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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

**CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 2982 OF 2000**

Shri Rajesh Ghadge & ors. ...Petitioners

Vs.

State of Maharashtra & ors. ...Respondents

WITH

WRIT PETITION NO. 2986 OF 2000

Dhananjay Mahesh Nayak & ors. ...Petitioners

Vs.

State of Maharashtra & ors. ...Respondents

WITH

WRIT PETITION NO. 4958 OF 2003

Shri V.R. Vedpathak & ors. ...Petitioners

Vs.

State of Maharashtra & ors. ...Respondents

WITH

WRIT PETITION NO. 3374 OF 2011

Shri V.R. Vedpathak & ors. ...Petitioners

Vs.

State of Maharashtra & ors. ...Respondents

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Dr. Ramdas Sabban with Mr. Pravin Sabban with Mr. Subhash Gutte for the petitioners in WP/2982/2000 and WP/2986/2000.

Mr. Anil Y. Sakhare, Senior Advocate with Mr. Sunil Kadam and Mr. U.B. Nighot for the respondents in WP/2982/2000 and WP/2986/2000.

Mr. P.N. Joshi for respondent Nos. 5,6,9 & 14.

Mr. N.C. Walimbe, A.G.P. for the State.

AND

Mr. Anil Y. Sakhare, Senior Advocate with Mr. Sunil Kadam and Mr. U.B. Nighot for the petitioners WP/4958/2003 and WP/3374/2011.

Dr. Ramdas Sabban with Mr. Pravin Sabban with Mr. Subhash Gutte for the respondents in WP/4958/2003.

Mr. N.C. Walimbe, A.G.P. for the State.

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CORAM : SMT. V.K. TAHILRAMANI ACTING C.J.

AND M.S.KARNIK, J.

RESERVED ON : 21st FEBRUARY, 2018

PRONOUNCED ON : 6th AUGUST, 2018.

JUDGMENT (PER M.S.KARNIK, J.) :- :-

The issues involved in the present petitions are common and connected. W.P. No. 2986 of 2000 is filed by the Direct Recruit – Section Officers against judgment and order of the Maharashtra Administrative Tribunal (“the Tribunal” for short) dated 5/11/1999. W.P.No. 2982 of 2000 is also filed by the Direct Recruit – Section Officers challenging the judgment and order of the Tribunal dated 10/4/2000 directing the State

Government to prepare the seniority list of Section Officers in accordance with judgment and order of the Tribunal dated 5/11/1999 and also the consequential directions issued for proper compliance thereof.

2. The Promotee – Section Officers have filed W.P.No. 4958 of 2003 challenging the order of the Tribunal dated 5/11/1999 to the extent the Tribunal refuses to consider the services rendered by the promotees in the promoted posts meant for Direct Recruits upto March, 1992 for the purposes of seniority. The Tribunal regularized the fortuitous services rendered by these promotees promoted against the Direct Recruits quota till 1/6/1990. It is the case of the promotees that as under the Rules of 1989 Direct Recruitment was resorted only from March, 1992 onwards, the services rendered by the promotees promoted to the posts meant for Direct Recruits be counted towards seniority instead of pushing them back.

3. W.P.No. 3374 of 2011 is filed by the Promotee – Section Officers challenging One Member Tripathi Committee

report dated 31/12/2008. According to the Promotee – Section Officers, the same is issued in breach of principles of natural justice. Though the Direct Recruits were heard, no such hearing was given to the promotees.

4. The facts of the case are as under :-

Before 5th February, 1986 there were two separate cadres of officers in Mantralaya viz. cadre of Assistant Secretary (pay scale 680 -1250) and cadre of Superintendent (pay scale 500-900). On 5/2/1986, the State Government issued a Government Resolution (G.R. for short) amalgamating the cadre of Assistant Secretary and cadre of Superintendent thereby creating new cadre of Section Officers carrying pay scale of 600 to 1150. To maintain administrative efficiency GR dated 5/2/1986 provided that the quota for direct recruits to the post of Section Officer shall be to the extent of 33.33%. GR also provided that the Recruitment Rules for the new cadre of Section Officers will be framed in due course, but will be come into force with retrospective effect from 1/1/1986. The

Recruitment Rules of 1989 (called “Section Officers in the Mantralaya Department (Recruitment) Rules, 1989” for short “the said Rules”) under Article 309 of the Constitution of India framed for the cadre of Section Officers were deemed to come into force w.e.f. 1/1/1986. Rule 4 of the said Rules provide for the ratio between the promotees and direct recruits as $66 \frac{2}{3} : 33 \frac{1}{3}$ (i.e. 2 : 1). The first batch of direct recruit – section officers joined sometime in April 1992 after coming into force of the said Rules.

5. On 6/4/1992, the State Government framed “Section Officers in Mantralaya Departments (Regulation of Seniority) Rules, 1992” which also provides that they shall come into force from 1/1/1986. The first provisional seniority list for the period from creation of cadre and upto 31/12/1991 was published on 12/11/1992. The State Government published the second provisional seniority list dated 31/10/1994 for the same period as the earlier provisional seniority list.

6. The Direct Recruits made representation dated 29/5/1997 requesting the State Government for determining the seniority of direct recruits – section officers in Mantralaya. The Direct Recruits filed OA No. 524 of 1997 before the Tribunal challenging the indecisiveness of the Government in deciding the representation. The Tribunal disposed of the OA by directing the State Government to decide the representation within two months.

7. Thereafter the State Government by its communication dated 7th November, 1997 stated that the seniority list will be prepared bearing in mind the Supreme Court decision in R.K. Sabharwal's case and consequent instructions issued by the State Government dated 18th October, 1997. No seniority list however was issued till that time.

8. Sometime in December, 1997, the direct recruits filed O.A.No. 713 of 1997 before the Tribunal for quashing the communication dated 7/11/1997 and for appropriate directions to the State Government for preparation of the seniority list in

accordance with the said Rules. Sometime in April, 1998, the promotees (Shri P.S. Indulkar and others) filed O.A.No. 200 of 1998 before the Tribunal challenging the retrospective effect given to the said Rules and also objected to the quota prescribed in the said rules. O.A.No. 713 of 1997 came to be disposed of by Tribunal on 9/6/1998 as according to the Tribunal no seniority list has been issued and that the communication dated 7th November 1997 does not provide for any cause of action. The Direct Recruits filed W.P.No. 1037 of 1999 before this Court challenging the Tribunal's order and by the order dated 5th March, 1999 the order passed by the Tribunal in O.A.No. 713 of 1997 was quashed and the matter was remitted back to the Tribunal to be heard afresh and to be decided in accordance with law. It was also directed that O.A.No. 713 of 1997 be heard with O.A.No. 200/1998.

9. The Tribunal by order dated 5/11/1999 decided O.A.No.200/1998 filed by promotees observing that the said Rules framed under Article 309 of the Constitution of India is in

the form of legislation and it is permissible to give retrospective effect to such rules. The Tribunal held that the posts earmarked in the category of promotees were only to be filled in by promotion and the GR did not permit promotion in excess of the quota or in the quota reserved for direct recruits. The Tribunal further held that the promotions given in the quota of direct recruits have to be considered as fortuitous. The challenge to the Constitutional validity of the said Rules was rejected. O.A.No. 200 of 1998 was dismissed. The order of the Tribunal in O.A.No.200 of 1998 attained finality as the same was never challenged by the promotees.

10. In so far as O.A.No. 713 of 1997 is concerned, vide order dated 5/11/1999 the Tribunal did not accept the contention of the promotees that the quota rule was broken down. The Tribunal has further observed that the State Government flouted their own circular by promoting Assistants in the quota meant for direct recruits when the G.R. banned such a course of action. The Tribunal further observed that the

promotions were permissible only to the extent of quota and not in excess of quota. It would be material to reproduce the observations of the Tribunal in para 13 which has a bearing on the controversy to be decided :-

“13. In view of the discussion in the preceding paragraphs we feel that the application has to be allowed. However, seniority list has not yet been finalised and there is no order impugned before us. The applicants have prayed that quota rule should be given effect from 1988 and it was conceded that in view of the specific provisions in G.R. dated 5.2.1986 that the direct recruitment should be resorted after 1988 that the applicants did not insist for giving effect to quota rule from 1.1.1986. We, however, feel that recruitment rules were published on 17-5-1989 and obviously the department could not have taken steps to make direct recruitment till 1990 as the procedure for sending requisition and getting recommendation of the Commission takes at least one year. Hence, we feel that promotions made in excess of the quota from 1.6.1990 i.e. one year after the date of publication of rules on 17.5.1989 shall be considered as fortuitous to the extent they are in excess of the quota meant for promotees. Hence, we can only give directions to

finalise the provisional seniority list published on 23.6.1999 in accordance with the principles laid down in the M.C.S. (Regulation of Seniority) Rules, 1982. We proceed to pass the following order :

ORDER

The application is partly allowed. The Respondents are directed to finalise the provisional seniority list of Section Officers as on 23.6.1999 by following the principles laid down in the M.C.S. (Regulation of Seniority) Rules, 1982 by excluding the period of fortuitous appointment of promotees appointed after 1.6.1990 in the post meant for direct recruits. The seniority list to be finalised within a period of two months, following the abovementioned principles.”

11. The Tribunal thus directed the State to finalise the seniority list of the Section Officers as on 23/6/1999 by following the principles laid down in Maharashtra Civil Services (Regulation of Seniority) Rules, 1982 by excluding the period of fortuitous appointment of promotees appointed after 1/6/1990 in the post meant for direct recruits. Being aggrieved by this

order of the Tribunal dated 5/11/1999 in O.A.No.713 of 1997 which virtually amounts to regularizing the fortuitous services rendered by the promotees appointed till 1/6/1990 in the posts meant for Direct Recruits for the purposes of seniority, the Direct Recruits have filed W.P.No. 2986/2000.

12. In the meantime alleging breach of the Tribunal's order dated 5th November, 1999, Contempt Petitions were filed by the promotees before the Tribunal. OA was also filed for proper implementation of the directions of the Tribunal dated 5/11/1999. It was contended that the seniority list of section officers which came to be published on 13/3/2000 was in utter defiance of the directions of the Tribunal's order dated 5/11/1999. By the order dated 10th April, 2000, the O.A. as well as Contempt Petition came to be disposed of. The Tribunal held that having regard to the observations in its order dated 5/11/1999 to the effect that "all the Section Officers who are promoted till 1/6/1990 should not be disturbed in their position in the seniority list of the Section Officers and thereafter the seniority list is to be prepared on the basis of the recruitment

made as per the recruitment rules and the direct appointees were entitled to retain their quota and they would get the seniority in the seniority list from the date of their appointment as per the rules”, the seniority list published on 13/3/2000 is not in accordance with the directions of the Tribunal. The Tribunal was pleased to issue the following directions while disposing of the Contempt Petition and O.A. filed by promotees :-

“1. Respondents should prepare a fresh seniority list of the section officers by taking into consideration out directions in O.A.713/1997 by retaining the seniority of the section officers who are the promotees on or prior to 01.06.1990 and there should not be any disturbance in their placement at level lower than the date of promotion as section officers and from 02.06.1990 seniority list of the section officers is to be prepared by taking into consideration the quota of direct appointees and promotees.

2. The respondents should count the vacancies of the section officers for the period running between 02.06.1990 till 31.12.1990 with dates on which vacancies arise and the respondents should promote section officers only within the

quota of the promotees and those persons who are exceeding the quota of promotees will have to be pushed down. The promotees within quota will have to be assigned dates according to the dates of vacancies.

Similarly, for the period running between 01.01.91 to 31.12.1991 the respondents should count the vacancies of the section officers and fix the quota of the promotees along with dates of vacancies as per the rules and only the persons within the quota of the promotees in that year will be eligible to get placement in the seniority list and date of appointment on the basis of date of vacancy.

The persons exceeding the quota will have to be naturally pushed down.

3. In the year 1992, that is for the period running between 01.01.1992 till 31.12.1992 the respondents will have to fix the total vacancies of the section officers. In this year there is direct recruitment. The quota of the direct recruits as well as the promotees must be fixed as per the rules. Promotees will be promoted in the quota meant for them and assigned the date of vacancy in the quota meant for promotees and the direct recruits will be placed in the seniority list according to the date of joining and ranking

recommended by the P.S.C.

4. Inter se seniority of direct recruits and promotees will be governed by dates of continuous officiation either actual or assigned according to this exercise.

5. The process to be repeated for subsequent years up to 01.04.1995.

6. Respondents should prepare the seniority list by following the above principles and place the same before us on 26.02.2000.”

13. This order dated 10/4/2000 of the Tribunal is challenged by the Direct Recruits by way of W.P.No. 2982 of 2000. The order dated 5/11/1999 is subject matter of challenge by Direct Recruits in W.P.No. 2986 of 2000.

W.P.NO. 4958 OF 2003

14. This petition is filed in the year 2003 by the promotees challenging some of the directions issued by the Tribunal in O.A.No. 713 of 1997 vide order dated 5/11/1999. The promotee – section officers contend that the Tribunal was not justified in prescribing the cut off date as 1/6/1990 and in

fact it should be from March 1992 when the direct recruits were appointed for the first time. The contention of the promotees is that the services of the promotees who are promoted as against the quota meant for direct recruits till March 1992 should be regularised.

W.P.NO. 3374 OF 2011 (filed by the promotees)

15. In July, 2008, the issue was discussed in a Calling Attention motion in the Legislative Council. During the discussion, some assurances were given by the Government and also it was directed by the Legislative Council that a committee under the Chairmanship of retired Chief Secretary should be constituted to examine the matter and make recommendations. As per these directions, One Member Committee under the Chairmanship of Shri Satish Tripathi, the then Additional Chief Secretary (Services), General Administration Department was constituted. The Tripathi Committee submitted its recommendations on 31st December, 2008. The State Government accepted those recommendations vide GR dated

26/5/2011. One of the recommendation was that the State Government will fix total number of sanctioned posts / cadre strength in the cadre of Desk Officers in each year from 1986. Upon considering the other two recommendations, the seniority lists published earlier were revised in view of fixation of cadre strength. This fact was brought to the notice of this Court by filing affidavit dated 26th March, 2010. In view of the aforesaid affidavit, the following order was passed by this Court on 30th April, 2010 :

“In these matters, affidavit has been filed by the Deputy Secretary, General Administration Department, Government of Maharashtra dated 26th March, 2010 stating that the draft list of working Section Officers from 1st January 1986 to 1st January 2000 will be published on or before 30th April 2010. Since the matters are already part-heard and are presently on Board, we hope and trust that the State Government will not precipitate the matter which would result in multiplicity of proceedings.” In view of the Orders of the Hon'ble High Court the action of publishing the annual seniority lists was withheld.”

16. On 26/5/2011, the Government accepted the report of Tripathi Committee and accordingly issued GR dated 26/5/2011 and thereafter for the first time fixed the cadre strength at 649 of Section Officers as on 1/1/986. The promotees have filed W.P.No. 3374 of 2011 challenging the report of Tripathi Committee mainly on the ground of breach of principles of natural justice and that no hearing was given to them before the report was submitted. It is the grievance of the promotees in W.P.No. 3374 of 2011 that though the Tripathi Committee heard direct recruits, no hearing was given to the promotees.

SUBMISSIONS :

17. Learned Counsel for direct recruits contend that the said Rules dated 17th May, 1989 are given retrospective effect from 1st January, 1986. Learned Counsel submits that merely because a concession is given by the petitioners that the said rules should be given effect not from 1st January, 1986 but from the year 1998 is of no consequence because there cannot be an

estoppel against law. Even prior to the introduction of the said Rules, the ratio was already fixed by GR dated 5th February, 1986 and therefore directions of the Tribunal are contrary to GR which was already in existence from 5th February, 1986. In his submission, once the Tribunal by order dated 5/11/1999 in O.A.No.200 of 1998 filed by the promotees has already held that the said Rules are constitutionally valid and having further directed that the services rendered by the promotees in excess of the quota by the candidates as fortuitous, the Tribunal could not have then while disposing of O.A.No. 713 of 1997 filed by direct recruits observed that as the said Rules were published on 17-5-1989 and obviously the department could not have taken steps to make direct recruitment till 1990 as the procedure for sending requisition and getting recommendation of the Commission takes at least one year. Learned Counsel submits that the Tribunal was in error in holding that promotions made in excess of the quota only from 1.6.1990 i.e. one year after the date of publication of rules on 17.5.1989 shall be considered as fortuitous to the extent they are in excess of the quota

meant for promotees. He therefore submits that the services of all those promotees appointed after 1/1/1986 in the posts meant for direct recruits be regarded as fortuitous.

18. Learned Counsel contends that if the said Rules expressly provide that they shall be deemed to have come into force with effect from 1st January, 1986, it was not open for the Tribunal to modify the date so as to make it applicable from 1st June, 1990. He submits that the order of the Tribunal in O.A.No. 200 of 1998 filed by the promotees and order in O.A.No. 713 of 1997 filed by direct recruits is contrary to each other. Learned Counsel for the direct recruits relied upon the decision of the Apex Court in the case of **V.B. Badami vs. State of Mysore reported in (1976) 2 SCC 901** to contend that quota strength of direct recruits vis-a-vis promotees has to be fixed with reference to total cadre strength. He submits that the Apex Court has clearly held that “ in respect of the promotions that are made to vacancies in excess of promotional quota, then promotees have no right to hold the promotional post and they

have to be reverted back or absorbed in vacancies for promotees.”

19. Per contra, learned Senior Counsel for the promotees supported the order passed by the Tribunal in O.A.No. 713 of 1997. He submits that there is a specific provision in G.R. dated 5.2.1986 that the direct recruitment should be resorted only after 1988. In his submission, the Recruitment Rules were published on 17/5/1989 and therefore the Tribunal was justified in observing that the department could not have taken steps to make direct recruitment till 1990 as the procedure for sending requisition and getting recommendation of the Commission takes at least one year. He thus submits that no fault can be found in the order of the Tribunal while holding that promotions made in excess of the quota from 1.6.1990 i.e. one year after the date of publication of rules on 17.5.1989 shall be considered as fortuitous to the extent that they are in excess of the quota meant for promotees.

20. By placing reliance on Rule 4 of the Maharashtra Civil Services (Regulation of Seniority) Rules, 1982, learned Senior Counsel submits that seniority of a Government servant in any post, cadre or service shall ordinarily be determined on the length of his continuous service therein. He therefore submits that as the promotees are discharging their duties in the said post though meant for direct recruits, nevertheless are entitled to continue as such, as the direct recruitment as per the Rules was resorted to for the first time only in the year 1992. Learned Senior Counsel submits that in fact the Tribunal should have granted regularization and relief of seniority to the departmental promotees at least till the date before the appointment of first direct recruit. Learned Senior Counsel submits that as direct recruits were appointed after March, 1992 under the said Rules, regularization of seniority of the departmental promotees till March 1992 in the said post should have been permitted and the seniority accordingly fixed. He therefore submits that W.P.No. 4958 of 2003 filed by the promotees deserves to be allowed and the seniority of those

promotees appointed as against the posts for direct recruits till March, 1992 be regularized. Learned Senior Counsel for the promotees invited our attention to Clause (6) of the GR dated 5th February, 1986 wherein it is mentioned as under :-

“Clause 6. To maintain administrative efficiency, the ratio of direct recruitment to the total posts in the new cadre of Section Officers should be to a maximum of 33 : 1/3. This direct recruitment should be done in stages spread over a number of years and every year posts falling vacant in the posts of Section Officers will be filled by direct recruitment subject to a maximum of 1/3 of the said posts. The direct recruitment to the posts of Section Officers shall be commenced after two years after the new cadre of Section Officers comes into force, i.e. from 1st January, 1986.”

He therefore submits that as GR itself provides that direct recruitment to the post two years after new cadre of Section Officer comes into force, the question of then holding the promotions of departmental promotees as fortuitous at least till March 1992 cannot arise.

21. Learned Senior Counsel further contends that after a lapse of number of years, unsettling the seniority list is not in the interest of the cadre or service and would totally disrupt the seniority attained by the promotees. He relies upon the decisions of the Apex Court in the case of i) **Rabindra Nath Bose and others vs. Union of India and others** reported in AIR 1970 SC 470 in support of his this proposed proposition, ii) **Charles K. Skaria vs. Dr. C. Mathew** reported in AIR 1980 SC 1230 and iii) **B.S. Bajwa & Anr. Vs. State of Punjab & ors.** reported in 1998 (2) SCC 523.

22. Learned Senior Counsel for the promotees next submitted that it is open for the Government to retrospectively revise service rules only if the same do not affect vested rights. In his submission, the promotees have been working in the said posts meant for Direct Recruits for long number of years, therefore, if upon issuance of the said Rules direct recruitment is made for the first time only from March 1992, it would be unfair and unjust to disturb those promotees who are working as

Section Officers till March, 1992 by holding that they are in excess of the quota meant for promotees. He further submits that the rules could not impair the rights of the officials who were appointed long prior to the rules of 1989 coming into force and in any event when promotion of Direct Recruits was effected only from March 1992 for the first time. Learned Senior Counsel relies upon the decisions of the Apex Court in the case of (i) **Janardhana Vs. Union of India** reported in **AIR 1983 SC 769** and (ii) **D.P. Sharma vs. Union of India** reported in **1989 Supp (1) SCC 244**.

23. As regards the break down of the quota rule, learned Senior Counsel submits that in the present case the quota rule has not been followed continuously for a number of years as it was impossible to do so and therefore the irresistible conclusion that the quota rule has been broken down has to be drawn. Learned Senior Counsel further contends that the promotees were appointed in the quota meant for Direct Recruits till March, 1992. Pursuant to the issuance of the GR in 1986 the

Recruitment Rules were published only in 1989 and actual Direct Recruitment under these Rules having been resorted only since March 1992 would clearly indicate that there has been enormous departure from the quota rule year to year which permits an inference that the departure was in exercise of the power of relaxing the quota rule conferred on the controlling authority. Learned Senior Counsel relies upon the decisions of the Apex Court in the case of (i) **Direct Recruit Class II vs. State of Maharashtra** reported in AIR 1990 SC 1607 and (ii) **Narendra Chadha vs. Union of India** reported in (1986) 2 SCC 157 in support of this submission.

24. Learned Senior Counsel also invited our attention to paragraph 38 of the decision of the Apex Court in the case of **S.B. Patwardhan vs. State of Maharashtra** reported in AIR 1977 SC 2051 to contend that the quota rule would apply on the date of recruitment and not on the date of confirmation. He therefore submits that the Petitions filed by direct recruits are devoid of any merits and in fact Writ Petition by promotees viz.

W.P.No.4958 of 2003 deserves to be allowed and prayed that departmental promotees promoted against the Direct Recruit's quota till March, 1992 be protected.

25. Learned AGP in support of his submissions invited our attention to the various affidavit-in-replies filed by the Government from time to time and has now taken a stand that in the light of the recommendations of the Tripathi Committee report dated 31/12/2008 the seniority lists have been prepared in accordance with the said Rules but the same are kept in abeyance in view of the pendency of these petitions.

26. Learned AGP in support of his submission that the State Government is justified in preparing the seniority list in accordance with the recommendations of the Tripathi Committee Report and to support his contention that the same is in consonance with the said Rules has relied upon the decision of the Apex Court in the case of **Rudra Kumar Sain vs. Union of India** reported in **2000 (8) SCC 25** and decision of this Court in **Chandrakant Sakharam Karkhanis vs. State of**

Maharashtra reported in AIR 1977 Bom. 193.

CHALLENGE IN W.P. NO. 2982 OF 2000 :

27. Contempt Petition No. 27 of 2000 and O.A. No. 173 of 2000 were filed by promotees contending that the seniority list published by the State Government on 13/3/2000 was not in consonance with the directions of the Tribunal dated 5/11/1999 in O.A.No. 713 of 1997. Learned Counsel for direct recruits submits that the order passed by the Tribunal dated 10/4/2000 which is challenged in W.P.No. 2982 of 2000 is more in the nature of issuing further directions for proper compliance of the Tribunal's order dated 5/1/1999. In our opinion the question of considering whether the Tribunal was justified in issuing the consequential directions in W.P.No. 2982 of 2000 would arise only if we uphold the decision of the Tribunal dated 5/11/1999 in O.A.No. 713 of 1997. We therefore proceed to first deal with the submissions made by learned Counsel for the parties in W.P.No. 2986 of 2000 and W.P.No.4958 of 2003 in which the order dated 5/11/1999 passed by the Tribunal is challenged.

CONSIDERATION:-

28. We have considered the submissions of learned Counsel for the parties in the light of the law laid down by the Hon'ble Supreme Court and this Court.

29. The State Government took a decision to merge the cadres of "Assistant Secretary (Class-I)" and "Superintendent (Class-II)" into one common cadre of "Section Officers, Class II" by GR dated 5/2/1986. Clause 6 of the said GR provides that to maintain administrative efficiency, the ratio of direct recruitment to the total posts in the new cadre of Section Officers should be to a maximum of 33 : 1/3. It further provides that this direct recruitment should be done in stages spread over a number of years and every year Section Officer posts falling vacant will be filled by direct recruitment subject to a maximum of 1/3 of the said posts. The G.R. further provides that the direct recruitment to the posts of Section Officer shall be commenced two years after the new cadre of Section Officers comes into force, i.e. from 1st January, 1986. The said GR further provides that the Recruitment Rules to the new cadre of Section Officers

should be made gradually but they should be made operative from 1st January, 1986. By another GR dated 4th September, 1986 decision was taken that as regards those posts of Section Officers which fall vacant as a result of retirement or death of the incumbent which are to be filled in by direct recruitment, the same should not be filled in till further orders. However, in respect of those posts which are to be filled in by promotion meant for departmental promotees may be filled in by promotion in the event of the posts falling vacant on account of death or retirement of the incumbent.

30. In exercise of the powers conferred by the Constitution of India, the Governor of Maharashtra made the said Rules. Sub-clause (2) of Rule 1 provides that they shall be deemed to have come into force with effect from the 1st day of January, 1986. The promotees challenged the said Rules as unconstitutional by filing O.A. No. 200 of 1998 before the Tribunal. It is the specific case of the promotees in the said OA that in view of the GR dated 5/2/1986 the direct recruitment

was to be initiated 2 years after the date of creation of new cadre. It was the specific case of the promotees that there was a ban on direct recruitment but there was no ban on promotion and therefore in view of the administrative exigency, the post of Section Officers were only filled in through the channel of promotion till March 1992. Before the Tribunal, the promotees contended that the promotions effected even in the Direct Recruits quota should be considered as valid. It was further contended that the said Rules which give retrospective effect from 1/1/1986 are contrary to the GR dated 5/2/1986 wherein a conscious decision was taken to fill in the posts of Section Officer by nomination in a phased manner. According to the promotees this aspect was not incorporated in the said Rules. The Tribunal even while disposing the OA No.713 of 1997 filed by the promotees raising all these contentions held that the said Rules are constitutionally valid. The Tribunal has further held that in view of the restriction placed on the direct recruitment by GR dated 4th September, 1986 the posts earmarked in the category of promotees were only to be filled in by promotion

and this GR did not permit promotion in excess of the quota or in the quota reserved for direct recruitment. The Tribunal has clearly rendered a finding that by granting promotion in the direct recruit quota, the intention of GR to economise Government expenditure itself has been frustrated. The Tribunal goes on to hold that the promotions given in the quota of direct recruits has to be considered as fortuitous. The Tribunal has rejected the contention of the promotees that the promotions in excess of the quota was affected as there was a ban on direct recruitment. Furthermore, even the GR dated 4th September, 1986 clearly provides that the posts of direct recruits should not be filled in and only those posts meant for promotees should be filled in by promotion. Order dated 5/11/1999 in OA No.200/1998 is not challenged and has thus attained finality.

31. We find that Clause (2) of Rule 1 of the said Rules clearly provides that they shall be deemed to have come into force with effect from the 1st day of January, 1986. Though GR dated 5th February 1986 provides for direct recruitment to the

post of Section Officer to commence 2 years after the date of creation of new cadre, the GR itself provides that the Recruitment Rules to the new cadre of Section Officers should be made gradually but they should be made operative from 1st January, 1986. In our opinion when the Recruitment Rules of 1986 itself provides that they shall be deemed to have come into force from 1st January, 1986 and the challenge to the said rules being unconstitutional on the ground that the same has been made retrospectively applicable having failed, proper effect has to be given to the provisions of the said Rules. As the said rules provides retrospectivity, having come into force with effect from 1st January, 1986, the GR dated 5th February, 1986 cannot override the rules made in exercise of the powers conferred under Article 309 of the Constitution of India. In any case the GR of 5th February, 1986 only provides that the direct recruitment to the post of Section Officer shall commence 2 years after the date of creation of new cadre of Section Officers formed on 1st January, 1986. Moreover, the State Government by issuance of a subsequent GR dated 4th September, 1986

categorically lays down that the posts meant for direct recruit – Section Officers should not be filled up and only the promotions be against the vacancies meant for departmental promotees. This being the position, the promotions of the promotee - Section Officers as against the posts meant for direct recruits has to be regarded as fortuitous.

32. The Tribunal having held that the said Rules are constitutionally valid and even the challenge of the promotees to give retrospective effect to the rules being rejected, the Tribunal was not justified in partly allowing OA no. 713 of 1997. In our opinion, the said Rules are specific. Even the State Government after issuing GR dated 4th September, 1986 clearly stated that posts meant for direct recruits should not be filled in and only vacancies of promotee quota may be filled in by promotions. Moreover, we find that the Tribunal after considering the provisions of the M.C.S. (Regulation of Seniority) Rules, 1982 clearly held that it is difficult to infer that the quota rule was broken down. The Tribunal has in fact drawn inference that

there was an attempt to subvert the quota rule and promote the Assistants in excess of the quota meant for promotees. It is in these circumstances the Tribunal held that the appointment made in the quota of direct recruit by promotion has to be treated as fortuitous in view of the provisions mentioned in the rules. The Tribunal further holds and according to us correctly, the seniority of promotees will have to be counted from the date on which they become due for regular promotion excluding the period of fortuitous appointment i.e. date of initial appointment and date of regular appointment in the vacancy meant for promotees. The Tribunal in fact placing reliance on the Circular dated 4th September, 1986 came to a conclusion that the State Government has flouted their own circular by promoting Assistants in the quota meant for direct recruits. The Tribunal goes on to hold that instead of resorting to direct recruitment as required by the rules, the State Government promoted the Assistants in excess of their quota. Even the contention of the promotees that the promotions of the promotees have been approved by the MPSC and hence promotees are entitled to the

seniority from the date of their appointment has been rejected by the Tribunal. It is observed that the irregularity of promoting the persons in excess of quota cannot be regularized by concurrence or consultation with the Commission. The Tribunal thus held that while fixing the seniority, the period of fortuitous appointment has to be excluded as per the rules framed by the Government itself. Having thus held and in our opinion correctly, the Tribunal then has completely fallen in error in issuing the impugned directions. In our opinion, the Tribunal was not justified in holding that as the said Rules were published on 17/5/1989 and as the department could not have taken steps to make direct recruitment till 1990, it is only the promotions made in excess of the quota from 1/6/1990 i.e. one year after the date of publication of rules on 17/5/1989 shall be considered as fortuitous to the extent that they are in excess of the quota meant for promotees.

33. As indicated earlier the Tribunal came to the conclusion that the said Rules are constitutionally valid and the

challenge of the promotees for giving retrospective effect to the said Rules has been negated by the Tribunal. This being the position, it is clear that the said Rules framed under Article 309 of the Constitution of India shall be deemed to have come into force with effect from 1st day of January, 1986. The concession given by some of the direct recruits and mere mention in the GR dated 5th February, 1986 that the direct recruitment to the posts of Section Officer shall commence 2 years after the date of creation of new cadre cannot override the provisions of the said Rules. In any case, the promotees did not have any right to be appointed as against the vacancies meant for direct recruits after coming into force of the said Rules as the rules have been made applicable retrospectively. The challenge of the promotees to the giving of the retrospective operation to the rules and the challenge to constitutional validity of the rules having failed, which order of the Tribunal has attained finality in O.A.No.200 of 1998, issuing directions in O.A.No.713 of 1997 that “promotions made in excess of the quota from 1.6.1990 i.e. one year after the date of publication of rules on 17.5.1989 shall be

considered as fortuitous to the extent they they are in excess of the quota meant for promotees” would virtually amount to negating the retrospectivity given to the rules. We do not find any error in the findings of the Tribunal that there has been no break down of quota rules of direct recruits. After coming into force of the said Rules with effect from 1/1/1986 the promotees had no right to be appointed as against the vacancies meant for direct recruits. The promotions of the Section Officers in the posts meant for direct recruits after coming into force from 1/1/1986 has to be regarded as fortuitous.

34. In this view of the matter, W.P.No.2986 of 2000 deserves to be allowed. The order of the Tribunal to the extent of excluding the period of fortuitous appointment only of the promotees appointed after 1.6.1990 in the post meant for direct recruits is set aside.

35. In so far as W.P.No.2982 of 2000 filed by direct recruits is concerned, the same will have to be allowed. As we

have allowed W.P.No.2986 of 2000 in its challenge to the order dated 5/11/1999 of the Tribunal, the directions issued by the Tribunal on 10/4/2000 for properly implementing the order dated 5/11/1999 passed by the Tribunal will have to be set aside. The impugned order dated 10/4/2000 passed by the Tribunal is accordingly set aside. W.P.No. 2982 of 2000 is allowed.

36. In the light of the conclusion reached by us above, after coming into force of the rules with effect from 1/1/1986 the promotions of the departmental promotees in the vacancies meant for direct recruits has to be regarded as fortuitous, W.P.No. 4958 of 2003 filed by promotees will have to be rejected. Consequently, W.P.No. 4958 of 2003 is dismissed.

WRIT PETITION NO. 3374 OF 2011 :-

37. As indicated earlier, on notice of calling motion in Legislative Council, the State constituted One Member Committee on question of seniority of section officers on 13/10/2008. It is the contention of the promotees that the One

Member Tripathi Committee without hearing of the promotee section officers and upon hearing only direct recruit - section officers submitted its report on 31/12/2008. The promotee section officers filed affidavit dated 17/1/2011 in W.P.No. 4958 of 2003 objecting to the report of the Committee. By way of abundant caution, they however filed W.P.No. 3374 of 2011 challenging one man Committee report and seeking stay to the implementation of the report. On 5/5/2011, W.P.No. 3374 of 2011 was admitted and directed to be heard with W.P.No. 2982 of 2000. The State Government issued a G.R. dated 26/5/2011 accepting the recommendations of Tripathi Committee dated 31/12/2008. The principal challenge of the promotees in W.P.No.3374 of 2011 is that the Committee has submitted its report without hearing the promotees. Learned Counsel objected to the manner in which the Committee proceeded to submit its report in as much as though direct recruits were heard by the Committee, no such opportunity was given to the promotees. In his submission, the report of the Committee is against the principles of natural justice and therefore calls interference.

38. Learned Senior Counsel submits that implementation of the Tripathi Committee recommendations would mean that all the Section Officers working in the cadre are to be included in the seniority list to be prepared afresh from 1/1/1986 i.e. for the period of almost 24 years. Learned Senior Counsel submits that as all Section Officers are to be included in the seniority list, this would mean that not only direct recruit – Section Officers but the promotee - Section Officers who are already promoted as Under Secretary, Deputy Secretary, might be affected by this exercise. This according to learned Senior Counsel may unsettle the settled seniority of persons working as Section Officers for the last 22 years. Large number of Under Secretaries and Deputy Secretaries and also officers belonging to backward class communities will be affected. According to him this exercise is illegal as authentic figures of cadre strength of the Section Officers from 1986 to 1995 are not available with the Government.

39. Learned AGP on the other hand submits that the Tripathi Committee constituted is an executive authority and

therefore no hearing is to be required to be given. The Committee vide its report dated 31/12/2018 has recommended that the said Rules from 1/1/1986 should be strictly implemented. The Government accepted the report of the Tripathi Committee and accordingly issued GR dated 26/5/2011. In the light of the findings recorded by us that the promotee – Section Officers did not have right to be promoted as against the vacancies meant for direct recruits after coming into force of the said Rules with effect from 1st January, 1986, the State Government will obviously have to undertake the exercise of preparing a seniority list of Section Officers accordingly. It is the contention of the State Government that the Tripathi Committee has already submitted a report in consonance with the said Rules, even the seniority lists on the basis of Tripathi Committee Report are ready. In our opinion, in the light of the view taken by us, if promotees have any grievance that the report of the Tripathi Committee is not in consonance with the said Rules, the promotees have an alternate efficacious remedy of approaching the Tribunal and therefore

we are not going into the question as regards the challenge to the Tripathi Committee's report. All questions in this regard are kept open. W.P.No. 3374 of 2011 is dismissed by granting liberty to the petitioner – promotees therein to approach the Tribunal.

40. In view of the pendency of the W.P.No. 3374 of 2011 in this Court the period spent in prosecuting the said petition be taken into consideration by the Tribunal while deciding the application for condonation of delay in approaching the Tribunal.

41. Writ Petitions are disposed of with no orders as to costs.

42. All Civil Applications stand disposed of.

43. We may however clarify that in respect of those promotees who already stand retired may not be deprived of the monetary benefits already availed as a result of such fortuitous

promotion.

(M.S.KARNIK, J.)

(ACTING CHIEF JUSTICE)

44. At this stage, a request is made by learned Counsel for the promotees that the operation and effect of this judgment and order be stayed for a period of 8 weeks from today. The prayer is accepted. The respondent – State not to act in furtherance of this judgment and order for a period of 8 weeks from today.

(M.S.KARNIK, J.)

(ACTING CHIEF JUSTICE)