheme for absorption of employees of the Corporation. Accordingly petitioner was absorbed in the State Government. The Court has taken a view that the period spent in the earlier organization will be reckoned for granting the benefit of time bound promotion but will not affect the seniority existing employee of the department. It will be relevant to quote paragraph nos. 6 and 9 of the aforesaid judgment:*

“6. In the case of R. Parthasarathi (supra) relied upon on behalf of the petitioner the respondent was an employee in the State Government service who came to be absorbed permanently in the Andhra Pradesh State Electricity Board. The Apex Court held at paragraph-3 of the judgement that the period of service spent in the State Government prior to absorption in the State Electricity



Board was to be taken into consideration while considering his eligibility for having come into the promotion zone. In the case of Dwijen Chandra Sarkar (supra) relied on by the petitioner, the question was as to whether the service spent in one department was to be computed upon transfer to another department for the purpose of time bound promotion. Dealing with the issue of time bound promotion in paragraph Nos.11, 12 and 13, the Apex Court held that the aim and purpose of time bound promotion was to prevent frustration and stagnation. This does not get affected in any manner by the fact whether he was in one department or another as the issue of frustration and stagnation permeates throughout and therefore it was to be reckoned for the purpose of computing the benefit thereunder notwithstanding such subsequent absorption as it does not affect normal seniority of those already posted in the department.

9. If the period of service in the corporation under a policy scheme for absorption has to be considered for grant of time bound promotion, this Court has no hesitation in holding that it shall also have to be computed for the purpose of reckoning his period of pensionary service. Not to do so shall create an anomalous position. It shall not only frustrate the purpose of absorption, but shall create a peculiar situation where it was being counted for certain purposes and not for certain purposes with no tangible differentiation for the purpose.”

29. In the case of J.S. Yadav (supra) Mr. J.S. Yadav was entered into service in Uttar Pradesh State Judicial Service Munsif, promoted as District Judge, while working as Legal



Remembrance he was made member of Human Right Commission, on amendment of Human Right Commission Act, his period was curtailed which the Hon'ble Court rejected the action of the State and held that the period cannot be curtailed in any manner, on account of conferment of vested right. The Hon'ble Supreme Court has discussed the meaning of vested right, meaning of cadre, post and service and in paragraph 29 it has been held that accrued rights cannot be taken away by amending the statutory provisions arbitrarily. More so, the amending law must provide, taking away such right, expressly or by necessary implication. In the present case there is no challenge to the Intermediate Council Repealing Act but question has been raised of granted the seniority in the Board of the period which they have spent in the Council. So the proposition that has been laid in the case of J.S. Yadav (supra) does not apply as no vested right has been created to the petitioners that they will be entitled of counting past service rendered in the Council for counting their seniority in the service of Board as scheme itself provides that past service will be counted for the purposes of pensionary benefit as well as ACP but nor for seniority. In such view of the matter, this judgment does not apply to the present case as fact of that case is quite different than that of the present case.

30. In the case of State of Mahesh Narain (supra) the contesting person who was initially appointed as Junior Chemical Assistant in the Forensic Science Laboratory in the year 1968. The nomenclature of the said post was subsequently changed to Scientific Assistant. He was promoted to the post of Senior Chemical Assistant, was further promoted as Scientific Officer and accordingly he joined the post. The promotion was granted with a condition that the order of promotion would remain effective for period of one year or



until the Service Rules were published. The Government of Uttar Pradesh framed Rule as Forensic Science Laboratories Technical Officers Service Rules, 1987. Rule 5 of the said Rules provides 75% posts from the direct recruit and 25% posts from the promotees and proviso of Rule 5 of the said Rules laid down that where permanent Scientific Officers were not available, such temporary and officiating personnel may also be considered for promotion to the said post may be made permanent on the next lower post. In the meantime, as officer concerned had already acquired 5 years of experience on the next lower post due to which they had become eligible for promotion to the post of Assistant Director, Forensic Science. As the case of the employee concerned was not considered. He moved to the tribunal and the Tribunal directed for consideration. In that context Hon'ble Supreme Court says that no Rule or Order is meant for benefit of employees should normally be construed in such manner as to work hardship and injustice specially when its operation is automatic and if any injustice arises then the primary duty of the courts is to resolve the issue in such a manner that it may avoid any loss to one without giving undue advantage to other. In that context the Court has said that delay on the part of the Department should not be permitted to recoil on the appellants, more so since the restructuring order in the said case itself provided that vacancies existing on 31.7.1983 should be filled up according to procedure which was in vogue before 1.8.1983 and on that context the promotion order of the employees was restored which they were entitled prior to the change of service rules as it was held that the change of service rules cannot be made to the prejudice of an employee who was in service prior to the change. In this case considering the facts and circumstances proposition laid is not applicable to this



case as there is no change in the service condition but all the acts have been done for the benefit of the employees who were employed in the Council but they cannot reckon the period for the period of seniority over the employees of the Board who were in the Board prior to their adjustment.

31. In the case of Dr. Anshuman Singh (supra) petitioners were Assistant Professors in the Departments of Civil Engineering and Mathematics sought a direction to the respondent authorities to place them in Academic Grade of pay of Rs.9,000/-, as per recommendation of Screening Committee constituted by NIT, Patna. The Court has said that in exercise of judicial review it can not become a court of appeal not it would function to scrutinize the evidence and consider the relative merit of the candidates. It will be relevant to quote paragraph 26 and 27 of the aforesaid judgment:

“26. So far as issue of maintainability is concerned, I would like to point out that the Court is conscious of the limits of judicial review while considering the decision of the Selection Committee, comprising of experts and academicians. I would entirely agree with the submission of the respondents that the Court would not sit as a Court of appeal nor it would function to scrutinize the evidence and consider the relative merit of the candidates, as relied upon by the respondents in case of Basavalah (Dr.) vs. Dr. H.L. Ramesh & Ors and other analogous cases, reported in (2010) 8 SCC 372. However, if on the basis of materials available on record, it appears that a particular criterion set out in the norms for selection had escaped due considerations which may result into injustice, the Court can refer the matter for its reconsideration. In the instant case, the Screening Committee constituted by the NIT, had itself recommended for advancement of AGP of



Rs.9000 to the petitioners. In the case of Dalpat Abasaheb Solunke etc.Dr. B.S. Mahajan & Ors, reported in A.I.R. 1990 SC 434 has observed that the decision of the Selection Committee can be interfered on grounds such as “illegality or patent material irregularity in the constitution of the Committee or procedure vitiating the selection proved mala fide affecting the selection etc.

27. Again the Hon’ble Apex Court in the case of Raj Kumar & Ors v. Shakti Raj & Ors, reported in (1997) 9 SCC 527 observed that in case of glaring illegalities the Courts can interfere in the selection matter. The relevant extract of paragraph 16 of judgment is quoted herein below:

“16.But in his case, the Government have committed glaring illegalities in the procedure to get the candidates for examination under the 1955 Rules, so also in the method of selection and exercise of the power in taking out from the purview of the Board and also conduct of the selection in accordance with the Rules. Therefore, the principle of estoppel by conductor acquiescence has no application to the facts in this case.....”

The Tobacco Development scheme, in course of time, turned to irrelevant, Government dismantled the scheme, staffs working were decided to be absorbed though they could have been retrenched. In the present case, the manner and method of appointment of both cadres are different, cannot be compared to each



other.

In view of the aforesaid discussion, this Court is of the view that the petitioner would rank senior to private respondent, Clause 3(iii) of the Government Circular No. 15784 dated 26.8.1972 which has been relied, will not come in aid to respondents as it will apply to the case when the transfer is in the same cadre not in a situation of absorption of persons after abolition of another cadre otherwise it will bring absurd situation. If transfer is in same cadre at the instance of State Government, in that circumstance, the person who has been transferred will not lose his seniority not in the case when the person has been declared surplus and is absorbed in the different cadre.

The reliance placed by the learned counsel for the petitioner on the aforesaid judgments does not apply to the facts of this case as in those cases, central theme is that settled thing should not become unsettled after long lapse of time, reason is that the decision of the Government to grant seniority to the respondents at previous work was not known to the petitioners, when the seniority list was published, then they raised the objection, ultimately, when objection did not give result, the petitioners approached this Court in the present writ application and this court is of the view that they have very much explained the delay in challenging the order of seniority.



This court does not find any substance in the argument of the respondents which warrants consideration. Accordingly, the seniority list with respect to the petitioners vis-à-vis respondents is quashed. The Government is directed to redraw the seniority of the petitioners vis-à-vis the private respondents and place these petitioners over the private respondents who have wrongly been shown senior to the present petitioners.

With the aforementioned observation and direction, this writ application stands allowed to the aforementioned extent.

(Shivaji Pandey, J)

Vinay/-

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