

IN THE HIGH COURT OF PUNJAB AND HARYANA AT  
CHANDIGARH

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1. CWP-18515-2012 (O&M)

Jagbir Singh and another  
Vs.  
State of Haryana and others  
..... Petitioners  
..... Respondents

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2. CWP-15083-2010 (O&M)

Praveen Chaudhary and others  
Vs.  
State of Haryana and others  
..... Petitioners  
..... Respondents

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3. CWP-15685-2017(O&M)

Kamaldeep Singh Rana and others  
Vs.  
State of Haryana and others  
..... Petitioners  
..... Respondents

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4. CWP-18075-2011 (O&M)

Sukhbir Singh and others  
Vs.  
State of Haryana and others  
..... Petitioners  
..... Respondents

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5. CWP-5465-2018 (O&M)

Nishant & others  
Vs.  
State of Haryana and others  
..... Petitioners  
..... Respondents

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6. CWP-7706-2011 (O&M)

Abhishek and other s  
Vs.  
State of Haryana and others  
..... Petitioners  
..... Respondents

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7.

CWP-12882-2020 (O&M)

Hemant Kumar and others

. . . . Petitioners

**Vs.**

State of Haryana and others

. . . . Respondents

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8.

CWP-858-2021

Sukhbir Singh and another

. . . . Petitioners

**Vs.**

State of Haryana and others

. . . . Respondents

\*\*\*\*

9.

CWP-11848-2020

Abhishek

. . . . Petitioner

**Vs.**

State of Haryana and others

. . . . Respondents

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**Reserved on:20.02.2023**

**Date of Decision: 15.03.2023**

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**CORAM: HON'BLE MR JUSTICE M.S. RAMACHANDRA RAO  
HON'BLE MRS JUSTICE SUKHVINDER KAUR**

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Present: Mr. Gurminder Singh, Senior Advocate, assisted by  
Mr. Jatinder Singh Gill, Advocate for the petitioners in  
CWP-18515-2012 and CWP-5465-2018.

Mr. Rajiv Atma Ram, Senior Advocate, assisted by  
Mr. Arjun Pratap Atma Ram,  
Mr. Brijesh Khosla, Mr. Bhagoti Singh and  
Mr. Bhagoti Singh, Advocates,  
for the petitioner in CWP-15083-2010  
for the respondent No.3 in CWP-11848-2020,  
for the respondent No.3 in CWP-858-2021,  
for respondents No.3 to 5 in CWP-7706-2011  
for respondent No.3 in CWP-12882-2020,  
for respondent No.4 to 6 in CWP-18515-2012 and  
for respondent No.11 in CWP-18075-2011.

Mr. R.K. Malik, Senior Advocate with  
Mr. Sandeep Dhull, Advocate  
for the petitioners in CWP-18075 & 7706-2011, CWP-15685-2017  
for respondent Nos. 5, 6 and 8 in CWP-15083-2010.

Mr. R.P. Dangi, Advocate with Mr. Vinod Bhustian Dahiya and  
Mr. R.S. Kadian, Advocate,  
for the petitioner(s) in CWP-11848-2020  
for respondent No.14 in CWP-15083-2010.

Mr. Suryaveer S. Surjewala, Advocate and  
Mr. Arnav Udai Singh, Advocate for  
Mr. Sunil K. Nehra, Advocate  
for the petitioner(s) in CWP-12882-2020 and CWP-15685-2017.

Mr. Karan Nehra, Advocate and  
Mr. Abhay Josaw, Mr. Harvinder Singh and  
Ms. Juhi, Advocates  
for the petitionerin CWP-18515-2012 and CWP-5465-2018

Mr. Anurag Goyal, Advocate  
for the petitioner No.2in CWP-7706-2011,  
for petitioners in CWP-858-2021 and  
for respondents No. 4 and 5 in CWP-12882-2020.

Mr. Puneet Bali, Senior Advocate, assisted by  
Mr. Aditya Shioran and Mr. Gagandeep Singh, Advocates  
for respondent No.3 in CWP-18515-2012 and  
CWP-18075-2011.

Mr. Gautam Pathania, Advocate, for respondent No.3 in  
CWP-15685-2017 and for respondent No.5 in CWP-5465-2018.

Mr. Sumeet Mahajan, Senior Advocate with  
Mr. Saksham Mahajan and Ms. Suhani Jain and  
Ms. RabaniAttri, Advocates  
for respondent No.4 in CWP-15685-2017 and  
for respondent No.6 in CWP-5465-2018.

Mr. Amit Jhanji, Senior Advocate with  
Mr. Abhishek K. Premi, Advocate for  
respondent No.5 (in CWP-5465-2018) and  
for respondent No.3 (in CWP-15685).

Mr. Hitesh Pandit, Addl. A.G., Haryana.

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**M.S. RAMACHANDRA RAO, J.**

Since common issues of law and fact arise in this batch of cases, they are being disposed off by this common order.

We are concerned in these cases with the legality and validity of *absorption* of Sh.PradeepAtri, Sh. Praveen Chaudhary,Sh.Pankaj Gaur and Sh.Arun Bhatia(for short ‘**private respondents**’) [originally appointed as Sub Divisional Engineers/ Asst.Engineers (Civil) in the Haryana Rural and Panchayat Raj Department [for short ‘**the PR Department**’]] into the Haryana Public Works (Building and Roads) Department [for short ‘**the PWD (B&R) Department**’] and *grant of seniority* to them above certain direct recruits.

| Name              | Date of appointment in the PR dept. as Sub-Divisional Engineer/Asst Engineer | Date of deputation to PWD (B&R) dept. as Sub-Divisional Engineer/Asst Engineer | Date of absorption in PWD (B&R) dept. as Sub-Divisional Engineer/Asst Engineer | Date from which seniority was given to them in the cadre of Asst.Engineer | Date on which such seniority was conferred on them                   |
|-------------------|------------------------------------------------------------------------------|--------------------------------------------------------------------------------|--------------------------------------------------------------------------------|---------------------------------------------------------------------------|----------------------------------------------------------------------|
| Pradeep Atri      | 6.12.2004                                                                    | 16.11.2005                                                                     | 6.10.2006                                                                      | 6.10.2006                                                                 | 2.7.2010 (as indicated in a provisional seniority list of that date) |
| Praveen Chaudhary | 18.10.2005                                                                   | 25.4.2006                                                                      | 18.7.2007                                                                      | 2.5.2006                                                                  | Order dt.1.10.2019                                                   |
| Pankaj Gaur       | 18.10.2005                                                                   | 22.11.2007                                                                     | 23.10.2009                                                                     | 5.1.2008                                                                  | Order dt.1.5.2017                                                    |
| Arun Bhatia       | 18.10.2005                                                                   | 22.11.2007                                                                     | 23.10.2009                                                                     | 5.1.2008                                                                  | Order dt.1.5.2017                                                    |

**An overview of the background facts**

The PWD (B&R) Department had issued an advertisement on 07.05.2006 inviting applications for 44 posts of Sub Divisional Engineers (also called “Asst. Engineers”) to be recruited by way of direct recruitment through

the Haryana Staff Selection Commission. Their conditions of service are governed by the Rules mentioned above.

The petitioners in CWP-7706-2011, CWP-18515-2012, CWP-18075-2011, CWP-11848-2020, CWP-858-2021 and first two petitioners in CWP-12882-2020 applied in response to the said advertisement and qualified in the test conducted by the said Commission and their cases were also recommended by it to the State Government on 14.11.2006.

Sh. Pradeep Atri, Sh. Pankaj Gaur and Sh. Arun Bhatia also appeared for the said examination for direct recruitment in the PWD (B&R) Department held in 2006, but did not qualify.

CWP-16016-2000 and the undertaking given by the State therein

By that time, CWP-16016-2000 and batch had been filed in this Court by certain persons selected in the PWD (B&R) Department to the post of Sub Divisional Engineers in 1999/2000, but who were denied appointments on the ground of reduction of cadre strength.

So a corrigendum was issued on 8.5.2006 that the recruitment to 44 posts of Asst.Engineer in the PWD(B&R) Department notified on 7.5.2006 would be subject to decision in CWP-16016-2000 and batch pending in this Court as on that date.

They filed an application CM-14464-2006 in the said Writ Petition seeking stay of fresh appointments on the basis of the recommendations made by Haryana Staff Selection Commission on 14.11.2006.

On 22.11.2006, in CWP-16016-2000, the following order was passed:

*“The Ld. State Counsel requests for a short adjournment in order to seek instructions on facts as there is a variation in the affidavit dt.26.8.2006 filed by the petitioner and the order dt.17.1.2005 with regard to vacancies of the select list during life time. List again on 29.11.2006.”*

On 29.11.2006, the Counsel for the State gave an *undertaking* that appointment letters would not be issued to the selected candidates recommended by the Haryana Staff Selection Commission on 14.11.2006.

So the following order was passed:

“The Ld.State counsel again requests for another adjournment to comply with the order dt.22.11.2006 and states that in the meanwhile selected candidates for the post of Sub-divisional Engineer shall not be issued appointment orders.

*List again on 6.12.2006”( emphasis supplied)*

On 6.12.2006, the following order was passed:

“ List again on 13.12.2006 for further consideration. Undertaking of Additional Advocate General, Haryana given on 29.11.2006 shall continue.”( emphasis supplied)

In view of the same, the petitioners in the CWP-7706-2011, CWP-18515-2012, CWP-18075-2011, CWP-11848-2020, CWP-858-2021 and first two petitioners in CWP-12882-2020, whose names figured in the select list prepared by the Haryana Staff Selection Commission on 14.11.2006, could not be issued the letters of appointment.

In CWP-16016-2000, the State filed a reply that there was restructuring in the PWD (B&R) Department vide decision of the Cabinet on 15.03.2001; that 235 sanctioned posts of Asst. Engineers (Civil) were reduced to 159 in the said restructuring; quota of direct recruits was 91, but there were 109 direct recruits working at that time; that as on 31.05.2001, there were 107 direct recruits and 126 promotee Asst. Engineers (Civil) against the cadre strength of 91 and 68 respectively; the excess Asst. Engineers as well as promotees were continued to be adjusted against the resultant vacancies arising after that date in their respective quota; but a number of vacancies fell vacant due to promotion, retirement etc.; in order to run the administration 48 Junior

Engineers/Circle Head Draftsmen were given additional charge to look after the work of the post of Sub Divisional Engineers (Civil) in addition to their own duties without any extra remuneration on 07.12.2004, but no promotion was made and it was only a stop gap arrangement. Out of the 48 Junior Engineers, it was stated that ad hoc promotions of 40 officials as Sub Divisional Engineers (Civil) had been made on 31.12.2005 against their quota posts as per the restructured cadre; promotions of 20 officials as Sub Divisional Engineers (Civil) were also made on 06.10.2006 and 28.12.2006 against their respective quota posts as per restructured cadre; and 44 vacancies of Asst. Engineers (Civil) were advertised which vacancies arose *after* 31.05.2001 till 03.03.2006 and requisition for filling up vacancies for direct recruitment was sent to the Haryana Staff Selection Commission. It was stated that though a total number of 59 vacancies were available on 03.03.2006, requisition was sent only for 44 vacancies. Thereafter, on 07.12.2006, 14 Asst. Engineers were promoted to the post of the Executive Engineers (Civil) in the PWD (B&R) Department. Therefore, there were 73 vacancies of Asst. Engineers posts in the said department.

The said Writ Petition, CWP-16016-2000, was ultimately dismissed on 03.12.2007 *and the undertaking given by the State on 29.11.2006 got vacated.*

LPA-96-2008 and batch was filed against the judgment dt.03.12.2007 in CWP-16016-2000, but it was dismissed on 14.07.2008<sup>1</sup>.

Immediately on such dismissal of CWP-16016-2000, 29 of the selected direct recruits recommended by the Haryana Staff Selection Commission on 14.11.2006 were issued letters of appointment on 05.12.2007 to the post of Asst. Engineer (Civil) in PWD (B&R) Department.

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<sup>1</sup>P-4 in CWP-858-2021.

Some of them are petitioners in CWP-7706-2011, CWP-18075-2011, CWP-18515-2012. *They are collectively referred to as the direct recruits appointed on 05.12.2007.*

After the issuance of the advertisement on 07.05.2006 for filling up the 44 posts of Asst. Engineer (Civil) by the PWD (B&R) Department, and during the period the State Government had voluntarily taken a decision not to issue appointment orders to the selectees/direct recruits who got selected by the Haryana Staff Selection Commission in the said selection on 14.11.2006 (which was recorded by the Court on 29.11.2006 and which undertaking continued till 3.12.2007 in CWP-16016-2000), Sh. Pradeep Atri and Sh. Praveen Chaudhary, who were working on deputation in the PWD (B&R) Department from their parent department (the PR Department) since 16.11.2005 and 25.4.2006 respectively were *absorbed* in the PWD (B&R) Department on 06.10.2006 and 18.07.2007 respectively.

Sh. Pankaj Gaur and Sh. Arun Bhatia had been taken on deputation from the PR Department in the PWD (B&R) Department on 22.11.2007.

There was also further direct recruitment to posts of Asst. Engineers in 2009. Petitioners in CWP-15685-2017, CWP-5465-2018 and petitioners 3 and 4 in CWP-12882-2020 joined on 19/20.8.2009 in the PWD (B&R) Department.

On 27.10.2009 Sh. Pankaj Gaur and Sh. Arun Bhatia were *absorbed* in the post of Asst. Engineers in the PWD (B&R) Department.

**Tentative Seniority list of January, 2010**

For the first time, in a tentative seniority list of Asst. Engineers prepared in January, 2010, Sh. Pradeep Atri was given seniority at Sr. No. 17 above the direct recruits who were appointed on 5.12.2007. These direct

recruits were shown at Sr. No.27 to 56 in the said seniority list of Asst. Engineers. Sh. Praveen Chaudhary is shown as Sr. No.57 in the said list.

Ms.SeemaDhankar and others (who were the direct recruits appointed on 05.12.2007 including petitioners No. 2, 3 and 5 in CWP-7706-2011) gave a representation dt.27.01.2010<sup>2</sup> for correction of the seniority list in the cadre of Sub Divisional Engineers opposing his placement in the tentative seniority list of the said cadre.

On 10.05.2010, the Special Secretary, PWD (B&R) Department found merit in the objections and opined that he cannot be given seniority over the direct recruits.

Ms.Seema Dhankar and others filed CWP-8481-2010 for consideration of their objections.

This Court disposed of the said Writ Petition on 11.05.2010 directing consideration of their objections to the tentative seniority list.

**Tentative Seniority list dt.2.7.2010**

Thereafter another provisional seniority list of Asst.Engineers in the PWD (B & R) Department dt.02.07.2010<sup>3</sup> was published in which Sh. Pradeep Atri was shown at Sr. No.39 and the direct recruits who were appointed on 5.12.2007 were shown as seniors to him at Sr. No.10 to 38. Sh. Praveen Chaudhary was shown at Sr. No.48 in the said provisional seniority list of Asst. Engineers.

**CWP-15083-2010 by the 3 pvt.respondents challenging the provisional seniority list dt.2.7.2010**

This tentative seniority list issued on 02.07.2010 was disputed in **CWP-15083-2010** by Sh. Praveen Chaudhary, Sh. Pankaj Gaur and Sh. Arun Bhatia and they sought seniority over the said direct recruits. They contended

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<sup>2</sup>Page 333 and 334 of CWP-18515-2012

<sup>3</sup>P-15 in CWP-15083-2010

that though their appointment orders in the said department used the word 'absorption', in fact it was a case of 'appointment by transfer' made under Rule 10, and they also challenged 5<sup>th</sup> proviso to Rule 12(5) of the Rules. They also challenged the condition imposed in their respective absorption orders dt.18.07.2007 and 23.10.2009 which stated that they would be at junior most level not only among the Sub Divisional Engineers, who are already posted in the PWD (B &R) department, but also lower than the candidates who might get posted against vacancies arisen before 01.07.2006.

**Final seniority list dt.2.9.2011**

A final seniority list of Asst. Engineers in the PWD (B&R) Departmentas on 24.8.2011 was notified on 02.09.2011 in which Sh. Pradeep Atri was shown at Sr. No.6, Sh. Praveen Chaudhary at Sr. No.44, Sh. Pankaj Gaur at Sr. No.111 and Sh. Arun Bhatia at Sr. No.112. The direct recruit Asst.Engineers, who had been appointedon 5.12.2007,were shown as juniors to Sh. Pradeep Atri (At Sr. No. 15 to 41), but as seniors to Sh. Praveen Chaudhary,Sh. Pankaj Gaur and Sh. Arun Bhatia.Sh.PradeepAtri was given seniority w.e.f.6.10.2006, the date of his absorption in the PWD (B&R) Dept.

**CWP-7706-2011, CWP-18075-2011 CWP-18515-2012**

In CWP-7706-2011, CWP-18515-2012, the *absorption* of Sh.PradeepAtri is challenged by direct recruit Asst. Engineers appointedon 5.12.2007.

In CWP-18075-2011 and also in CWP-18515-2012, the *seniority* assigned to Sh.PradeepAtri and 7 others in the cadre of Asst.Engineers (Civil) in PWD (B&R) Department as on 24.08.2011 in final seniority list dt.02.09.2011 is challenged by such direct recruit Asst.Engineers.

**Promotion of Sh.Pradeep Atri and Sh.Praveen Chaudhary as Executive Engineers**

Sh.Pradeep Atri was promoted as Executive Engineer on 26.04.2012 and Sh. Praveen Chaudhary was promoted as Executive Engineer on 29.12.2016.

**Pankaj Gaur and Arun Bhatia given seniority on 1.5.2017 w.e.f.5.1.2008 in the cadre of Asst. Engineers**

Vide order dt.01.05.2017, Sh. Pankaj Gaur and Sh. Arun Bhatia were given seniority in the cadre of Asst. Engineers in the PWD (B&R) Department with effect from 05.01.2008, the date when they joined on deputation in the PWD (B&R) Department without giving any notice to the affected parties.

**CWP-15685-2017**

In CWP-15685-2017, the order dt.01.05.2017 granting *seniority* to Sh.Pankaj Gaur and Sh.Arun Bhatia from 05.01.2008 is challenged by direct recruit Asst.Engineers appointed on 19.08.2009 in PWD (B&R) Department on the ground that these two persons could not have been given seniority over them.

**Tentative Seniority list of Asst.Engineers dt.29.9.2017**

There was a tentative seniority list of Asst.Engineers notified on 29.09.2017 by the PWD (B&R) Department in which Sh. Pankaj Gaur and Sh. Arun Bhatia were shown as seniors to the direct recruits appointed as Asst.Engineers in August,2009.

Objections were filed thereto by the latter on 07.10.2017.

These objections were rejected and final seniority list dt.04.04.2018 was notified showing them as seniors to the persons who were directly recruited as Asst.Engineers in the PWD (B&R) Department in August,2009.

**CWP-5465-2018**

The order dt.01.05.2017 issued by the State giving benefit of seniority to Sh. Pankaj Gaur and Sh. Arun Bhatia from 05.01.2008 and the tentative seniority list dt.29.09.2017 are both challenged in **CWP-5465-2018** by Asst.Engineers who were directly recruited in the PWD (B&R)Department in August,2009.

**Seniority given to Praveen Chaudhary on 1.10.2019 w.e.f 2.5.2006**

On 01.10.2019, Sh. Praveen Chaudhary was given seniority from the date of his joining as Asst.Engineer in the PWD (B&R) Department on deputation w.e.f 02.05.2006. This was done in spite of the fact that his 3 previous requests seeking such seniority had been rejected and by accepting his fourth representation dt.01.10.2019 without giving any notice to the affected parties.

**Promotion of Pradeep Atri as Superintending Engineer on 20.9.2019**

Sh. Pradeep Atri was given promotion from the post of Executive Engineer to the post of Superintending Engineer on 20.09.2019.

**Tentative Seniority list of Executive Engineers dt.28.7.2020**

A tentative seniority list of Executive Engineers in the PWD (B&R) Department as on 01.01.2019 was circulated by the department on 28.07.2020 wherein Sh. Praveen Chaudhary was shown (at Sr. No.4) as senior to direct recruits who were appointed on 5.12.2007 and who were also promoted as Executive Engineers on 26.04.2012 (they were shown at Sr. No.5 to 31)<sup>4</sup>.

**CWP-11848-2020**

Some such direct recruits, who had filed CWP-7706-2011, also filed **CWP-11848-2020** challenging the said tentative seniority list dt.28.07.2020 of Executive Engineers.

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<sup>4</sup>P-1 in CWP-11848-2020/ P-20 in CWP-585-2021

**CWP-12882-2020**

Two other persons directly recruited as Asst. Engineers and appointed on 5.12.2007 *along with* two others, who were directly recruited as Asst. Engineers in the PWD (B&R) Department on 20.08.2009, filed **CWP-12882-2020** challenging the order dt.01.10.2019 giving Sh. Praveen Chaudhary seniority as an Asst. Engineer with effect from 02.05.2006, order dt.17.07.2020 reiterating the same and the tentative seniority list dt.28.07.2020 of Executive Engineers cadre where he was shown as senior to them.

**CWP-858-2021**

**CWP-858-2021** is filed by the petitioners in CWP-18075-2011, who were directly recruited as Asst. Engineers in the PWD (B&R) Department and appointed on 7.12.2007, challenging the order dt.01.10.2019 giving Sh. Praveen Chaudhary seniority as an Asst. Engineer with effect from 02.05.2006, order dt.17.07.2020 reiterating the same and the tentative seniority list dt.28.07.2020 of Executive Engineers cadre where he was shown as seniors to them.

Sh. Pankaj Gaur and Sh. Arun Bhatia were promoted as Executive Engineers on 23.08.2022.

**I. Re: Delay and laches**

*“Whether there are any laches or delay on the part of the petitioners in CWP-7706-2011 and CWP-18515-2012, who were directly recruited and appointed on 5.12.2007 as Asst. Engineers in challenging the absorption of Sh. Pradeep Atri, and Sh. Praveen Chaudhary in the PWD (B&R) Department?”* and

*“Whether there is any delay or laches on the part of the petitioners in CWP-5465-2018 who were directly recruited as Asst. Engineers in August, 2009 in challenging the absorption of Sh. Pankaj Gaur and Sh. Arun Bhatia in the PWD (B&R) Department?”*

The direct recruit Asst. Engineers who were appointed on 5.12.2007 contend that though the absorption of Sh. Pradeep Atri in the PWD

(B&R) Department was on 06.10.2006, that of Sh. Praveen Chaudhary was on 18.07.2007 and that of Sh. Pankaj Gaur and Arun Bhatia in the said department was on 17.03.2008, this came to light for the first time only when the proposal to promote Sh. Pradeep Atri was initiated and a tentative seniority list was prepared in January 2010; Ms. Seema Dhankar, Jagbir Singh (1<sup>st</sup> petitioner in CWP-18515-2012), Sukhbir Singh and Vikas Kumar (1<sup>st</sup> and 2<sup>nd</sup> petitioner in CWP-18075-2011) along with six others filed representation/objection dt.27.01.2010<sup>5</sup>; they filed CWP-8481-2010 in this Court for consideration of their objections to the tentative seniority list issued in January 2010; and the said CWP was disposed of on 11.05.2010 with a direction to the respondents to decide the said objections.

They contend that thereafter a tentative seniority list was circulated vide Memo dt.02.07.2010 in which Sh. Pradeep Atri was shown at Sr. No.39, Sh. Praveen Chaudhary was shown at Sr. No.48 below the direct recruits appointed on 5.12.2007; that even as per the file notings [in particular the noting dt. 17.08.2010<sup>6</sup> and noting dt.27.01.2011<sup>7</sup>, the Special Secretary-cum-Chief Vigilance Officer of the department recommended that the absorption order of the four private respondents is illegal and that they should be repatriated to their parent department and this was reiterated by him again.

They contend that in the tentative seniority list dt.02.07.2010 they had been shown as seniors to Sh. Pradeep Atri and Sh. Praveen Chaudhary, but in the final seniority list published on 2.9.2011, Sh. Pradeep Atri was shown as senior to them, though Sh. Praveen Chaudhary, Sh. Pankaj Gaur and Sh. Arun Bhatia were shown as juniors to them.

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<sup>5</sup>(P8 in CWP-18515-2012)

<sup>6</sup>(Page 422 of CWP-18515-2012)

<sup>7</sup>(Page 412 of CWP-18515-2012)

The direct recruits who were appointed on 5.12.2007 contend that they had no cause of action to question the absorption of Sh. Pradeep Atri till 2.9.2011, when the final seniority list of Asst.Engineers was published, because till then he had not been made senior to them, and they had no cause of action to question the absorption of Sh. Praveen Chaudhary till 28.7.2020, when the tentative seniority list of Executive Engineer cadre was published because till then he had not been made senior to them; and that any challenge to their absorption or seniority before that stage would have been futile since they had no cause of action to assail either their absorption or his seniority.

Direct recruits who were appointed in August,2009 contend that Sh. Pankaj Gaur and Sh. Arun Bhatia were given seniority on 01.05.2017 with effect from 01.05.2008; and in the revised tentative seniority list of Asst. Engineers dt.29.09.2017, for the first time they were shown as juniors to both of them; that they had no cause of action to question the absorption of Sh. Pankaj Gaur and Sh. Arun Bhatia till 29.09.2017, and even if they had approached this Court challenging the same, no relief would have been granted to them because by such absorption, their seniority had not been affected in any way.

They also point out that it is not permissible in service law to file Public Interest Litigations regarding appointment/seniority as was held in several decisions of the Supreme Court.

They therefore contend that none of the Writs filed by them challenging absorption or grant of seniority to private respondents are barred by delay or laches.

Though this is disputed by the State and the counsel for the private respondents we find force in the contention of the petitioners in these Writ Petitions that there is no delay or laches on their part.

It is not the case of the State or of the private respondents that the circumstances surrounding the absorption of the private respondents in the cadre of Asst. Engineers in the PWD (B&R) Department were in public domain and that everybody was aware of them and could have questioned the orders of absorption. The circumstances relating to their absorption (discussed in detail later in this judgment) show that everything was done secretly by the officials in the PWD (B&R) Department without any publicity. So the petitioners cannot be blamed for not challenging them earlier between 2006 to 2011.

We agree with the contentions of the direct recruit Asst. Engineers appointed on 5.12.2007 that they had no cause of action to question the absorption of Sh. Pradeep Atri till 26.08.2011 or of Sh. Praven Chaudhary till 28.7.2020 because till then they had not been made senior to them. Any challenge to their absorption or seniority before that stage would have been futile since they had no cause of action to assail it. Moreover, it is settled law that no public interest litigation will be entertained in service matters and none could have filed such cases challenging their deputation or absorption.

We also agree with the contention of the direct recruits appointed in August, 2009 that Sh. Pankaj Gaur and Sh. Arun Bhatia were given seniority on 01.05.2017 with effect from 01.05.2008 and that for the first time only in the revised tentative seniority list of Asst. Engineers dt. 29.09.2017 they were shown as juniors to both of them. So even the Writs filed by them are not barred by laches or delay.

Also admittedly there were clauses in the absorption orders of Sh. Praveen Chaudhary, Sh. Pankaj Gaur and Sh. Arun Bhatia stating that they would be junior most in service to all persons directly recruited in the PWD (B&R) Department against vacancies arisen *before* 01.07.2006. Contrary to

such clauses in their absorption orders, they have been given seniority over the direct recruits appointed to vacancies which arose *after* 01.07.2006 only on 01.10.2019, 01.05.2017 and 01.05.2017 respectively.

Till then, the said direct recruits are not affected parties, and they would not have had a cause of action to challenge the seniority given to these three persons or their absorption. Therefore, the plea of laches or delay raised against them by these three persons cannot be countenanced.

In *S.N.Karkhanis v. Union of India*<sup>8</sup>, the Supreme Court held that if a decision was not communicated or was only provisional and had not attained finality, the petitioners could not have come to court earlier and plea of laches cannot be raised by respondents in such a situation. It held:

*“3.An objection was sought to be taken on the ground that there was an inordinate delay in the petitioners’ presenting the writ petition after over ten years even though the letter of January 6, 1960, stated that the decision taken by the Government was final. The petitioners countered this objection by pointing out, firstly, that the letter of January 6, 1960, was addressed to the Heads of Departments who were asked to communicate the decision to those officers whose names figured in the list and since the petitioners were appointed after April 1, 1959, their names did not appear and the decision was not communicated to them; secondly, the letter of April 7, 1970, itself clearly stated that everything done earlier by the Government was provisional. It is, therefore, urged that as right from the beginning objections had been taken by the Service Associations regarding the principles enunciated in the letter of January 6, 1960, and the Government itself had called upon the Service Associations by its letter of June 20, 1961, to enunciate the principles they considered fair in fixing the seniority, in compliance to which objections were being urged, the petitioners cannot be held to have committed any laches. Taking into consideration the respective contentions it appears to us that having regard to the stand taken by the Government and the admissions made by it in the letters subsequently written that the proposals set out in the letter of January 6, 1960, were to be treated as provisional, the petitioners could not have come to this Court earlier till a final decision was made on April 7, 1970. Accordingly the preliminary objection is not sustainable.”*

*( emphasis supplied)*

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<sup>8</sup>(1974) 4 SCC 360

In *Joginder Nath v. Union of India*<sup>9</sup>, the Supreme Court held that if nothing special had happened creating any right in favour of the respondents or no such position had been created, the disturbance of which would unsettle the long standing settled matters, a writ application cannot be thrown out on the ground of delay. It declared:

“ 9. .... The first list fixing the seniority of the Judicial Officers initially recruited to the Delhi Judicial Service was issued on August 2, 1971. This was subject to revision on good cause being shown. Petitioners also, as we shall show hereinafter in this judgment on one ground or the other, wanted their position to be revised in the seniority list. They, however, did not succeed. A revised seniority list was issued on June 2, 1973. The filing of the writ petition was not designedly delayed thereafter. Since the petitioners position in the seniority list vis-a-vis Respondents 3 to 6 had not been disturbed in the new list dated June 2, 1973 it was sufficient for the petitioners to challenge the list dated August 2, 1971. We shall point out in this judgment that except the promotion to the posts of Additional District Judges, the seniority in relation to which also is under challenge in this writ application, nothing special had happened creating any right in favour of the respondents or no such position had been created the disturbance of which would unsettle the long standing settled matters. The writ application, therefore, cannot be thrown out on the ground of delay in regard to any of the reliefs asked for by the petitioners.”( emphasis supplied)

Similar view was taken in *G.P. Doval v. Govt. of U.P.*<sup>10</sup>. that if a seniority list was only provisional and not final, challenge to it cannot be said to be barred by laches. The Court held:

“16. ....It was pointed out that the provisional seniority list was drawn up on March 22, 1971 and the petitions have been filed in the year 1983. The respondents therefore submitted that the Court should throw out the petitions on the ground of delay, laches and acquiescence. It was said that promotions granted on the basis of impugned seniority list were not questioned by the petitioners and they have acquiesced into it. We are not disposed to accede to this request because Respondents 1 to 3 have not finalised the seniority list for a period of more than 12 years and are operating the same for further promotion to the utter disadvantage of the petitioners. Petitioners went on making

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<sup>9</sup>(1975) 3 SCC 459

<sup>10</sup>(1984) 4 SCC 329

*representations after representations which did not yield any response, reply or relief. Coupled with this is the fact that the petitioners belong to the lower echelons of service and it is not difficult to visualise that they may find it extremely difficult to rush to the court. Therefore, the contention must be rejected.”(emphasis supplied)*

**The decision in K.A. Abdul Majeed**

Counsel for private respondents cited the decision of the Supreme Court in ***K.A. Abdul Majeed Vs. State of Kerala***<sup>11</sup> and contended that the question whether initial appointment was regular or not cannot be considered at the time of fixation of seniority.

In ***K.A. Abdul Majeed*** (11 Supra) the appellant had been appointed to the post of Lower Division Typist on 27.03.1981 after proper selection. Later he completed the period of probation satisfactorily in the said post. On 02.07.1983 he was promoted to the post of Upper Division Typist and was placed on probation for two years. He completed this period also.

In that case, Respondents No.4, 5 & 6 were appointed as Lower Division Typist on 20.09.1984, 23.02.1985 and 15.07.1985 respectively.

On 01.01.1987, a provisional seniority list was published in which the appellant was placed on the top of the list whereas respondent No.4 was placed at position No.2 in the said list. Respondent No.4 filed a representation claiming seniority over the appellant on the ground that the appointment of the appellant as Lower Division Typist was illegal, as on the date of his appointment, he was not qualified for the post.

In that case, on 07.01.1988, the impugned final seniority list was published by respondent No.3, wherein the appellant was shown as junior to respondents No.4, 5 & 6.

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<sup>11</sup> 2001 (6) SCC 292

The appellant challenged the said list in the High Court by filing a Writ Petition which was dismissed and so also the Writ Appeal. He then approached the Supreme Court.

The Supreme Court was of the opinion that in the posts of Lower Division Typist as well as Upper Division Typist, the appellant's probation was declared based on his initial appointment and subsequent promotions respectively. It observed in that context that *the question whether initial appointment was regular or not cannot be considered at the time of fixation of seniority under the Rules and allowed the appeal and restored the appellant's seniority.*

The decision in *K.A.Abdul Majeed* ( 11 supra) is distinguishable because in that case there was no relief sought challenging the initial appointment of the appellant and the plea of illegality in his appointment was raised only to claim seniority over him.

On the contrary, in the instant cases, there is a challenge specifically to the absorption of the private respondents apart from a challenge to the seniority granted to them contrary to the terms of their absorption in the PWD (B&R) Department.

When the facts relating to the absorption of the private respondents were not in public domain, and it is alleged that due to their connections with politicians, they were absorbed in the PWD (B&R) Department contrary to Rule 10 which requires existence of 'special circumstances' to absorb/appoint them by transfer, and that such circumstances do not exist, the challenge to their absorption can certainly be examined.

More so, when such challenge *prior to* the alteration of the seniority of the private respondents to the disadvantage of the direct recruits

would have been futile as they cannot claim that they have any cause of action to do so then.

These points are answered accordingly in favour of the petitioners in all the CWPs (except CWP-15083-2010) and against the respondents therein and the plea of delay and laches raised by the counsel for the private respondents is rejected.

We also hold that therefore all events which occurred during the pendency of these Writs from 2011 till date are subject to final orders in these Writ Petitions.

## **II. Re: Deputation and Absorption of Pvt.Respondents**

As we have held on question of delay in favor of the petitioners in all the CWPs (except CWP-15083-2010), it is open to us to consider other questions.

We shall now consider the question:

*“Whether the orders of the deputation of the private respondents and their subsequent absorption in the PWD (B&R) Department are valid in law?”*

We shall now discuss the circumstances in which each of the private respondents was taken on deputation and later absorbed in the PWD (B&R) Department.

### **Sh. Pradeep Atri**

Sh. Pradeep Atri got recruited initially in the PR Department on 06.12.2004 through direct recruitment (R3/1) in CWP-18515-2012.

Clause (i) of his appointment order indicates that he was to be on probation for a period of 2 years.

Even before he satisfactorily completed the period of probation, he admittedly made a request on 14.07.2005 (within 7 months of his appointment) seeking *deputation* to the PWD (B&R) Department.

This request was made without even getting approval of his parent department i.e. PR Department.

On 03.08.2005, his case for deputation was recommended by the office of the Engineer in Chief, PWD (B&R) Department on the ground that there was a shortage of Sub Divisional Engineers/Asst. Engineers in the said department.

On 12.08.2005, the Financial Commissioner and Secretary of the PR Department gave “no objection” for his deputation.

But the said proposal was “filed” by the Government as can be seen from the Memo 24.08.2005 from the Financial Commissioner, PWD (B&R) Department to the Engineer in Chief, PWD (B&R) Department<sup>12</sup>. But Sh. Pradeep Atri again made similar request for deputation on 12.09.2005.

The file notings of 15.09.2005 indicate that by then the Government had already decided to make fresh recruitment to the post of Asst. Engineers against vacant posts of direct quota and that the matter was under process.<sup>13</sup>

On the same day the Joint Secretary of the PWD (B&R) Department endorsed that there were 50 posts of Sub Divisional Engineers meant for direct recruitment which are vacant, for filling up those posts long time is expected to be taken, and so Sh.Pradeep Atri’s case for taking on

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<sup>12</sup>File notings @ pg.295 in CWP-18515-2012

<sup>13</sup>File notings @ pg.295 in CWP-18515-2012

deputation may be considered *as a short term gap arrangement till the joining of direct recruits*<sup>14</sup>.

This was accepted on 19.10.2005 subject to the condition that *he can be sent back at any time*.

Only thereafter on 02.12.2005, the approval of the Chief Minister was taken for his posting in Sub Division No.6 in Ambala<sup>15</sup>.

Thus as a *stop gap arrangement*, pending appointment of the direct recruits Asst. Engineers in the PWD (B&R) Department for which a decision was already taken by the said department, and subject to the condition that *he can be sent back to his parent department* at any time, he was taken on deputation in the said department on 19.10.2005.

He was relieved from the PR Department on 16.11.2005, and he joined on 17.11.2005 in PWD (B&R) Department.

It was stated specifically in an order dt.16.11.2005<sup>16</sup> that terms and conditions of the deputation will be issued separately. But no such terms and conditions appear to have been issued for his deputation.

Still the fact remains that it was to be only a *stop gap arrangement* and there was a condition that *he could be sent back any time* to his parent department.

It is admitted by the respondents/State of Haryana that requisition had been sent to the Haryana Staff Selection Commission on 03.03.2006 for filling up of 44 vacancies of Asst. Engineers in the PWD (B&R) Department.

Within two months of coming on deputation into the PWD (B&R) Department, Sh. Pradeep Atri requested on 24.02.2006 to be *absorbed* on

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<sup>14</sup>File notings at Page 296 in CWP-18515-2012

<sup>15</sup>File notings at Page-302 in CWP-18515-2012

<sup>16</sup>Note file at Page 12 submitted by the respondents/State of Haryana

regular basis in the said department<sup>17</sup>. He contended that approximately 40 posts of Sub Divisional Engineers are vacant in the said department and so he may be absorbed in the said department.

The Engineer-in-Chief recommended his absorption against one of the 44 direct recruit vacancies of Asst. Engineers quoting Rule 10 of the Rules which permitted appointment by transfer under *special circumstances* and subject to approval of the Haryana State Public Service Commission.

But the Under Secretary opposed such absorption<sup>18</sup> on the ground that requisition had already been sent to the Haryana Staff Selection Commission to fill up these 44 posts and so no post is available against which he can be absorbed; but some vacancies may arise in future as a result of promotion of directly recruited Sub Divisional Engineers to the post of Executive Engineer, and his case for absorption may be considered against *vacancies to arise in future*.

Thereafter, after taking opinion on 12.06.2006 of the Legal Remembrancer (who opined that in *special circumstances* it is possible to appoint persons by transfer under Rule 10 but who did not say that such circumstances exist in this case), on 06.10.2006, he was absorbed in the PWD (B&R) Department subject to four conditions one of which was that “*he will be absorbed against one of the resultant vacancies of direct recruit quota arisen on 01.07.2006 due to retirement of senior officers*”.

There is no mention in the record submitted by the State what are the “*Special Circumstances*” on the basis of which Rule 10 of the Rules was being invoked. Except that there were said to be 50 direct recruit vacancies in the PWD (B&R) Department (of which admittedly 44 direct recruit vacancies

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<sup>17</sup>P-3 in CWP-7706-2011

<sup>18</sup>File notings @ Pg.309-311 in CWP-18515-2012

had already been requisitioned for filling up by the Haryana Staff Selection Committee), no other reason is discernable from the record.

While the existence of vacancies in a department may possibly offer justification for taking persons qualified and working in other departments on *deputation*, it certainly cannot be a good reason to constitute a *special circumstance* warranting a person like Sh. Pradeep Atri to be *absorbed*/appointed by transfer in the PWD (B&R) Department.

#### **The decision in Mohinder Singh**

In *Mohinder Singh v. State of Haryana*<sup>19</sup>, action of the Haryana Government in making appointment to 15 posts of Haryana Civil Service ( Executive Branch) by *Special* Recruitment under proviso to Rule 5 of the Punjab Civil Service ( Executive Branch) Rules, 1930 was challenged.

The petitioners contended that the Government has decided to make *Special* recruitment without there being a special reason for not following the normal method of recruitment envisaged in the rules.

The State took the plea that a number of cadre posts were lying vacant and it will not be possible to the Haryana Public Service Commission to make available adequate number of selected candidates to fill up the vacant posts.

A Division Bench of this Court held that a *special* recruitment envisaged in proviso to Rule 5 is a sort of exception to the substantive rule; that resort to *special* recruitment can be had only if the State Government forms an opinion that the '*exigencies of service*' so require; the said word has been interpreted as "*need; imperativeness; emergency; something arising suddenly out of current events; any event or occasional combination of circumstances calling for immediate action or remedy, a pressing necessity; a sudden and*

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<sup>19</sup> 1999 (3) SCT 280 = 1999 (1) RSJ 556 (DB)

*unexpected happening or an unforeseen occurrence or condition;”*; that the files produced by the State show that there is no material to hold that it can justify formation of an opinion that exigency of service required for making of Special Recruitment to the service exists. It held that *the likelihood of a little more time being taken for selection by open competition affords no justification for making selection by Special Recruitment.*

Thus a slight delay occasioned by pendency of some court cases cannot be treated as a *specialcircumstance* justifying his *absorption* on 6.10.2006 under Rule 10 when infact it was the State which had given an undertaking on 29.11.2006 in CWP-16016-2010 that it will not issue appointment letters to the direct recruits and thus disabled itself from appointing the direct recruits in November,2006 itself.

More so when his very deputation was supposed to be a *stop gap arrangement* pending filling up of the 44 direct recruit vacancies of Asst.Engineers and he was sent on deputation to the PWD (B&R) Department with a specific condition that *he can be sent back to his parent department at any time.*

The fact that he was absorbed in the PWD (B&R) Department on 06.10.2006 *even before* completing his two year probation from the date of his initial appointment in the Development and Panchayati Raj Department on 06.12.2004, obviously indicates support of some hidden hand espousing his cause at every stage leading to not only his deputation, but also to his absorption and,as we shall show, later also in the matter of fixation of his seniority from 06.10.2006 above the direct recruits.

The term “*special circumstances*” has been interpreted by the Supreme Court to be something exceptional in character, extraordinary, significant, uncommon. It is an antonym of common, ordinary and general.

(See *Rajni Kumar v. Suresh Kumar Malhotra*<sup>20</sup>). In our opinion no such special circumstances exist in the instant case to “absorb”/“appoint by transfer” him in the PWD (B&R) Department at all.

In *Chandigarh Admn. v. K. K. Jerath*<sup>21</sup>, the Supreme Court had an occasion to consider Rule 10 of Punjab Service of Engineers, Class I, PWD (Buildings & Roads Branch) Rules, 1960 which also permitted appointment by transfer in *special circumstances* of the post of the Chief Engineer in Buildings and Roads Departments in the Union Territory of Chandigarh.

An officer of the Punjab Service was sought to be appointed to the said post in the Union Territory of Chandigarh.

This was challenged by the respondent, who was working as Superintending Engineer in the Union Territory of Chandigarh, in the Central Administrative Tribunal.

*Inter alia* the proposal to appoint a person from the State of Punjab to the said post of Chief Engineer in the Chandigarh Administration was sought to be defended on the ground that Rule 10 permits it. The Supreme Court rejected the said plea and held as under:-

*“8. Much was attempted to be made out from Rule 10 which permits appointment by transfer in special circumstances with the approval of the commission to the Service and the provisions in the Rules permitting appointment by transfer and it was urged that the Rules themselves contemplate that an officer of the Punjab Service could be appointed by the Administration to the exclusion of any person in Chandigarh if the State was of opinion that it was in the interest of Service. It is true that the Rules do permit appointment by transfer. But sub-clause (6) of Rule 5 itself provides that appointment by transfer of an officer will normally be made to the rank of Executive Engineer except that specialists may be recruited to any rank. A reasonable reading of the rule would indicate that the appointing authority should not resort to appointing an officer above the rank of Executive Engineer by transfer. The appointment of specialist is no doubt permissible*

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<sup>20</sup>(2003) 5 SCC 315, at page 318

<sup>21</sup>1994 Supp (3) SCC 582

*but that should be resorted to only if the officers in the State are not available. The Rules cannot be understood to confer an unfettered discretion in the State Government or the appointing authority who may appoint any person from outside to the exclusion of a person from the cadre unless it is found that the person concerned is not eligible and if eligible then not suitable. The appointment of specialist as provided in the Rules has to be resorted to in those exceptional circumstances where the officer brought on transfer is exceptional and the like of whom cannot be found in the State itself. If the word 'specialist' is understood as empowering the State to appoint anyone it considers appropriate it may lead to arbitrariness. It has, therefore, to be limited to those exceptional cases where public interest demands that a person from outside should be appointed as he is of extraordinary merit and a specialist in the branch on which he is being appointed and no officer from the State is available to be appointed."*  
(Emphasis supplied)

Thus in ordinary circumstances there cannot be an appointment by transfer invoking Rule 10 of the Rules and such recourse is permissible only if the proposed appointee is exceptional, has extraordinary merit and the like of whom is not otherwise available in the State itself.

It is not permissible to take recourse to it to favour persons like Sh. Pradeep Atri and absorb them in the PWD (B&R) Department at a time when an advertisement had already been issued to fill up 44 direct recruits vacancies of Asst. Engineers in the said department and there is every possibility that they may join in the near future; and his appointment was only as a stop gap arrangement subject to condition that he can be sent back to his parent department at any time.

### **The decision in K.S. Brar**

Counsel for the respondents placed reliance on ***Chief Engineer and Secretary, Engineering Department, for and on behalf of Chandigarh Vs. K.S. Brar and another***<sup>22</sup>. They contended that the request of an employee for absorption by transfer is itself a *special circumstance* and so no objection

<sup>22</sup>1988 Supp. SCC 756

on that count be taken with regard to the absorption/appointment by transfer of the private respondents.

In *K.S. Brar* (22 Supra), the respondent No.4 was appointed as an Asst. Engineer in the Punjab Public Works Department (Irrigation Wing) on 15.07.1968 on selection through the Punjab Public Service Commission. On 07.10.1972, he was deputed to work with the Chandigarh Administration in its Engineering Department as an Asst. Engineer.

On 24.06.1976, the petitioner joined the Chandigarh Administration as an Asst. Engineer as a direct recruit by his selection through the Union Public Service Commission.

Respondent No.4 made an application, while on deputation, with the Administration of the Union Territory of Chandigarh, for absorbing him in the cadre of Sub Divisional Engineers in the Engineering Department at Chandigarh. His request was accepted on 17.06.1978 and he was absorbed in the Engineering Department as a Sub Divisional Engineer (B&R) in the Chandigarh Administration. This order absorbing him in the Chandigarh Administration was notified on 01.03.1979 in the Gazette. Consent of the Union Public Service Commission, New Delhi was also taken for his appointment by transfer. There is no mention of public interest or interest of the service in this order.

In that case,thereafter a tentative seniority list was circulated on 19.11.1979 inviting objections and after hearing the objections, respondent No.4 was granted seniority with effect from 07.10.1972, the date of his joining as an Asst. Engineer on deputation in the PWD (B&R) Department of the Chandigarh Administration and a notification was issued on 19.01.1980 granting him final seniority stating that all circumstances were considered and public interest was kept in view for giving him the said seniority.

The petitioner challenged both the order of absorption of respondent No.4 in the Chandigarh Administration and the order fixing his seniority on the ground that these orders were not in public interest or in the interest of the service before the Central Administrative Tribunal, Chandigarh Bench.

However at the hearing before the Tribunal, at the very outset, the learned counsel for the petitioner made it clear that *he was not challenging the absorption of respondent No.4* but only the placement of the petitioner in the seniority list and the assignment of seniority to respondent No.4 from the date he was taken on deputation.

In spite of it, the Tribunal on the basis of Rule 10 of the Rules held that the order of absorption was not valid as *no special circumstances* had been set out or shown justifying the same and hence there was a lacuna in the order of absorption. The Tribunal therefore directed that respondent No.4 should be placed at the bottom of the gradation list of officers of his category and granted seniority from the date he was absorbed in the cadre i.e. from 09.02.1979.

This was challenged before the Supreme Court by the Chandigarh Administration and respondent No.4.

The Supreme Court considered Rule 10 of the Rules which is in *pari materia* with the Rule 10 which is under consideration in this Batch of cases and specifically observed that *it did not wish to go into the question as to whether such an appointment could be said to be invalid or irregular merely because no special circumstance has been recited in the order of absorption because the challenge to the order appointing respondent No.4 by transfer had been specifically given up by the petitioner in the Tribunal.* It set aside the order of the Tribunal and restored the seniority of respondent No.4 above that of the petitioner.

It also opined that Rule 12(5), like in the instant case, required interest of public service to be taken into account for assigning seniority to any person of a date earlier than the date of absorption; that there was no basis on which it can be contended that there was no public interest in making appointment of respondent No.4 by transfer since he had been appointed as Asst. Engineer in July 1968 long prior to the petitioner on 26.04.1976 and his qualifications are better than those of the petitioner and no oblique motive for granting a higher seniority to respondent No.4 is shown to the Court.

In that context, at Para 8 it observed:

*“8..... In our view, where the request made by the officer concerned is based on circumstances showing the request for transfer is justified, this might be looked up as a special circumstance. ....”( emphasis supplied)*

In our opinion this stray sentence cannot be read out of context as is being done by the counsel for respondents and they cannot contend that if a request for absorption is made by an officer, that itself is a ‘special circumstance’.

We hold that this Court can certainly examine whether there are really in fact any *special circumstances* justifying his absorption/appointment by transfer.

Therefore, we reject the plea of the counsel for private respondents that their very request is a *special circumstance* justifying their appointment by transfer in the PWD (B&R) Department.

There is one more difficulty which would arise.

In the Rules, though Rule 10 permits appointment by transfer, there is no specific quota of vacancies earmarked for such appointments since Rule 6 fixes a quota of 50% for direct recruitment and 50% by promotion thus

exhausting all vacancies in the cadre of the Asst. Engineers governed by the Rules.

The term “direct appointment” is defined in Rule 2 (9) of the Rules as under:-

*“Direct appointment” means an appointment by open competition but does not include:-*

*(a) an appointment made by promotion, and*

*(b) an appointment by transfer of an officer already in service of a State Government or of the Government of India;*

*Explanation:- A member of the Haryana P.W.D. (B&R) Sectional Officers (Engineering) Service or a member of the B&R Branch Draftsmen and Tracers Services, who enters the Service by open competitive selection shall, for the purpose of these rules, be deemed to have entered the service by direct appointment.”*

Direct appointment is dealt with by Rule 8. This Rule provides for direct recruitment.

When Rule 2 (9) specifically states that *direct appointment* will not include *appointment by transfer*, it is not permissible to utilize a vacancy earmarked for a direct recruit for absorption of an appointee by transfer.

Therefore, the condition imposed in the absorption order dt.06.10.2006 that Sh. Pradeep Atri will be absorbed against one of the resultant vacancies of *direct recruit quota* is illegal and contrary to the Rules.

So we hold that there are no *special circumstances* for invoking Rule 10 and *absorbing* Sh.PradeepAtri in the PWD ( B&R) Department and the action of the State of Haryana in absorbing him in the said Department is contrary to the Rules, and is not *bonafide*.

Praveen Chaudhary

Sh. Praveen Chaudhary was appointed on 18.10.2005 in the PR Department as an Asst. Engineer.

The record reveals that the Revenue Minister on 23.11.2005 wrote to the Financial Commissioner of the Development and Panchayati Raj Department that Sh. Praveen Chaudhary should be sent on deputation from the said department to the PWD (B&R) Department. Similar recommendation was also made by the Transport Minister on the same day.<sup>23</sup>

Neither of them given any reason why he should be taken on deputation in the said department.

The Engineer-in-Chief cited acute shortage of Sub Divisional Engineers in PWD (B&R) Department as a reason for taking him on deputation<sup>24</sup>. The case of Sh. Pradeep Atri was also cited as a precedent. It was proposed on 29.12.2005 that he may also be taken on deputation on the condition that *he can be sent back to his parent department at any time.*<sup>25</sup> When nothing was done, the Revenue Minister again insisted on 23.02.2006<sup>26</sup> that he be taken on deputation in the PWD (B&R) Department.<sup>27</sup>

Thereafter, on 25.04.2006, he was taken on deputation in the PWD (B&R) Department<sup>28</sup> on the approval of the Chief Minister.

On 03.05.2006, the Transport Minister endorsed to the Chief Minister, Haryana State that Sh. Praveen Chaudhary be absorbed permanently in the PWD (B&R) Department.<sup>29</sup>

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<sup>23</sup>Pages 429-430 in CWP-18515-2012/P6A & P6B in CWP-858-2021.

<sup>24</sup>Govt. file notings filed at Page 304 of the in CWP-18515-2012.

<sup>25</sup>Govt. file notings filed at Page 304-305 of the in CWP-18515-2012.

<sup>26</sup>Page 433 in CWP-18515-2012.

<sup>27</sup>P-6C in CWP-858-2021.

<sup>28</sup>P-2 in CWP-15083-2010.

<sup>29</sup>Page 171 of Part I file containing file notings.

On 04.05.2006, the Chief Minister's office endorsed that he had seen the request of the Transport Minister and desired the same to be examined and put up.

As per the said order placing him on deputation, terms and conditions of deputation would be issued separately.

They were issued on 24.07.2006, 3 months later and his deputation was stated to be subject to the following three conditions<sup>30</sup>:-

- a) *That he would not claim absorption in the PWD (B&R) Department;*
- b) *That he should give undertaking that he will not claim any benefit of absorption in PWD (B&R) Department; and*
- c) *That he can be sent back at any time to the PR Department on receipt HSPSC recommendation to fill direct recruit posts.*

Contrary to the above conditions laid down in the order dt.24.07.2006<sup>31</sup>, he sought *absorption* in the PWD (B&R) Department.

His case was also recommended for absorption on 19.03.2007 by Sh. Rajender Singh, MLA Bahadurgarh<sup>32</sup>.

The file notings<sup>33</sup> reveal that though it was the State Government which gave an undertaking on 29.11.2006 in CWP-16016-2000 that it will not issue appointment letters to the selected direct recruits who had qualified in the test conducted by the Haryana Staff Selection Commission pursuant to the advertisement dt.07.05.2006, and later got the said order extended, it was projected as if there was a *stay order granted* by the High Court for issuing appointment letters to them as one of the justifications for his absorption. This is patently false.

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<sup>30</sup>(P8 in CWP-858-2021)

<sup>31</sup>P-10 in CWP-858-2021

<sup>32</sup>file notings at Page 417 in CWP-18515-2012, file notings in file Part I at page 173.

<sup>33</sup>at page 416 and 418 in CWP-18515-2012

On 11.07.2007, the Chief Minister approved his absorption relying on grant of earlier absorption orders to Sh. Pradeep Atri subject to five conditions.<sup>34</sup>

Thereafter, on 18.07.2007<sup>35</sup>, he was ordered to be absorbed in the PWD (B&R) Department. The said order reads:

*“The Governor of Haryana is pleased to absorb Sh. Parveen Chaudhary, Sub Divisional Officer, Development and Panchayat Department presently on deputation with Public Works Building and Roads Department, in PW B&R Department as SDE (Civil) with immediate effect subject to the following conditions in relaxation of the extant rules/instructions:*

- 1. The approval of Haryana Public Service Commission.*
- 2. The decision/undertaking given by the department in various Civil Writ Petition pending in various courts including the Hon’ble High Court relating to the appointment of SDEs in PWD (B&R) Department.*
- 3. The confirmation of possession of degree of Civil Engineering by a duly recognized university.*
- 4. The seniority of Sh. Parveen Chaudhary will be at junior most level not only amongst the SDEs, who are presently posted in the department, but also lower than the people who might get posted against the vacancies arisen before 01.07.2006 as he is being absorbed against one of the vacancies which has arisen due to the retirement of SDEs after 01.07.2006.*
- 5. He will be posted against the vacancy of direct recruits.”*

We are of the opinion that in order to facilitate his absorption in the PWD (B&R) Department, the undertaking dt.29.11.2006 was given in CWP-16016-2000 to this Court that no appointment letter will be issued to the selected direct recruit Asst.Engineers, and then the non-availability of such direct recruits was taken as a justification for his absorption in the PWD (B&R) Department.

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<sup>34</sup>Page 419 in CWP-18515-2012.

<sup>35</sup>P-5 in CWP-18515-2012.

We may also point out that on 20.07.2007<sup>36</sup>, two days after Sh. Praveen Chaudhary was absorbed in the PWD (B&R) Department, 15 diploma holder Junior Engineers, 7 AMIE Junior Engineers and 6 Circle Head Draftsmen were promoted as Sub Divisional Engineers (Civil)/Asst. Engineers. When promotion of 28 persons as Asst. Engineers was on the anvil, we fail to see any reason why there was any necessity to absorb Sh. Praveen Chaudhary in the PWD (B&R) Department.

The counsel for the Sh. Praveen Chaudhary however sought to contend that the absorption of Sh. Praveen Chaudhary was on the orders of the Chief Minister who had relaxed the rules, that it was permissible to grant such relaxation and so no exception can be taken to his absorption.

No doubt, Rule 21 permits relaxation of requirements for appointment/promotion. It states:

**“21. Power to relax:-** (1) Where Government is satisfied that the operation of any of these rules causes under hardship in any particular case, it may, by order, dispense with or relax the requirements of that rule of such extent, and subject to such condition as it may consider necessary for dealing with the case in a just and equitable manner.

(2) ... .. “

Thus power to relax a rule can be exercised by the Government on being satisfied that the operation of a rule is causing *hardship* in any particular case and to deal with the case “*in a just and equitable manner*”.

In *State of Gujarat v. Arvindkumar T. Tiwari*<sup>37</sup>, the Supreme Court held that power to relax should be exercised for justifiable reasons and must not be exercised arbitrarily only to favour an individual. The Court held:

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<sup>36</sup>P-13 in CWP-15083-2010

<sup>37</sup>(2012) 9 SCC 545

*“10. The appointing authority is competent to fix a higher score for selection, than the one required to be attained for mere eligibility, but by way of its natural corollary, it cannot be taken to mean that eligibility/norms fixed by the statute or rules can be relaxed for this purpose to the extent that the same may be lower than the ones fixed by the statute. In a particular case, where it is so required, relaxation of even educational qualification(s) may be permissible, provided that the rules empower the authority to relax such eligibility in general, or with regard to an individual case or class of cases of undue hardship. However, the said power should be exercised for justifiable reasons and it must not be exercised arbitrarily, only to favour an individual. The power to relax the recruitment rules or any other rule made by the State Government/authority is conferred upon the Government/authority to meet any emergent situation where injustice might have been caused or, is likely to be caused to any person or class of persons or, where the working of the said rules might have become impossible. (Vide *State of Haryana v. Subash Chander Marwaha*<sup>5</sup>, *J.C. Yadav v. State of Haryana*<sup>6</sup> and *Ashok Kumar Uppal v. State of J&K*<sup>7</sup>.)” (emphasis supplied)*

The power to relax thus cannot be exercised arbitrarily and whimsically to favour any person.

Nowhere in the record it is stated what was the hardship to Sh. Praveen Chaudhary which is sought to be removed by relaxation of rules. Also operation of what rule is causing hardship to him is not mentioned.

Though there could be said to be justification to take him on *deputation* in the PWD (B&R) Department because temporarily there were many vacancies of Asst.Engineers in the PWD (B&R) Department and process for direct recruitment was initiated by 03.03.2006 by sending requisition to the Haryana Staff Selection Commission, the same cannot be a justification for his *absorption* in the said department.

It is not as if his absorption in the said department would result in a great improvement of his performance or that of the department itself.

There could not have been any necessity to absorb him on 18.07.2007 in the PWD (B&R) Department if the State Government had not given the undertaking on 29.11.2006 in CWP-16016-2000 that it will not issue appointment letters to the direct recruit Asst.Enginers recommended by the Haryana Staff Selection Commission on 14.11.2006.

Thus obviously because of political pressure Sh. Praveen Chaudhary was taken on deputation from the PR Department into the PWD (B&R) Department and he was also absorbed in the said department without there being any *special circumstances* warranting his absorption/appointment by transfer as mandated by Rule 10 and also contrary to the very order of deputation which imposed a condition that he would not seek absorption and that he can be sent back at any time to the PR Department on receipt HSPSC recommendation to fill direct recruit posts.

In the written statement filed by the State of Haryana in CWP-15083-2010 (the said CWP was filed by Sh. Praveen Chaudhary, Sh. Pankaj Gaur and Sh. Arun Bhatia challenging the conditions imposed in their respective absorption orders making them junior most to direct recruits posted against vacancies already arisen before their absorption) it is stated at para No.1 as under:

*“Since in the present case, the petitioners themselves have made a voluntary request for their absorption in the respondent Department. So it was not remotely a case that the department compel them for absorption nor the department has a dire need for their absorption. The department has taken the step of their absorption purely on their voluntary request and they had been absorbed in accordance with the department rules. The petitioners themselves submitted their joining after accepting the said condition. Therefore, they are now stopped from filing the instant petition on account of their own act and conduct.” (emphasis supplied)*

***This indicates that there was no need to absorb Sh.Praveen Chaudhary in the PWD ( B & R ) Department.***

Sowhat was said by us in the case of Sh. Pradeep Atri equally applies to the *absorption* of Sh. Praveen Chaudhary i.e. that it is contrary to the Rules and is not *bona fide*.

He also cannot be posted against the vacancy of direct recruits for the reasons given by us while dealing with the case of Sh. Pradeep Atri's absorption.

**Sh. Pankaj Gaur and Sh. Arun Bhatia**

These two individuals had been recruited in the PR Department as direct recruits on 18.10.2005<sup>38</sup>.

They were taken on deputation in the PWD (B&R) Department on 23/27.11.2007<sup>39</sup>.

They sought absorption in the PWD (B&R) Department on 17.03.2008<sup>40</sup>.

On 10.03.2008, this was taken up in the PWD (B&R) Department and it was suggested that their absorption is possible on pattern similar to that of Sh. Pradeep Atri and Sh. Praveen Chaudhary<sup>41</sup>.

Though the Minister for PWD (B&R) Department sought examination of the issue by the Department on 25.04.2008, the Department noted that such requests will increase litigation and recommended rejection of the request of Sh. Pankaj Gaur for absorption. It was also noted that 30 posts of Asst. Engineers pertaining to direct quota are vacant for which a requisition has been sent to the HSPSC<sup>42</sup>.

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<sup>38</sup>R5/3 in CWP-5465-2018.

<sup>39</sup>R5/5 in CWP-5465-2018.

<sup>40</sup>P6 in CWP-5465-2018.

<sup>41</sup>P-20 in CWP-18515-2012.

<sup>42</sup>File notings at page 276-277 in CWP-18515-2012.

Then Mr.Radhey Sham Sharma, an MLA of Narnaul requested the PWD Minister to absorb Sh. Pankaj Gaur<sup>43</sup>.

Again on 30.07.2008, the file notings showed that the Department did not agree for the absorption of these two persons<sup>44</sup> and this was reiterated on 08.08.2008 and 11.08.2008<sup>45</sup>, but on 21.08.2008, on the ground that both possessed M.Tech. Degree, the Financial Commissioner, recommended their absorption stating that they will be junior most in the inter se seniority in the department. This was approved by the Minister PWD on 20.09.2008.<sup>46</sup> However, it appears that their request was *filed* as can be seen from a letter dt.07.10.2008 from the Financial Commissioner of the PWD (B&R) Department addressed to the Engineer-in-Chief of the said department<sup>47</sup>.

On 17.02.2009, the MLA, Mohindergarh, who was also Parliamentary Secretary, Transport Department of the Government of Haryana gave a letter<sup>48</sup> for *merger* of Sh. Pankaj Gaur in the PWD (B&R) Department.

On 07.07.2009, the Officer on Special Duty in the HSPSC addressed a letter dt.07.07.2009 to the Financial Commissioner of the PWD (B&R) Department stating that appointment by transfer can be made only in special circumstances, and there are no special circumstances to justify their absorption in the PWD (B&R) Department<sup>49</sup>.

The Financial Commissioner responded on 30.07.2009 that both possessed M.Tech. degree in field relevant to the Roads and Buildings engineering, that they had been recruited through a proper process by the HSPSC, that they had spent time in the department and have been found good in their work and it is difficult to find M.Tech. qualified persons as Sub

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<sup>43</sup>File notings at page 279/280 in CWP-18515-2012.

<sup>44</sup>File notings at page 286 in CWP-18515-2012.

<sup>45</sup>File noting at page 286 & 287 in CWP-18515-2012.

<sup>46</sup>File notings at page 288 in CWP-18515-2012.

<sup>47</sup>P-21 in CWP-18515-2012.

<sup>48</sup>P10 in CWP-5465-2018.

<sup>49</sup>P-11 in CWP-5465-2018.

Divisional Engineers. Thereafter the HSPSC on 17.09.2009 gave approval for their absorption.

After the intervention of the MLA of Narnaul and MLA, Mohindergarh, it appears that their case was reconsidered and after obtaining approval of HSPSC, they were absorbed in the said department on 17.09.2009 vide order dt.23.10.2009.<sup>50</sup>

Thus even in their absorption, the persistent interference of politicians is very clear.

Two of the conditions imposed in their order of absorption dt.23.10.2009 are as under:

*“(1) Their seniority shall be at junior most level not only amongst the Sub Divisional Engineers who are presently posted in the department, but also lower than the candidates who might get posted against the vacancies already arisen.*

*(2) They shall be posted against the vacancies of direct recruits.”*

The reason assigned for their absorption i.e. that both possessed M.Tech. degree, in our opinion is a *specious* reason and it cannot constitute a *special circumstance* to justify their absorption for the reason that if there was a requirement that such qualification is necessary to work as an Asst. Engineer in the PWD (B&R) Department, the Rules would have been framed specifying possession of such qualification.

Also by the date they were absorbed in the PWD (B&R) Department on 23.10.2009, admittedly 29 direct recruit Asst. Engineers, had already been appointed in the PWD (B&R) Department on 5.12.2007. We have already pointed out that on 20.07.2007<sup>51</sup>, 15 diploma holder Junior Engineers, 7 AMIE Junior Engineers and 6 Circle Head Draftsmen were promoted as Sub

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<sup>50</sup> P-6 in CWP-15083-2010

<sup>51</sup> P-13 in CWP-15083-2010

Divisional Engineers (Civil)/Asst. Engineers. On 28.07.2008<sup>52</sup>, 7 diploma holder Junior Engineers, 1 AMIE Junior Engineers and 2 Circle Head Draftsmen, were promoted as Sub Divisional Engineers/Asst. Engineers.

Along with Shri Pankaj Gaur and Sh.Arun Bhatia, 8 others had also been taken on deputation on 22.11.2007. Also 23 direct recruits had joined as Asst. Engineers in the PWD (B&R) Department on 19.08.2009/20.08.2009(Sr. No.82 to 104 in the final seniority list of the Asst. Engineers notified on 02.09.2011)<sup>53</sup>.

Thus there were ample number of Asst. Engineers available in the PWD (B&R) Department by August, 2009, and there was no need to *absorb* Sh. Pankaj Gaur and Sh. Arun Bhatia in PWD (B&R) Department on 23.10.2009.

It is not in dispute that these two persons along with Sh. Pradeep Atri had appeared along with the direct recruits for the selection test conducted by the Haryana Staff Selection Commission pursuant to the advertisement issued on 07.05.2006 for direct recruitment of Asst.Engineers in the PWD ( B&R) Department and they had not qualified in the said examination, while the direct recruits appointed on 5.12.2007 had qualified.

In such a scenario, their absorption in the PWD (B&R) Department without there being any *special circumstance* justifying the same is clearly illegal, contrary to Rule 10, not *bona fide* and amounts to a *back door entry*.

In the written statement filed by the State in CWP-15083-2010 (the said CWP was filed by Sh. Praveen Chaudhary, Sh. Pankaj Gaur and Sh. Arun Bhatia challenging the conditions imposed in their respective absorption

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<sup>52</sup>P-14 in CWP-15083-2010

<sup>53</sup>P-2 in CWP-15685-2017

orders making them junior most to direct recruits posted against vacancies already arisen before their absorption) it is stated at para No.1 at pg.2 that there was *no need to absorb them in the PD (B&R) Department*. We extract the relevant portions of the said Written statement :

*“1. .... Since in the present case, the petitioners themselves have made a voluntary request for their absorption in the respondent Department. So it was not remotely a case that the department compel them for absorption nor the department has a dire need for their absorption. The department has taken the step of their absorption purely on their voluntary request and they had been absorbed in accordance with the department rules. The petitioners themselves submitted their joining after accepting the said condition. Therefore, they are now stopped from filing the instant petition on account of their own act and conduct.”( emphasis supplied)*

However, a diametrically opposite stand is taken by the State later and in the replies filed by the State to the Writ Petitions filed by the direct recruits challenging the absorption and seniority of the private respondents, the absorption of the private respondents is sought to be justified on the ground that at that time there was acute shortage of officers in the PWD (B&R) Department as new direct recruit appointments were being delayed due to pending litigation in the High Court; though the Haryana Staff Selection Commission had sent recommendation of the selected candidates to the Government on 14.11.2006, no appointments could be given as there was *stay order* by the High Court against their joining; and that in such circumstances, the Government decided to absorb the Officers on deputation who were willing; opinion of the Legal Remembrancer to the Government of Haryana was sought, and after imposing certain conditions, they were absorbed<sup>54</sup>. It is stated that their absorption is on the recommendation of the Head of the

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<sup>54</sup>Written Statement in CWP-7706-2011, Para 4, Page 2

Department i.e. the Engineer in Chief<sup>55</sup>. It is stated that their requests were processed by the Department after keeping in view their services rendered in the Department while on deputation. It was denied that their absorption amounts to a back door entry in the Department<sup>56</sup>.

In para 2 of the State's reply in CWP-18515-2012 also it is stated that appointments could not be given in the PWD (B&R) Department *due to interim order dt.29.11.2006* in CM-14464-2006 in CWP-16016-2000 and its continuance till 03.12.2007 when the said CWP was dismissed. This is reiterated in para 5 at Page 9 of the State's reply again.

This stand of the State cannot be countenanced and it is estopped from taking a totally different stand in the Writ Petitions filed by the direct recruits contrary to its stand in CWP-15083-2010.

Similar stand is taken by the private respondents in their replies filed to the Writ Petitions challenging their absorptions.

The plea of shortage of staff because of a stay order of the High Court cannot be accepted because it was the State Govt. which sent requisition for only 44 direct recruit vacancies of Asst. Engineers when there were 59 vacancies as on 03.03.2006; and it was the State Government which had undertaken on 29.11.2006 in CWP-16016-2000 that it would not issue appointment letters to the direct recruits selected by the Haryana State Staff Selection Commission on 14.11.2006. It was thus a case of the State disabling itself to favour the private respondents, blaming the Court for stopping direct recruits from joining in the department and using the said excuse to make possible the absorption of the private respondents.

The State cannot be allowed to take advantage of its own wrong.

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<sup>55</sup>Para 4 at Page 4 of the same Written Statement.

<sup>56</sup>Para 7, Page-5 of the same Written Statement.

In *Kusheshwar Prasad Singh v. State of Bihar*<sup>57</sup>, the Supreme Court reiterated this principle which it had laid down earlier in *Union of India v. Major General Madan Lal Yadav*<sup>58</sup> by quoting the latin maxim *commodum ex injuria sua nemo habere debet* (no party can take undue advantage of his own wrong).

There is no mention in the written statement of the State as to what are the “special circumstances” existing at the time of their absorption warranting the invoking of Rule 10 of the Rules.

While shortage of staff may be a ground to take people on *deputation* from other departments, it cannot be a ground to *absorb* them in the PWD (B&R) Department.

In spite of several persons having been directly recruited as Asst. Engineers in August, 2009 and others promoted to said cadre in 2007 and 2008, still on the pretext of shortage of staff, Sh. Pankaj Gaur and Sh. Arun Bhatia have been absorbed on 23.10.2009.

The State’s replies in CWP-7706-2011 and CWP-18515-2012 make no mention of the political influence which occurred to facilitate the *deputation* of the private respondents and also their *absorption* which the material filed by the petitioners and the record submitted by the State reveals. There is thus suppression of material facts by the State which cannot be countenanced.

For the aforesaid reasons, we are of the opinion that their absorption is for oblique motives and they were given back door entry into the

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<sup>57</sup>(2007) 11 SCC 447, at page 451

<sup>58</sup>(1996) 4 SCC 127

PWD (B&R) Department because of their political influence and there is no justification for their absorption in the said department at all.

Like Sh.PradeepAtri and Sh.Praveen Chaudhary, even Sh.Pankaj Gaur and Sh.Arun Bhatia cannot be posted against direct recruit vacancies in the PWD(B & R) Department in view of Rule 2(9) which excluded appointees by transfer from being treated as ‘direct appointees’.

We therefore hold that the orders of the deputation of the private respondents and their subsequent absorption in the PWD (B&R) Department are not valid in law and were the product of political machinations by them.

### **III. Re: Inter-se Seniority**

Assuming for the sake of argument without conceding that the deputation and absorption of the private respondents in PWD (B&R) Department as Asst. Engineers is legally valid, the next important issue to be considered is:

*“Whether the State was justified in giving seniority to the Sh. Pradeep Atri and Sh. Praveen Chaudhary over the direct recruits selected and appointed on 5.12.2007 against the vacancies which arose prior to 1.7.2006?; and*

*Whether the State is justified in giving seniority to Sh. Pankaj Gaur and Sh. Arun Bhatia over the direct recruits or promotes who were appointed against the vacancies which arose before 23.10.2009, the date of their absorption in the PWD ( B&R) Department?”*

First we shall deal with Sh.Pradeep Atri and Sh.Praveen Chaudhary.

We have already pointed out Sh. Pradeep Atri, Sh. Praveen Chaudhary were taken on deputation in the PWD (B&R) Department on 16.11.2005 and 25.04.2006 and they were absorbed in the said department on 06.10.2006 and 18.07.2007 respectively. In the discussion above we have already held why their absorption is bad in law.

In the absorption order dt.06.10.2006 of Sh. Pradeep Atri one of the conditions is as under<sup>59</sup> :

*“4.He will be absorbed against one of the resultant vacancies of direct recruit quota arisen on 01.07.2006 due to retirement of senior officers”.*

Likewise in the absorption order<sup>60</sup> dt. 18.07.2007 of Sh. Praveen Chaudhary the condition No.4 was as follows:

*“4.The seniority of Sh. Parveen Chaudhary will be at junior most level not only amongst the SDEs, who are presently posted in the department, but also lower than the people who might get posted against the vacancies arisen before 01.07.2006 as he is being absorbed against one of the vacancies which has arisen due to the retirement of SDEs after 01.07.2006.”*

We have already discussed why they cannot be absorbed against one of the resultant vacancies of direct recruits in view of Rule 2(9) which defines direct appointment as not including appointment by transfer under Rule 10.

In addition thereto, admittedly on 03.03.2006, 44 vacancies in the direct recruitment quota had been requisitioned to the Haryana Staff Selection Commission by the State Govt.<sup>61</sup>

It is against these vacancies that the petitioners in CWP-7706-2011, CWP-18075-2011, CWP-18515-2012, CWP-11848-2020, CWP-858-2021 some of the petitioners in CWP-12882-2020 were selected and recommended by the Haryana Staff Selection Commission on 14.11.2006<sup>62</sup>. However in view of the undertaking given by the State Government on 29.11.2006 in CM-14464-2006 in CWP-16016-2000 and its continuance till 03.12.2007 when the said CWP was dismissed, they joined on 05.12.2007<sup>63</sup>.

<sup>59</sup>P-4 dt. 06.10.2006 in CWP-18515-2012

<sup>60</sup>P-5 in CWP-18515-2012

<sup>61</sup>File Notings at Page-307 in CWP-18515-2012.

<sup>62</sup>Para 4 of the Written Statement filed by respondent No.1 in CWP-7706-2011.

<sup>63</sup>Page-2 Para-2 of the Written Statement filed by respondents No.1 and 2 in CWP-18515-2012.

Thus, these petitioners referred to above, had been recruited against vacancies of direct recruits which were already in existence by 03.03.2006.

Till 2010, Sh. Pradeep Atri's seniority does not appear to have been disclosed to anybody.

For the first time, in a tentative seniority list of Asst.Engineers prepared in January,2010, Sh. Pradeep Atri was given seniority above them.

Ms.Seema Dhankar and others gave a representation dt.27.01.2010 for correction of the seniority list in the cadre of Sub Divisional Engineers<sup>64</sup> opposing his placement in the tentative seniority list of the said cadre.

On 10.05.2010, the Special Secretary, PWD (B&R) Department found merit in the objections and opined that he cannot be given seniority over the direct recruits.

Ms.Seema Dhankar and others filed CWP-8481-2010 for consideration of their objections.

This Court disposed of the said Writ Petition on 11.05.2010 directing consideration of their objections to the tentative seniority list.

Thereafter another provisional seniority list of Asst.Engineers in the PWD (B & R) Department dt.02.07.2010<sup>65</sup> was published in which Sh. Pradeep Atri was shown at Sr. No.39 and the direct recruits who were appointed who had been appointed on 5.12.2007 were shown as seniors to him.

On 02.02.2011, the Special Secretary-cum-Chief Vigilance Officer, PWD (B&R) Department opined that the very absorption of the private respondents was in violation of the Rules, that there is no such provision for 'absorption' and they should in fact be repatriated to the PR Department<sup>66</sup>.

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<sup>64</sup>Page 333 and 334 of CWP-18515-2012.

<sup>65</sup>P-15 in CWP-15083-2010

<sup>66</sup>Pages 407 to 412 in CWP-18515-2012

Even prior thereto, on 17.08.2010, the said official recommended the repatriation of Sh. Pradeep Atri.<sup>67</sup>

However, later the final seniority list<sup>68</sup> was issued on 26.08.2011 making Sh. Pradeep Atri as senior to the direct recruits appointed on 5.12.2007 on the ground that the Chief Minister had ordered on 24.08.2011 that seniority be fixed keeping in view the express provision in statutory Rules particularly Rule 12 of the Rules regarding seniority.<sup>69</sup>

*The question is whether this is validly done or not?*

To come to a conclusion on this point we shall go back to the stand taken by the State in CWP-15083-2010 filed by Sh. Praveen Chaudhary, Sh. Pankaj Gaur and Sh. Arun Bhatia.

The State filed written statement therein justifying the conditions in absorption orders and making them junior most to the direct recruits.

In Para No.3 at page 7 of the said written statement in CWP-15083-2010, it stated :

*“That therefore, as per the above mentioned rules, the petitioners were absorbed in Public Works (Building & Roads) Department on 18.07.2007 & 30.09.2010 as per the provisions of Sub Rule 5 of Rule 12 of Class-II Service Rules, the petitioners will be placed in the seniority list at the junior most level to all the offices appointed directly or by promotion Asst. Engineers in that particular year.”*

In Para No.7 at page 9 of the said written statement in CWP-15083-2010, it is further stated :

*“.....the petitioners have rightly been placed in the tentatively seniority list as per provisions contained in sub rule 5 of Rule 12 of Class-II Service Rules and this proviso is legal, just and constitutional. After joining the department the petitioners cannot pray now to quash this proviso only for their vested interest and just to suit their own interest and*

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<sup>67</sup>Pages 419 to 420 in CWP-18515-2012.

<sup>68</sup>P-12 in CWP-18515-2012.

<sup>69</sup>Page 407 in CWP-18515-2012.

to seek seniority which they have already foregone by joining conditionally. Such conditions were imposed to protect the right of those employees who originally belong to the department and come through a competitive examination conducted specially for this department.”

In Para No.11 at pages 10& 11 of the said written statement in CWP-15083-2010, it is further stated :

“.... The respondents No.3&4 were appointed to the service on 31.12.2005, thus they are senior to the petitioner No.1 and as such all the petitioners have rightly been placed at Sr. No.48, 122 & 123 in the tentative seniority list as per provision contained in Sub Rule 5 of Rule 12 of Class-II Service Rules.”

In Para No.13 at page 11 of the said written statement in CWP-15083-2010, it is further stated :

“.... It is submitted that petitioner No.1 was appointed to the service on 18.07.2007 ad petitioners No.2&3 were appointed to the service on 23/27.10.2009 and they have been rightly placed in the tentative seniority at Sr. No. 48, 122 and 123 as per the provisions contained in sub Rule 5 of Rule 12 of Class II Service Rules.”

In Para No.14 at pages 11 & 12 of the said written statement in CWP-15083-2010, it is further stated :

“.... However, it is submitted that in provision of sub rule 5 of Rule 12 Class II Service Rules it is amply clear that Govt. can determined the seniority of a member of Service, if in the opinion of the Govt. a member of service was holding equivalent or greater responsibility. It is, further, submitted that the petitioners were not holding equal or greater responsibility in Development and Panchayat Department than respondent department because respondent department is handling very major project like upgradation of State Highways, upkeepment of National Highways as well as major Public Buildings and Railway Over Bridges etc. It is further submitted that petitioners were selected keeping in view their suitability for Panchayati Raj Department and not B&R Department. So in view of above submissions, petitioners were absorbed conditionally as such condition No.4 in respect of petitioner No.1 and condition No.1 in respect of petitioner No.2&3 has rightly been inserted in their

appointment letters and are consistent with rules. Therefore, the same cannot be allowed to be deleted.”

In Para No.21 at page 13 of the said written statement in CWP-15083-2010, it is further stated :

“.... Further it is submitted that since in the present case, the petitioners themselves consented to the said condition, therefore, they are estopped from filling the instant petition by their own act and conduct.”

But obviously on account of strings pulled by the private respondents and their political influence, in the written statements filed by the State in the other Writ Petitions filed by the direct recruits from 2011, an opposite stand is taken and it justified giving the private respondents seniority over the direct recruits appointed on 5.12.2007.

The State is estopped from shifting its stand and supporting the private respondents.

In ***Joint Action Committee of Air Line Pilots’ Assn. of India v. DG of Civil Aviation***<sup>70</sup> the Supreme Court held that parties cannot be allowed to take inconsistent stands. It held:

**“11. In *R.N. Gosain v. Yashpal Dhir***<sup>71</sup>**this Court observed as under: (SCC pp. 687-88, para 10)**

**“10. Law does not permit a person to both approbate and reprobate. This principle is based on the doctrine of election which postulates that no party can accept and reject the same instrument and that ‘a person cannot say at one time that a transaction is valid and thereby obtain some advantage, to which he could only be entitled on the footing that it is valid, and then turn round and say it is void for the purpose of securing some other advantage’.”**

**12. The doctrine of election is based on the rule of estoppel—the principle that one cannot approbate and reprobate inheres in it. The doctrine of estoppel by election is one of the species of estoppels in pais (or equitable estoppel), which is a rule in equity. By that law, a person may be precluded by his actions or conduct or silence when it is his duty to speak, from asserting a right which he otherwise would have had. Taking inconsistent pleas by a party makes its conduct far from**

<sup>70</sup>(2011) 5 SCC 435, at page 442

<sup>71</sup>(1992) 4 SCC 683

*satisfactory. Further, the parties should not blow hot and cold by taking inconsistent stands and prolong proceedings unnecessarily.”*

**The decision of the Supreme Court in Govinda Chandra Tiria case**

Similar issue arose for consideration before the Supreme Court in ***Govinda Chandra Tiria Vs. Sibaji Charan Panda and Others***<sup>72</sup>.

The respondent No.1 in the said case was appointed on 24.05.1993 as a Lower Division Clerk, Group C in the Ministry of Environment and Forests, Government of India, New Delhi. On his request, he was sent on deputation on 12.04.1994 to the post of Lower Division Clerk at Bhubaneshwar, Orissa.

He sought absorption on transfer basis at Bhubaneshwar citing family reasons and though such requests were initially rejected, ultimately on 13.11.1996 this was accepted by the department subject *inter alia* to the following conditions:

- (i) He should sever fully his link or lien with the CSCS cadre.
- (ii) He will be treated as fresh appointee in the Eastern Regional Office, Ministry of Environment and Forests, Bhubaneshwar and he will be ranked juniormost in the cadre of LDC in ERO, MoEF, after his appointment in this office.

He gave his technical resignation thereafter and also accepted the permanent absorption subject to the above conditions and joined in the cadre of Lower Division Clerk, Eastern Regional Office of the Ministry in January, 1997.

On 08.03.2001, he was shown as junior to the appellant in the provisional seniority list circulated by the said office of the Lower Division Clerks.

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<sup>72</sup>(2020) 3 SCC 803

Respondent No.1 objected to the same on 12.03.2001, but the same was rejected on 22.06.2001 and the final seniority list was published on 03.07.2001.

The Respondent No.1 challenged in Central Administrative Tribunal, Cuttack which dismissed it on 17.10.2003. He challenged the same before the High Court of Orissa which allowed the Writ Petition filed by him on 22.08.2008 and directed a fresh gradation list of LDC to be drawn and to consider his case for promotion to the post of UDC, if he is so entitled. This was challenged in the Supreme Court by the appellant.

The Supreme Court allowed the appeal and held that *the terms and conditions of his absorption on transfer would prevail because he had not challenged the absorption or the terms thereof when he was treated as a fresh appointee*. It held that it is only when the seniority list was circulated that the challenge was sought to be made to the seniority list in an oblique manner and the terms and conditions of the absorption were sought to be assailed and that the same was not permissible. *It held that once the respondent No.1 had accepted absorption on the terms that (a) it would be deemed a new recruitment and (b) that the previous service would not be counted for the seniority in the cadre, without demur, the seniority list prepared as a sequitur to the terms and conditions of the absorption could not be faulted with.*

In our opinion, the said decision applies on all fours to the instant cases.

Admittedly Sh. Pradeep Atri had never challenged the condition imposed in his absorption order dt.06.10.2006 till date.

Though orders of absorption were passed on 18.07.2007 in the case of Sh. Praveen Chaudhary and on 23.10.2009 in the case of Sh. Pankaj

Gaur and Sh. Arun Bhatia, they also did not protest at that time and acquiesced in the said orders.

Only 19.08.2010, much later, they filed CWP-15083-2010 challenging the conditions imposed in their orders of absorption after the tentative seniority list of Asst. Engineers was circulated on 02.07.2010.

Therefore, they are not entitled to any relief in the said Writ Petition as regards challenge to the conditions of their absorption are concerned on the ground of acquiescence.

Moreover, after filing of the CWP-15083-2010, Sh. Praveen Chaudhary has been given seniority w.e.f. 02.05.2006 vide order dt.01.10.2019 and Sh. Pankaj Gaur and Sh. Arun Bhatia were given seniority on 01.05.2017 w.e.f. 01.05.2008 ignoring the conditions in their absorption orders.

So these three individuals no longer have a cause of action to challenge the conditions in their absorption orders in CWP-15083-2010 because the said conditions were in fact not applied to them by the State. So no relief can be granted to them in that regard in the said Writ Petition.

As regards the challenge in CWP-15083-2010 to the 5<sup>th</sup> proviso to Rule 12 is concerned, no relief can be granted in that regard also to these three persons because there is no such proviso to Rule 12.

There are only two provisos to Clause (5) of Rule 12 which deal with seniority of persons *appointed by transfer* like them as can be seen from the following:

“Rule 12 (5):

*In the case of an officer appointed by transfer as an Asst. Engineer, while normally he would be placed junior to all the officers appointed directly or by promotion as Asst. Engineers in a particular year, the Government may, in interest of the public service and taking in to consideration all circumstances of the case, fix his seniority on an adhoc basis:*

*Provided that the seniority thus fixed shall, in on case, be more favourable than the seniority determined after allowing him credit for the period of service rendered by him in previous appointment as Asst. Engineer or on a post the date of which in the opinion of Government, are of equivalent or greater responsibility. The decision of Government on this point shall be final:*

*Provided further that the provisions of proviso to sub-rule (1) shall apply to such an officer if his period of probation is extended.”*

These three persons are not concerned with the other clauses in Rule 12 since they do not deal with fixation of seniority of persons appointed by transfer like them.

Therefore, CWP-15083-2010 is liable to be dismissed on all of the above grounds.

**Consideration of Rule 12 (5)**

The first part of Rule 12(5), referred to above declares that in the case of an officer *appointed by transfer* as an Asst. Engineer, normally he would be placed junior to all the officers appointed directly or by promotion as Asst. Engineers in a particular year.

Therefore, in the tentative seniority list of Asst. Engineers circulated on 02.07.2010, Sh. Pradeep Atri and Sh. Praveen Chaudhary were rightly shown as junior to the direct recruits who had been appointed on 5.12.2007 by obviously treating them as persons directly recruited against vacancies which arose prior to 1.7.2006.

It is no doubt true that the direct recruits who had been selected by the Haryana State Staff Selection Commission pursuant to the advertisement dt. 07.05.2006 were able to join in service as Asst. Engineer in the PWD (B&R) Department only on 05.12.2007 after CWP-16016-2000 was dismissed on 03.12.2007 dissolving the undertaking of the State Government given on

29.11.2006 that they will not issue appointment letters to such direct recruits which was continued till 03.12.2007.

The question is:

*“whether they should be treated as persons directly recruited in 2006 itself though they joined on 05.12.2007 or they should be treated as persons who were directly recruited in 2007?”*

If it is the former, then they can be treated as persons senior to persons appointed by transfer like Sh. Pradeep Atri whose absorption was on 06.10.2006 because the first part of Rule 12(5) declares that in the case of an officer appointed by transfer as an Asst. Engineer, normally he would be placed junior to all the officers *appointed directly or by promotion* as Asst. Engineers *in a particular year*.

If it is the latter, then they have to be junior to Sh. Pradeep Atri.

Counsel for the State as well as counsel for the private respondents sought to contend that direct recruits cannot claim a deemed date of appointment/seniority from a date prior to their actual date of appointment. They contend that they cannot claim seniority from the date of recommendation of Haryana Staff Selection Commission on 14.11.2006 because selection gives no vested right of appointment; that there can be no claim for seniority from the date the vacancies arose; that seniority in a service can only be from the date of appointment which in the instant case is only 05.12.2007 and only from that date, they can claim seniority. It is further contended that the direct recruits cannot claim seniority from the date when they were not borne in the cadre.

Counsel for respondents relied on ***Pawan Pratap Singh v. Reevan***

***Singh***<sup>73</sup>, where the Supreme Court held as under:

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<sup>73</sup>(2011) 3 SCC 267

*“45....the legal position with regard to determination of seniority in service can be summarised as follows:*

*(i) The effective date of selection has to be understood in the context of the service rules under which the appointment is made. It may mean the date on which the process of selection starts with the issuance of advertisement or the factum of preparation of the select list, as the case may be.*

*(ii) Inter se seniority in a particular service has to be determined as per the service rules. The date of entry in a particular service or the date of substantive appointment is the safest criterion for fixing seniority inter se between one officer or the other or between one group of officers and the other recruited from different sources. Any departure therefrom in the statutory rules, executive instructions or otherwise must be consistent with the requirements of Articles 14 and 16 of the Constitution.*

*(iii) Ordinarily, notional seniority may not be granted from the backdate and if it is done, it must be based on objective considerations and on a valid classification and must be traceable to the statutory rules.*

*(iv) The seniority cannot be reckoned from the date of occurrence of the vacancy and cannot be given retrospectively unless it is so expressly provided by the relevant service rules. It is so because seniority cannot be given on retrospective basis when an employee has not even been borne in the cadre and by doing so it may adversely affect the employees who have been appointed validly in the meantime.*

Similar view was taken in ***K. Megahachandra Singh and others Vs. Ningam Siro and others***<sup>74</sup> and it was reiterated therein that direct recruit cannot claim seniority from a date they were not borne in service; that a person cannot be said to have been recruited to the service only on the basis of initiation of process of recruitment and that he is borne in the post only when formal appointment order is issued. It held that seniority is to be reckoned not from the date when the vacancy arose but from the date on which the appointment is made to the post; and retrospective seniority should not be granted from a day when the employee is not even borne in the cadre so as to adversely impact those who were validly appointed in the meantime.

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<sup>74</sup>(2020) 5 SCC 689

**The decisions cited by the respondents are distinguishable**

We have no quarrel with the said propositions laid down in the above decisions, but they were not cases where after the process of recruitment commenced, there was an impediment because of an act of the State or because of a stay order of a Court to complete the normal process of recruitment and make appointments.

We have already noted that the Haryana Staff Selection Commission had recommended the selection of direct recruit Asst.Engineers in the PWD ( B&R) Department on 14.11.2006 itself, but on 29.11.2006, the State Government gave an undertaking in this Court in CWP-16016-2000 that it will not issue appointment letters to the direct recruits so recommended by the Commission and this order subsisted till the said Writ Petition was dismissed on 03.12.2007. Only thereafter appointment letters could be issued to these direct recruits.

**The case of *Balwant Singh Narwal***

This point was considered in the case of *Balwant Singh Narwal Vs. State of Haryana*<sup>75</sup>.

In that case, the appellants, who were appointed as Principals between 1995 & 2000 (either by direct recruitment or promotion), were aggrieved by the seniority given to respondents No.4 to 16 appointed as Principals on 26.05.2000 with retrospective effect from 02.06.1994.

The Haryana Public Service Commission had issued an advertisement in January 1992, inviting applications for 18 posts of temporary Principals in Higher Secondary Schools. On 01.06.1993, fresh requisition was made by the State Government to the said Commission increasing the vacancies to 37. Respondents No.4 to 16 were applicants against the said

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<sup>75</sup>2008(7) SCC 728

advertisement and underwent the process of selection. The Commission declared the merit list of 30 selected candidates on 30.09.1993 which included respondents No.4 to 16.

However, before the State Government could make appointment in terms of the said list, a non-selected candidate filed WP-12700-1993 contending that only 18 posts were notified and the Commission could not make recommendations for selection of 30 candidates.

The said Writ Petition was allowed on 04.04.1994 and the recommendations in excess of the 18 vacancies were quashed on the ground that the Commission could not make recommendations beyond the number of posts advertised.

The appeal against the said judgment of the Single Judge was dismissed by the Division Bench on 18.01.1999.

In the meanwhile, in view of the order of the learned Single Judge, the State Government appointed only 16 candidates from the list of 30 by order dt.02.06.1994 as against 18 permitted by the High Court, not for want of vacancies, but on account of some technical difficulty in appointing the other two candidates.

Respondents No.4 to 16, who were denied appointments approached the Supreme Court which reversed on 06.12.1999 the decision of the High Court and held that all the 30 names recommended by the Commission are entitled to be appointed.

Thereafter respondents No.4 to 16 were appointed as Principals on 26.05.2000.

The State Government then fixed their seniority immediately after the 16 candidates who were appointed from the same merit list on 02.06.1994.

So they were shown above the appellants in the provisional seniority list of Principals.

The appellants approached the High Court contending that selection by the Commission is only recommendatory and does not imply automatic employment, and so candidates selected by the Commission are not entitled to claim seniority on the basis of selection or from the date of selection. They contended that the seniority of respondents No.4 to 16 should be reckoned only from the date of their actual appointment i.e. 26.05.2000 and that respondents No.4 to 16 cannot be granted notional seniority with retrospective effect.

The High Court dismissed the Writ Petition. They approached the Supreme Court.

The Supreme Court dismissed the appeal and held that the question is in regard to seniority of respondents No.4 to 16 selected on 01.10.1993 against certain vacancies of 1992-93 who were not appointed due to litigation, and those who were selected against subsequent vacancies; all others from the same merit list declared on 01.10.1993 were appointed on 02.06.1994; that the Supreme Court in *Surender Narayan Vs. State of Bihar*<sup>76</sup> had held that candidates who were selected against earlier vacancies but who could not be appointed along with others of the same batch due to certain technical difficulties, when appointed subsequently, will have to be placed above those who were appointed against subsequent vacancies.

It therefore held as under:

*“10. This Court while allowing the appeals by Respondents 4 to 16 by order dated 6-12-1999 made it clear that all the 30 persons recommended by the Commission as per merit list dated 1-10-1993, including Respondents 4 to 16 are entitled to be appointed. The State Government*

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<sup>76</sup>1998(5) SCC 246

submitted that but for the order dated 4-4-1994 of the High Court, Respondents 4 to 16 would have been appointed on 2-6-1994 itself. The order dated 4-4-1994 was ultimately set aside by this Court and Respondents 4 to 16 who were consequently appointed should not be denied the benefit of seniority. Therefore, the State Government was justified in giving them only notional seniority and placing them immediately below the other 16 candidates selected in the common merit list (published on 1-10-1993) and appointed on 2-6-1994. Respondents 4 to 16 have been given retrospective seniority not from the date of their selection as wrongly assumed by the appellants, but from 2-6-1994 when other selected candidates in their merit list were appointed.”

This decision was reiterated in **C. Jayachandran Vs. State of Kerala and others**<sup>77</sup>.

In **C. Jayachandran** (77 Supra) an advertisement was published on 16.04.2007 to fill up 6 posts in the Kerala Higher Judicial Service in terms of the Kerala State Higher Judicial Services Special Rules, 1961.

The selection process in pursuance of such advertisement was challenged by the appellant in respect of minimum age which was fixed as 35 years.

The Kerala High Court struck down the eligibility in respect of minimum age on 12.11.2009.

The Special Leave Petition filed in the Supreme Court against the said order was also dismissed on 15.12.2009.

After the said order 4 candidates were selected against the General merit vacancies whereas 3 others were selected against the posts meant for Reserved category.

The appellant disputed such selection process and approached the High Court challenging the grant of moderation/grace marks to the candidates who were appointed on 30.03.2009 and sought his appointment as District

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<sup>77</sup>2020 (5) SCC 230

Judge. The High Court allowed his Writ Petition and directed the recast of the select list. This order was confirmed on 08.10.2010 by the Supreme Court.

Thereafter the appellant was appointed in the cadre of District Judge vide order dt.22.12.2010 issued by the Govt. of Kerala.

On 11.04.2012, the appellant gave a representation claiming notional seniority with effect from the date of appointment of other candidates through the same selection with effect from 30.03.2009 as directed by the High Court. The Administrative Committee of the High Court accepted this plea.

When this decision was challenged by others, a Single Judge of the High Court dismissed it, but when intra Court appeal was preferred against it, the Division Bench allowed the appeal on 03.09.2019 holding that the claim of the appellant was belated and has to be rejected though his recruitment was not delayed because of his default.

The Supreme Court reversed the said view and held that the appellant was entitled to be appointed along with the other three candidates; that because of the action of the High Court in adopting moderation of marks, the appellant was excluded from appointment which was illegal; once his Writ Petition was allowed by the High Court on 30.09.2010, the selection list had to be revised, and the appellant would be deemed to be a par with the other candidates in the same select list.

It held that as the actual date of appointment was on 24.02.2011, the appellant cannot actually be treated to be appointed on 30.03.2009, but is entitled to notional appointment from that date and consequential seniority. It held that seniority list was not circulated after 2009 after he was appointed, that he represented claiming seniority and the delay in deciding the same cannot

defeat his rights to claim seniority from the date the other candidates were selected in pursuance of the same selection process.

In *Union of India Vs. Smt. Sadhana Khanna*<sup>78</sup> the respondent joined the Central Secretariat Service on 13.07.1983 after passing Assistant Grade Examination in October, 1981. After completion of 8 years of regular service in the grade of Assistant, she was granted a short term promotion to the grade of Section Officer on 24.07.1991. Her name was not included in the select list for promotion to the Section Officers grade for the year 1991 issued on 28.05.1993 and officers who were junior to her and who secured lower rank in the Assistant Grade Examination 1981 were included in the said list. She approached the Central Administrative Tribunal.

The appellant took the plea that she was short of the minimum eligibility service requirement of 8 years by 12 days as she had joined on 13.07.1983, and she should have had the 8 years eligibility by 01.07.1991.

The Tribunal allowed the OA and the said decision was confirmed by the Supreme Court. It held that the respondent had been offered appointment vide letter dt.05.07.1983, which is after 01.07.1983, from which the eligibility was to be counted; the department was to blame for sending the letter offering appointment after 01.07.1983; in fact some of the candidates who were junior to the respondent were issued letters offering appointment prior to 01.07.1983; that an office memorandum dt.19.07.1989 had been issued stating that where the junior had completed the eligibility requirement of promotion, then their seniors will also be considered even if they have not completed the eligibility period; and if not, a very incongruous situation would arise namely that the junior will be considered for promotion, but the senior will not be.

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<sup>78</sup>2008 (1) SCC 720

Similar view was also taken in *Sasidhar Reddy Sura Vs. State of Andhra Pradesh and others*<sup>79</sup> and *Lakshmana Rao Yadavalli and another Vs. State of Andhra Pradesh and others*<sup>80</sup>. In that case the appellants' claim for appointment as direct recruit Additional District Judges had been rejected erroneously by the High Court of the Andhra Pradesh. The Supreme Court reversed the decision of the High Court and granted and notional seniority to them with retrospective effect i.e. from the date on which they ought to have been appointed and their seniority was also given as per their position in the merit list.

The ratio in all these cases starting from *Surender Narayan* (76 Supra) is that if an employee would have been appointed to a post but for an error of an employer, and such error of the employer is later rectified by a Court, the employee should get notional seniority from the date he would have been appointed by the employer but for the employer's error.

There is another way also to look at it.

If there is any order of stay by a Court restraining the appointment of a party in a post, and such stay is vacated subsequently, the party is entitled to seniority at least from the date of such stay order by the Court. This also flows from the principle that 'mistake of the Court should not be to the prejudice of the party' and 'delay in disposal of a case by the Court should not be to the advantage of the respondent in that case'.

Applying these principles, since the direct recruits recommended by the Haryana Staff Selection Commission on 14.11.2006 would have got appointed in the normal course shortly thereafter but for the undertaking given by the State Government in the High Court in CWP-16016-2000 on 29.11.2006

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<sup>79</sup>2014 (2) SCC 158

<sup>80</sup>(2014) 13 SCC 393

(that they will not give appointment letters to the selected candidates), they should be given notional seniority from that date, though they were given appointment letters on 05.12.2007 after the said Writ Petition was dismissed on 03.12.2007 dissolving the undertaking given by the State.

Consequently, the direct recruits recommended by the Haryana Staff Selection Commission on 14.11.2006 are entitled to notional seniority from 29.11.2006 though they were given appointment letters on 05.12.2007.

So they ought to be treated as having been appointed in 2006 as direct recruits, and by virtue of Clause (5) of Rule 12, they should rank above persons appointed by transfer under Rule 10 like Sh. Pradeep Atri and Sh. Praveen Chaudhary.

This result would also follow from the conditions of absorption incorporated in the absorption orders of Sh.Pradeep Atri and Sh.Pankaj Chaudhary passed on 06.10.2006 and 18.07.2007 respectively that they would be at the junior most level amongst the Sub Divisional Engineers who are posted in the department and would also be lower in seniority to people who might get posted against the vacancies arisen before 01.07.2006.

More importantly as regards Sh. Praveen Chaudhary, the record reveals that he sought seniority contrary to the conditions of his absorption laid down in the order dt.18.07.2007 on 21.12.2009, that the same was rejected vide P16/dt.22.03.2010 in CWP-12882-2020 by the State Government. He again made an identical request which was rejected by the Government on 27.12.2011.<sup>81</sup> He then made a third request which was rejected on 4.03.2014.<sup>82</sup>

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<sup>81</sup>Para 4 at Page 159 of P17/dt.04.03.2014 in CWP-12882-2020.

<sup>82</sup>P-17 in CWP-12882-2020

At last, his fourth representation dt.25.9.2019 was accepted on 01.10.2019<sup>83</sup> and he was given seniority w.e.f. 02.05.2006.

As per the first proviso to Clause (5) of Rule 12, a decision given on the aspect of seniority of officers appointed by transfer as Asst. Engineers by the Government would be *final*.

Therefore, once his first representation was rejected on 23.02.2010, the said rejection has to be treated as *final*, and it cannot be reopened under any circumstances.

This aspect was totally ignored by the State Government while accepting his fourth representation on 01.10.2019 and re-fixing his seniority over the direct recruits.

Thus in our view, Sh.Pradeep Atri and Sh. Praveen Chaudhary cannot be given a seniority over any direct recruit or promotee who had been appointed against vacancies which arose prior to 1.7.2006.

Now we shall consider the question:

*“whether the seniority was rightly fixed for Sh. Pankaj Gaur and Sh. Arun Bhatia ?”*

They were taken on deputation in the PWD (B&R) Department on 22.11.2007.<sup>84</sup> They were absorbed in the said department on 17.09.2009 vide order dt.23.10.2009<sup>85</sup>. In the said absorption order, one of the conditions was as under:

*““Their seniority shall be at junior most level not only amongst the Sub Divisional Engineers who are presently posted in the department, but also lower than the candidates who might get posted against the vacancies already arisen.”*

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<sup>83</sup>P-9 in CWP-12882-2020

<sup>84</sup>R5/5 in CWP-5465-2018.

<sup>85</sup>R5/8 in CWP-5465-2018.

They challenged these conditions by joining Sh.Praveen Chaudhary and filing CWP-15083-2010. We have already dealt with the said Writ Petition supra and dismissed it.

In Para No.3 at page 7 of the said written statement filed by the State in CWP-15083-2010, it is stated :

*“That therefore, as per the above mentioned rules, the petitioners were absorbed in Public Works (Building & Roads) Department on 18.07.2007 & 30.09.2010 as per the provisions of Sub Rule 5 of Rule 12 of Class-II Service Rules, the petitioners will be placed in the seniority list at the junior most level to all the offices appointed directly or by promotion Asst. Engineers in that particular year.”*

In Para No.4 at page 7 of the said written statement in CWP-15083-2010, it is further stated :

*“That the petitioners having applied for absorption under the provisions of 1965 Rules, are estopped by their act and conduct to challenge the said rules. It is not open to the petitioners to accept a part of the rule, which suits them and to challenge another part thereof. The “selective” challenge thus laid is liable to be negatived.”*

Thus the Department took a stand in the said CWP that *there was no need to absorb them and that seniority given to them was proper.*

In the final seniority list dt.02.09.2011 of Asst. Engineers in the PWD (B&R) Department, they were shown at Sr. No.111 & 112 respectively below the direct recruits appointed in August 2009.

They had represented for the grant of seniority with effect from the date they were transferred on deputation i.e. from 05.01.2008.<sup>86</sup>

On 30.01.2017, the Engineer-in-Chief, PWD (B&R) Department recommended grant of seniority to them from 05.01.2008 on the basis that in case of Praveen Chaudhary, this was already done<sup>87</sup>.

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<sup>86</sup>Sh. Pankaj Gaur's representation dt.23.12.2016 is R5/11 in CWP-5465-2018  
VIVEK PAHWA  
2023.03.20 17:38  
I attest to the accuracy and  
integrity of this document

An office note was put up by the Special Secretary, PWD (B&R) Department on 08.02.2017<sup>88</sup> stating that under Rule 12 they were rightly given seniority rightly as per the Service Rules; they should be junior most to all officers appointed directly or by promotion as Asst. Engineers in a particular year; if not, there would be litigation as it would cause heart burn to others; the PWD (B&R) Department is the mother of all Engineering Departments because working there involves greater technicalities having greater specification and diversification and it can never be equated with other departments like PR Department from which they had been brought on deputation; that they along with others did not get through the examination conducted by the Haryana Staff Selection Commission in 2006 for direct recruits and had managed to get appointment in PR Department and later got deputed in PWD (B&R) Department; and giving them seniority as sought would cause resentment and endless litigation. It was proposed by him that if they are to be given benefit of their past service, then Rule 12 has to be amended.

However, he changed his mind on 21.04.201<sup>89</sup> and recommended grant of seniority to them from 05.01.2008 on the basis of Rule 12(5) of the Rules, judgment of the Supreme Court in **K.S. Brar** (22 Supra) and on the basis that he had worked in the department when there was crises of manpower and acute shortage of engineers and it was in the interest of public service.

The Chief Minister then approved it on 28.04.2017 and order dt.01.05.2017 was issued by the State Government granting them seniority with effect from 01.05.2008<sup>90</sup> without giving notice to any affected party.

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<sup>87</sup>Page 137 in CWP-5465-2018.

<sup>88</sup>Page 125 to 129 in CWP-5465-2018.

<sup>89</sup>Page 131 to 135 in CWP-5465-2018.

<sup>90</sup>P-16 in CWP-5465-2018

Thereafter a communication dt.21.06.2017 was issued by the Special Secretary to PWD (B&R) Department to the Engineer-in-Chief of the said department<sup>91</sup> to send a revised seniority list relating to Sub Divisional Engineers by placing Sh. Pankaj Gaur and Sh. Arun Bhatia as per the above orders dt.01.05.2017 in the seniority list.

So the Engineer-in-Chief of the said department prepared a revised tentative seniority list dt.29.09.2017<sup>92</sup> placing them above the direct recruits.

Objections were filed by the direct recruits to this on 07.10.2017<sup>93</sup>.

On 23.01.2018, the Engineer-in-Chief, Haryana wrote to the Additional Chief Secretary of PWD (B&R) Department that the seniority of Sh. Pankaj Gaur and Sh. Arun Bhatia was previously fixed correctly in 2011 and the same should not be altered and recommended reconsideration of the same and termed the order dt.01.05.2017 passed by the Government as an unjustified one.

In CWP-5465-2018, the petitioners/direct recruits have challenged order dt.01.05.2017, order dt.21.06.2017 and revised tentative seniority list dt.29.09.2017 on several grounds.

We have already noted supra that by the date they were absorbed in the PWD (B&R) Department on 23.10.2009, admittedly 29 direct recruit Asst. Engineers were given appointment letters and had joined on 5.12.2007 in the PWD (B&R) Department; on 20.07.2007<sup>94</sup>, 15 diploma holder Junior Engineers, 7 AMIE Junior Engineers and 6 Circle Head Draftsmen were promoted as Sub Divisional Engineers (Civil)/Asst. Engineers; and on

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<sup>91</sup>P-20 in CWP-5465-2018

<sup>92</sup>P-23 in CWP-5465-2018

<sup>93</sup>P-25 in CWP-5465-2018

<sup>94</sup>P-13 in CWP-15083-2010

28.07.2008<sup>95</sup>, 7 diploma holder Junior Engineers, 1 AMIE Junior Engineers and 2 Circle Head Draftsmen, were promoted as Sub Divisional Engineers/Asst. Engineers. Also along with these Sh.Pankaj Gaur and Sh.Arun Bhatia, 8 others had also been taken on deputation and thus there were enough number of people in the PWD (B&R) Department to attend to the works of the said department. Also there were 23 direct recruits who joined as Asst. Engineers in PWD (B&R) Department on 19.08.2009/20.08.2009<sup>96</sup> (Sr. No. 82 to 104 in the final seniority list of the Asst. Engineers notified on 02.09.2011.<sup>97</sup>

Rule 12(5) says that appointees by transfer under Rule 10 would be placed junior to all the officers appointed directly or by promotion as Asst. Engineers in a particular year normally.

If in the period 2007 to 20.08.2009, there were direct recruitments as well as promotions to the cadre of Asst. Engineer as mentioned above, Sh.Pankaj Gaur and Sh. Arun Bhatia have to be junior to such persons and cannot be given seniority above them vide order dt. 01.05.2017 w.e.f. 05.01.2008.

As per the condition mentioned in the absorption order dt. 23.10.2009 of Sh.Pankaj Gaur and Sh.Arun Bhatia, they have to be junior to candidates who might get posted against the vacancies *already arisen* i.e., which had arisen by 23.10.2009. They never protested about this condition at the time of their absorption. They thus acquiesced in the said condition and are estopped from seeking seniority from any date prior to 23.10.2009. The principle of acquiescence laid down in the decision of **Govinda Chandra Tiria (72 Supra)** and having accepted their absorption vide order dt. 23.10.2009 with the condition that they would be junior most amongst Asst. Engineers posted in the

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<sup>95</sup>P-14 in CWP-15083-2010

<sup>96</sup>P-1 in CWP-15685-2017

<sup>97</sup>P-2 in CWP-15685-2017.

Department by then and also that they would be junior to candidates who might get posted against the vacancies which have already arisen *without protest*, they cannot seek seniority over these persons appointed directly or by promotion by then.

Their counsel as well as counsel for Sh. Pradeep Atri and Sh. Praveen Chaudhary placed reliance on the later part of Rule 12(5) which permits the Government in *interest of public service* to fix seniority of persons appointed by transfer by giving them credit for the period of service rendered in their previous appointment as Asst. Engineer.

We have already held that their absorption/appointment by transfer in the PWD (B&R) Department is not *bona fide*, contrary to the Rules and contrary to the conditions of their absorption and is invalid.

We find that no public interest is served by giving them seniority contrary to the main part of Rule 12(5) which says *normally* they should be junior to all officers appointed directly or by promotion as Asst. Engineers in a particular year.

Therefore we hold that State was not justified in giving seniority to Sh. Pradeep Atri and Sh. Praveen Chaudhary over the direct recruits selected and appointed on 5.12.2007 against the vacancies which arose prior to 1.7.2006; and the State was also not justified in giving seniority to Sh. Pankaj Gaur and Sh. Arun Bhatia over the direct recruits or promotees who were appointed against the vacancies which arose before 23.10.2009, the date of their absorption in the PWD ( B &R) Department.

**Relief to be granted**

Though we are of the opinion that the very deputation and absorption of the private respondents in PWD (B&R) Department as Asst. Engineers is bad in law, it is brought to our notice that they do not have lien in their parent department i.e. the PR Department.

Therefore, in the normal course we would have had to direct their termination from service.

But since they had been in service since 2005, they would suffer hardship if their services are terminated now, 18 years later.

Therefore taking a sympathetic view, we are not inclined to disturb their deputation and absorption as Asst. Engineers in PWD (B&R) Department at this stage, but they will not be allowed to have seniority contrary to the main part of Rule 12(5) or the conditions of their absorption i.e. they cannot be seniors to direct recruits appointed on 07.12.2007 or in 2009 /persons promoted against vacancies which arose before 1.7.2006 or in 2009 in the cadre of Asst. Engineers in PWD (B&R) Department.

For the aforesaid reasons:

- 1) CWP-15083-2010 is dismissed;
- 2) CWP-7706-2011 is dismissed;
- 3) CWP-18075-2011, CWP-15685-2017, CWP-11848-2020, CWP-12882-2020, and CWP-858-2021 are allowed ;
- 4) the State of Haryana through its Principal Secretary, PWD (B&R) Department and the Engineer-in-Chief, PWD (B&R) Department are directed to count Sh.Praveen Chaudhary's seniority in the PWD (B&R) Department in the cadre of Asst.Engineer ( Civil) only from 18.7.2007, the date of his absorption in the said department;

- 5) the State of Haryana through its Principal Secretary, PWD (B&R) Department and the Engineer-in-Chief, PWD (B&R) Department are directed to count the seniority of Sh.Pankaj Gaur and Sh.Arun Bhatia in the PWD (B&R) Department in the cadre of Asst.Engineer ( Civil) only from 23.10.2009, the date of their absorption in the said department;
- 6) the State of Haryana through its Principal Secretary, PWD (B&R) Department and the Engineer-in-Chief, PWD (B&R) Department are directed give notional seniority w.e.f. 29.11.2006 to the directly recruited Asst. Engineers ( Civil) in the PWD (B&R) Department who were given appointment letters on 05.12.2007, to treat them as having been recruited in 2006, and to make them seniors to Sh. Pradeep Atri and Sh. Praveen Chaudhary in the Asst.Engineer (Civil) cadre in the PWD(B&R) department within 4 weeks from today;
- 7) the State of Haryana through its Principal Secretary, PWD (B&R) Department and the Engineer-in-Chief, PWD (B&R) Department are directed not to give Sh.Pradeep Atri and Sh. Praveen Chaudhary seniority over any direct recruit or promotee who had been appointed against vacancies which arose *prior* to 1.7.2006;
- 8) the State of Haryana through its Principal Secretary, PWD (B&R) Department and the Engineer-in-Chief, PWD (B&R) Department are directed to treat direct recruit or promotee Asst. Engineers who were appointed against vacancies which arose *before* 23.10.2009 in that department as seniors to Sh. Pankaj Gaur and Sh. Arun Bhatia;

- 9) the State of Haryana through its Principal Secretary, PWD (B&R) Department and the Engineer-in-Chief, PWD (B&R) Department are directed not to adjust Sh. Pradeep Atri, Sh. Praveen Chaudhary, Sh. Pankaj Gaur and Sh. Arun Bhatia, against any direct recruit vacancy of the Asst. Engineers in PWD (B&R) Deptt;
- 10) the final seniority list of Asst. Engineers in PWD (B&R) Department dt.02.09.2011 in so far as it shows Sh. Pradeep Atri as senior to direct recruit Asst. Engineers appointed on 05.12.2007 is set aside;
- 11) order dt.01.10.2019 giving Sh. Praveen Chaudhary seniority as Asst. Engineer in PWD (B&R) Department from 02.05.2006, the order dt.17.07.2020 reiterating it are set aside;
- 12) the tentative seniority list dt.28.07.2020 of Executive Engineers in so far as Sh. Praveen Chaudhary is shown as senior to direct recruit Asst. Engineers in the said department appointed against vacancies which arose *before* 1.7.2006 is set aside ;
- 13) order dt.01.05.2017 passed by the respondents granting seniority to Sh. Pankaj Gaur and Sh. Arun Bhatia from 05.01.2008 as Asst. Engineers in PWD (B&R) Department is set aside;
- 14) revised tentative seniority list dt.29.09.2017 and also the final seniority list dt.4.4.2018 of Asst. Engineers in PWD (B&R) Department insofar as they are inconsistent with the above directions are set aside;
- 15) CWP-18515-2012 is partly allowed and the action of the State of Haryana through its Principal Secretary, PWD (B&R) Department and the Engineer-in-Chief, PWD (B&R) Department insofar they

gave Sh. Pradeep Atri seniority over the direct recruits appointed on 05.12.2007 is set aside. The claim in the said writ petition as regards regarding absorption of the private respondents is however rejected;.

- 16) CWP-5465-2018 is partly allowed and the action of the State of Haryana through its Principal Secretary, PWD (B&R) Department and the Engineer-in-Chief, PWD (B&R) Department insofar as they granted seniority to Sh. Pankaj Gaur and Sh. Arun Bhatia in the PWD (B&R) Department w.e.f. 05.01.2008 and the revised seniority list dt.29.09.2017 of Asst. Engineers in PWD (B&R) Department to the said extent, are set aside. The claim in the said writ petition as regards absorption of the private respondents is however rejected;

- 17) the State of Haryana through its Principal Secretary, PWD (B&R) Department and the Engineer-in-Chief, PWD (B&R) Department are directed to review on the above basis the seniority assigned to the private respondents in all cadres higher than Asst. Engineers (Civil) cadre in the PWD (B&R) Deptt. within 4 weeks and if necessary even revert them to a lower post on such review;

- 18) No costs.

All pending application(s), if any, shall also stand disposed of.

The original record submitted by the counsel for the State of Haryana in the Court be returned to the State counsel.

A copy of this order be placed on the file of another connected cases.

(M.S. RAMACHANDRA RAO)  
JUDGE

March 15, 2023  
*Vivek/Ess Kay*

(SUKHVINDER KAUR)  
JUDGE

|                               |   |     |
|-------------------------------|---|-----|
| 1. Whether speaking/reasoned? | : | Yes |
| 2. Whether reportable?        | : | Yes |