

(2004) 03 BOM CK 0107

In the Bombay High Court

Case No : Writ Petition No. 5344 of 2003

Babarrao Chavan and Others

APPELLANT

Vs

State of Maharashtra and Others

RESPONDENT

Date of Decision : 05-03-2004

Acts Referred:

Constitution of India, 1950 — Article 166(3), 226
Maharashtra Civil Services (Regulation of Seniority) Rules, 1982 — Rule 4(1)
Maharashtra Government Rules of Business, 1975 — Rule 15

Citation : (2004) 6 BomCR 936 : (2004) 4 MhLj 664

Hon'ble Judges : V.G. Munshi, J; A.P. Deshpande, J

Bench : Division Bench

Advocate : Pradeep Deshmukh and K.R. Deshpande, for Respondent Nos. 4 and 5, V.D. Sapkal, holding for S.R. Barlinge, for the appearing parties; A.V. Gondhalekar, Assistant Government Pleader for respondent Nos. 1 and 2 and D.R. Irale Patil, for the Respondent

Final Decision : Allowed

Judgement

A.P. Deshpande, J.—The petitioners are presently working as Assistant Engineers (Grade-II) in the employment of Zilla Parishad, Aurangabad. The petitioners from serial Nos. 1 to 4 came to be initially appointed by the orders of appointments dated 17-11-1980, 8-10-1984, 23-1-1986 and 27-14986, respectively, in the post of Junior Engineers. The petitioners were appointed on clear, vacant and sanctioned posts in the prescribed pay scale. The petitioners continued in the employment of the Zilla Parishad, Aurangabad, and were in due course of time, granted confirmation. After completion of 5 years service, in the post of Junior Engineer, all the petitioners were upgraded to the post of Sectional Engineer. While being in the employment, the petitioners improved their qualifications by acquiring a Degree of Bachelor of Engineering (Civil). In the year 2000, the petitioners were eligible and qualified to be absorbed in the post of Assistant Engineer (Grade-II), and were accordingly granted the said higher grade post.

It is relevant to note that higher grade post for candidates possessing the Degree

of Bachelor of Engineering is Assistant Engineer (Grade-II); whereas for under Graduates i.e. Diploma holders, the higher grade post is Sectional Engineer. The petitioners names also figure in the seniority list prepared as on 1st January, 2001 (Part I) which is final seniority list of Assistant Engineers (Grade-II) maintained at the State level and the petitioners names appear at serial Nos. 110, 130, 140 and 141, respectively.

2. As against the said service record of the petitioners, the respondent Nos. 4 and 5 were appointed as Junior Engineers on ad hoc basis temporarily under "Jawahar Rojgar Yojana", that too, having regard to the short broken period of service rendered by them under the Zilla Parishad prior in point of time. "Jawahar Rojgar Yojana" was a scheme floated by the Central Government and the Government of Maharashtra was to implement the said scheme through the Zilla Parishads and Village Panchayats. Respondent Nos. 4 and 5 had worked in Zilla Parishad for few months temporarily in the year 1987 and thereafter were discontinued.

3. On 11-12-1989, the Government by issuing a Resolution took a decision, where under the Zilla Parishads were directed to grant employment to the respondents No. 4 and 5 and other similarly situated employees under "Jawahar Rojgar Yojana", who had at some point of time, worked temporarily with the Zilla Parishads. The respondent Nos. 4 and 5 along with other similarly situated employees, came to be appointed on 23rd February, 1990 by the respondent/ Zilla Parishad and the appointment order clearly mentions the temporary nature of the appointments being for a period of 6 months, under the "Jawahar Rojgar Yojana". The appointment was to come to an end by 10th June, 1990. The posts of "Junior Engineers" under the Government Resolution dated 11th December, 1989 were created for temporary period of 6 months. As the petitioners were apprehending termination of their services by 10th June, 1990 i.e. on expiry of the period of appointment, the respondent Nos. 4 and 5, and others. filed writ petitions in the High Court bearing Nos. 1481/1990 and 1474/1990 and this Court by its order dated 8th June, 1990, passed an interim order and restrained the Zilla Parishad from terminating services of the petitioners (in the said petitions), so also, issued Rule. Under the interim order, the petitioners (in the said petitions) continued in service till the time the State Government took a decision to regularize their services.

The State Government, after calling for information in regard to all the candidates, who were irregularly appointed in breach of the rules of recruitment in various departments of the State Government, so also, under the Zilla Parishads, identified that there were in all 3,761 temporary employees working in different departments of the State Government and out of them 1,672 were under the Zilla Parishads. The State Government, on the basis of the data collected by it, in regard to irregular appointments made without following the recruitment rules, took a policy decision on 8th March, 1999 and decided to regularize their services. The said decision further reveals that the irregular

appointments made in defiance of the prescribed mode of recruitment, were to be regularized by giving one time concession. The said decision was followed by another Government Resolution dated 29th April, 1999, which deals exclusively with the temporary appointees under the Zilla Parishads. Under the Government Resolution dated 8th March, 1999, it was decided to grant the seniority to the regularized employees from the date of issuance of the Government Resolution viz. 8th March, 1999. The Government Resolution dated 29th April, 1999 provided that the seniority would be granted from 29th April, 1999 and, as such, this discrepancy came to be rectified by issuing a corrigendum, making it clear that all the candidates whose services were regularized would be entitled to have their seniority counted from 8th March, 1999.

When the Writ Petition Nos. 1481/1990 and 1474/1990 came up for hearing, the attention of the Court was drawn to the Government Resolution which regularized the services of the petitioners therein and, as such, the Court disposed of the petitions, leaving the question of seniority and consequential benefits to be adjudicated upon by State Government, as the same was pending consideration with the Government. While disposing of the writ petitions, the Division Bench of this Court has drawn attention of the State Government to the judgment of the Apex Court in the case of " Delhi Development Horticulture Employees" Union Vs. Delhi Administration, Delhi and others, and more particularly, the observations made in paras 13 to 15. The said judgment was referred to indicate the temporary nature of the appointments under the "Jawahar Rojgar Yojana". Under the said Yojana, it was never intended to provide permanent/regular employment to a handful of persons and as such, the said appointments were temporary and ad hoc in nature, which did not confer any right of regularization on the appointees.

4. As indicated hereinabove, as the decision to grant regularization to 3,761 temporary employees working in different Departments of the Government, so also, the Zilla Parishads involved more than one Department of the State Government, the Government Resolution dated 8th March, 1999 which reveals the policy of the Government, was taken by the General Administration Department in consultation with the Rural Development Department. The temporary employees working in various Government Departments fell under the jurisdiction of the General Administration Department; whereas the employee working in Zilla Parishads fell within the domain of Rural Development Department. A uniform decision was reached on 8th March, 1999 in regard to all the temporary employees being 3,761 in numbers who were not appointed by following the prescribed procedure of recruitment.

The Government Resolution dated 8th March, 1999 was followed by another Resolution dated 29th April, 1999. This was issued by the Rural Development Department but in consultation with the General Administration Department. The Resolution in its body makes a reference about the consultation. The Resolution dated 29th April, 1999 toed in line with the policy decision taken in the

Government Resolution dated 8th March, 1999, but for a discrepancy in regard to the date from which seniority was to be granted to the Zilla Parishad employees. The Resolution dated 8th March, 1999 granted deemed date of seniority to all the temporary employees being 3,761 in numbers from the date of issuance of the Government Resolution viz. 8th March, 1999; whereas mistakenly the Government Resolution dated 29th April, 1999 granted the same from the date of the said Resolution i.e. 29th April, 1999. The said discrepancy was removed by issuing a corrigendum which clarified that the seniority would be reckoned from 8th March, 1999.

After this Court disposed of the earlier petitions, leaving it open for the State Government to decide the question of seniority, it appears that the respondent Nos. 4 and 5, and similarly situate other Junior Engineers and Assistants to Junior Engineers appointed mainly under Jawahar Rojgar Yojana persuaded the State Government to grant them seniority from the date of their initial appointment i.e. from the year 1990. The demand was acceded to and said decision is reflected in the third Government Resolution dated 20th November, 2003. A peculiar anomalous situation has emerged as a result of the third Government Resolution, inasmuch as, the first two Government Resolutions are holding the field granting seniority to all the temporary employees who were not appointed in accordance with the rules of recruitment with effect from 8th March, 1999; whereas the third Resolution which deals with only a handful of employees, bestows a much favourable date of deemed seniority i.e. from the year 1990 viz. the date of initial appointment.

5. We proceed to explain the anomaly. The first Government Resolution dated 8th March, 1999 takes a policy decision in the matter of grant of seniority to all the temporary employees who were not appointed in accordance with the rules of recruitment, being 3,761 in numbers, working in various Government Departments and the Zilla Parishads. Out of 3,761 temporary employees, 1,372 are working with the Zilla Parishads. The second Government Resolution which deals with only the Zilla Parishad employees being 1,372 in numbers, again grants them the deemed date of seniority from 8th March, 1999. So, all the temporary employees working in Zilla Parishads, as well, under the said Resolutions are to be granted the deemed date of seniority from 8th March, 1999; whereas the third Government Resolution carves out a small portion of employees from and out of 1,372 temporary employees working in Zilla Parishads and grants them the special treatment. Out of 1,372 temporary employees working in Zilla Parishads, only such of them who are working as Junior Engineers and Assistants to Junior Engineers have been dealt under the third Government Resolution dated 20th November, 2003 and they alone are granted a deemed date of seniority from the date of their initial irregular appointment.

It is, as such, evident that all the employees working in different Departments of the Government who formed one class along with the Junior Engineers and

Assistants to Junior Engineers would be granted seniority from 8th March, 1999. So also, all other temporary employees working in Zilla Parishads barring the Junior Engineers and Assistants to Junior Engineers would also be granted the deemed date of seniority from 8th March, 1999. Only the Junior Engineers and the Assistants to Junior Engineers would be granted seniority from the date of their initial appointment. This anomalous situation which cannot be reconciled has been brought about by the third Government Resolution dated 20th November, 2003, which is impugned in the present petition.

6. It is reiterated and it is not in dispute that the third Government Resolution dated 20th November, 2003 came to be issued by the Rural Development Department without the issue being considered and/or without consultation of the General Administration Department. It is also relevant to note that all the three Resolutions are holding the field and the Resolution dated 20th November, 2003 did not and could not supersede the earlier Government Resolutions as the third Government Resolution dated 20th November, 2003 deals with only a small group of temporary appointees. In the above factual background, the learned Counsel for the petitioners raised two fold challenges to the impugned Government Resolution and the same are : (i) that, the Government Resolution dated 20th November, 2003 is in breach of mandatory rules framed by the Governor of the State in exercise of powers under Article 166(3) of the Constitution of India, and (ii) that, the impugned Government Resolution violates the petitioners' fundamental right to equality in the matter of employment and appointment contained in Articles 14 and 16 of the Constitution of India.

7. The learned Counsel for the petitioners has contended that the State Government had taken a policy decision to regularize the services of all the temporary employees who were not appointed in accordance with the recruitment rules working in various Departments of the Government and the Zilla Parishads which specifically grants the deemed date of seniority from 8th March, 1999. The petitioners have no quarrel with the said decision. In regard to the impugned Government Resolution, it is submitted that the anomalous situation has been created by the Rural Development Department by not following the Rules of Business and the Instructions issued by the Governor of the State. The learned Counsel for the petitioner submits that only a class of temporary employees viz. Junior Engineers and Assistants to Junior Engineers have been granted more favourable treatment from and out of "one class of temporary employees". It is then submitted that the Governor has framed the rules for regulating the conduct of business of the Government which lays down that if the subject falls within the jurisdiction of two or more Departments of the Government, then unless and until each of the Departments considers the issue, no order shall be passed, meaning thereby, no final decision to be reached by the Government. The grievance is in regard to breach of the rules framed under Article 166(3) of the Constitution of India which, according to the petitioners, renders the impugned Government Resolution, illegal, requiring it to be struck down.

8. The learned Counsel appearing for the respondent/Zilla Parishad supports the case of the petitioners and claims that the Junior Engineers and Assistants to Junior Engineers working with the Zilla Parishads cannot be picked and chosen for grant of special favour. He joins in the submissions made by the petitioners' Advocate, that there is no reason whatsoever to grant differential treatment to the temporary employees covered by the Resolution dated 8th March, 1999.

9. The learned Assistant Government Pleader, Smt. Gondhalekar, appearing for the respondent/State has justified the grant of deemed date to the Junior Engineers and Assistants to Junior Engineers, vide Government Resolution dated 20th November, 2003. She is unable to state any criteria on the basis of which the temporary employees covered by the Resolution dated 20th November, 2003 have been granted the deemed date of seniority from the year 1990 when other similarly situate employees are granted the deemed date of seniority from 8th March, 1999. In reply to a pertinent query made by the Court, the Assistant Government Pleader, on instructions, informed the Court that the impugned Government resolution was not issued in consultation with the General Administration Department, so also, admits the fact that the issue in regard to grant of deemed date of seniority to the Junior Engineers and Assistants to Junior Engineers was not considered by the General Administration Department.

10. Clause 3 of Article 166 of the Constitution of India obliges the Governor to make rules for the more convenient transaction of the business of the Government of the State, and for the allocation among Ministers of the said business insofar as it is not business with respect to which the Governor is by or under the Constitution of India required to act in his discretion. Under the said powers, the Governor has framed the rules known as the Maharashtra Government Rules of Business and Instructions Issued Thereunder (for short, hereinafter referred to as "the Rules"). Rule 4 reads thus:

"The Business of the Government shall be transacted in the Departments specified in the First Schedule and shall be classified and distributed between those Departments as laid down therein."

At serial No. 1 in First Schedule, is the General Administration Department and the Rural Development Department finds place at serial No. 12, The instructions regarding the business of the Government are issued under rule 15 of the Rules. The said instructions regarding the conduct of the business are issued in exercise of powers under rule 15 of the Rules. Rule 15 and Instruction No. 9 reads thus :

Rule 15 :

"These Rules may to such extent as necessary be supplemented by instructions to be issued by the Governor on the advice of the Chief Minister."

Instruction No. 9:

"Where the subject of a case concerns more than one Department, then unless the case is one of extreme urgency, no order shall be issued nor shall the case be

laid before the Council or Cabinet until it has been considered by all the Departments concerned."

Reading of rule 4 conjointly with Instruction No. 9 reveals that when the case concerned more than one Department, then no order shall be issued until the case is considered by all the Departments concerned except when the case is one of extreme urgency. In the matter in hand, the issue pertains to the grant of deemed date to irregularly appointed persons who were serving since the year 1990. Hence, there is no question of urgency, much less, extreme. If this be so, then unless and until all the concerned Departments consider the subject, no orders can be issued by one of the Departments.

11. The learned Counsel for the petitioners submits that, as a matter of fact, regularization of irregular appointees was a subject squarely falling within domain of the General Administration, Department. He submits that the Government had identified such irregular appointees from all the Departments and the Zilla Parishads, as well, and had taken a policy decision which was uniformly to be applied to all the irregular appointees. It is categorically pointed out that the first Resolution dated 8th March, 1999 was issued by the General Administration Department; whereas the second Resolution dated 29th April, 1999 was issued by the Rural Development Department and to the extent of departure from the decision reached by the earlier Government Resolution, a corrigendum was issued and the issue of seniority was brought in line with the decision reached by the General Administration Department.

Strangely enough, the Rural Development Department has issued the impugned Government Resolution without consulting the General Administration Department and carved out few officers only from and out of the irregular appointees working in Zilla Parishads viz. Junior Engineers and Assistants to Junior Engineers and they are given a special favourable treatment which is not made available to rest of the employees working in Zilla Parishads and/or other employees working in other Departments of the State Government. As a matter of fact, the State Government by its policy decision, after the matter was considered by all the concerned Departments, had taken a decision contained in Resolution dated 8th March, 1999. It is obvious that the Rural Development Department should not have singled out few irregularly appointed employees and bestowed them a seniority right since their date of initial appointment, more so, when the appointments were not in conformity with the rules of recruitment.

12. The rules framed under Article 166(3) of the Constitution of India are statutory in nature. By virtue of rule 15, instructions are issued by the Governor which are to supplement the rules and the said instructions are framed on the advice of the Chief Minister. Whatever instructions are issued in furtherance of Rule 15, are mean to supplement the rule and hence it partakes the nature of binding instructions. Neither the Government nor any of its Departments can violate the instructions. Even assuming that the instructions are directory in nature and not mandatory, still substantial compliance of the instructions would

be insisted upon. In the present case, admittedly though the issue of grant of seniority fell within the domain of two Departments of the State Government, one of the two Departments have chosen to issue the Government Resolution impugned, keeping the other Department in dark. Had the Rural Development Department brought it to the notice of the General Administration Department, the said issue, the Government could have taken a uniform decision. There appears absolutely no reason, much less, just, to grant dissimilar treatment to persons who constitute one class of employees.

13. The learned Counsel for the petitioners has placed reliance on the judgment of the Apex Court reported in Haridwar Singh Vs. Bagun Sumbrui and Others, . The Apex Court was called upon to interpret similar rule framed under Article 166(3) of the Constitution of India viz. Bihar Rules of Executive Business, and the question arose as to whether said rule is mandatory or directory which provided for prior consultation with the Finance Department in regard to certain matter. While dealing with the issue, the Apex Court observed in para 13 of the judgment, thus :

"Several tests have been propounded in decided cases for determining the question whether a provision in a statute, or a rule is mandatory or directory. No universal rule can be laid down on this matter. In each case one must look to the subject matter and consider the importance of the provision disregarded and the relation of that provision to the general object intended to be secured. Prohibitive or negative words can rarely be directory and are indicative of the intent that the provision is to be mandatory (See Earl T. Crawford. The Construction of Statutes, pp. 5234)."

14. In the case in hand, the Government was dealing with an issue of regularization of services of thousands of employees working in all the Departments of Government besides the Zilla Parishads and, as such, rightly it was prerogative of the General Administration Department. Without consulting and/or without affording an opportunity to the General Administration Department to consider the issue, the Rural Development Department has issued the Government Resolution dealing with only handful of employees and granted them seniority from the date of initial appointment which has been denied to other similarly situated employees working in other Departments of the Government, so also, some of the employees working in Zilla Parishads, as well.

Not only this, a peculiar situation has surfaced, inasmuch as, the Government Resolution issued by the General Administration Department, dated 8th March, 1999, so also, the Government Resolution dated 29th April, 1999 issued by the Rural Development Department in consultation with General Administration Department are holding the field, they are not superseded and could not have been superseded, inasmuch as, the first Government Resolution deals with all irregular appointees and the second Government Resolution deals with all irregular appointees working in Zilla Parishads; whereas the impugned Government Resolution deals with only the Junior Engineers and Assistants to

junior Engineers working in Zilla Parishads. The two earlier Resolutions and the impugned Resolution do not go hand in hand, inasmuch as, the earlier Resolution grant seniority from 8th March, 1999 to all irregular appointees; whereas the impugned Resolution grants deemed date of seniority only to Junior Engineers and Assistants to Junior Engineers from the date of their initial appointment. It is impossible to reconcile anomalies resulted from the impugned Government Resolution.

In this view of the matter, we have no doubt, that had the mandatory instructions issued by the Governor under Rule 15 of the Rules been complied with, than disregarded, the general object intended to be secured by the instruction viz. uniformity in decision making, could have been achieved. Placing reliance on the judgment of the Apex Court *supra*, we hold that the Rules of Business and the Instructions issued thereunder which are supplemental to the Rules, as is indicated by Rule 15, to the extent they relate to consultation and/or consideration by the respective Departments, is mandatory. As the impugned Government Resolution is in violation of the Rules and the Instructions, the Government Resolution must fall to the ground. We hold that the Government Resolution dated 20th November, 2003 is illegal besides being arbitrary, unfair and unjust.

15. To buttress the second submission, the learned Counsel for the petitioners submit that as Article 16 is a facet of Article 14 of the Constitution of India, the State Government's decision in the matter of employment or appointment falling under Article 16(1) must also be just, fair and reasonable. It cannot be arbitrary or irrational.

The next limb of submission is that on the one hand, the petitioners were appointed regularly in adherence to the recruitment rules, whereas the respondent Nos. 4 and 5 and other similarly situate persons were appointed in defiance to the rules of recruitment and their appointments were neither regular nor were in sanctioned posts. In the submission of the petitioners, the posts created under "Jawahar Rojgar Yojana" by their very nature were temporary and ad hoc and, as such, the State Government could not grant the benefit of seniority from the initial date of appointment. The petitioners apprehend that some of the persons who are presently shown junior to the petitioners, would supersede the petitioners taking advantage of the seniority granted to the said appointees from their initial date of appointment. In this factual background, it is emphatically canvassed that the decision reached by the Rural Development Department of the State Government contained in the Resolution dated 20th November, 2003 goes to abridge the petitioners rights contained in Articles 14 and 16 of the Constitution of India. The main thrust of the submission is that the State Government has no power, authority or jurisdiction to grant deemed date of seniority from the date of initial appointment, if the said appointment is not a regular appointment, meaning thereby, an appointment in accordance with the rules of recruitment and the State Government would have jurisdiction only to

grant the deemed date of seniority from the date of regularization of the service and not prior thereto.

16. Now, we come to the question as to whether the impugned Government Resolution granting deemed date of seniority to the Junior Engineers and Assistants to Junior Engineers could be sustained having regard to the settled position in law propounded by catena of judgment of the Apex Court. The judgment of the Apex Court reported in *The Direct Recruit Class-II Engineering Officers' Association and others Vs. State of Maharashtra and others*, has laid down the following propositions while summing up the said judgment. In the instant case, as we are concerned with propositions (A) and (B), we reproduce the two propositions :

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

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

With a view to explain the conclusions in regard to the two propositions, observations made by the Apex Court, in para 13 of the judgment, are relevant and hence reproduced below :--

"When the cases were taken up for hearing before us, it was faintly suggested that the principle laid down in *S.B. Patwardhan and Another Vs. State of Maharashtra and Others*, was unsound and fit to be overruled, but no attempt was made to substantiate the plea. We were taken through the judgment by the learned counsel for the parties more than once and we are in complete agreement with the ratio decidendi, that the period of continuous officiation by a Government servant, after his appointment by following the rules applicable for substantive appointments, has to be taken into account for determining his seniority; and seniority cannot be determined on the sole test of confirmation, for, as was pointed out, confirmation is one of the inglorious uncertainties of Government services depending neither on efficiency of the incumbent nor on the availability of substantive vacancies. The principle for deciding inter se seniority has to conform to the principles of equality spelt out by Articles 14 and 16. If an appointment is made by way of stop-gap arrangement, without considering the claims of all the eligible available persons and without following the rules of appointment, the experience on such appointment cannot be equated with the experience of a regular appointee, because of the qualitative difference in the appointment. To equate the two would be to treat two unequals

as equal which would violate the equality Clause. But if the appointment is made after considering the claims of all eligible candidates and the appointee continues in the post uninterruptedly till the regularisation of his service in accordance with the rules made for regular substantive appointments, there is no reason to exclude the officiating service for purpose of seniority. Same will be the position if the initial appointment itself is made in accordance with the rules applicable to substantive appointments as in the present case. To hold otherwise will be discriminatory and arbitrary. The principle has been followed in innumerable cases and has been further elaborated by this Court in several judgments including those in *Baleshwar Dass and Others Vs. State of Uttar Pradesh and Others*, , and *Delhi Water Supply and Sewage Disposal Committee and Others Vs. R.K. Kashyap and Others*, , with which we are in agreement. In *Narender Chadha and Others Vs. Union of India and Others*, the officers were promoted although without following the procedure prescribed under the rules, but they continuously worked for long periods of nearly 15-20 years on the posts without being reverted. The period of their continuous officiation was directed to be counted for seniority as it was held that any other view would be arbitrary and violative of Articles 14 and 16. There is considerable force in this view also. We, therefore, confirm the principle of counting towards seniority the period of continuous officiation following an appointment made in accordance with the rules prescribed for regular substantive appointments in the service."

17. A useful reference can be made to the judgment of the Apex Court, delivered by the three Honourable Judges, reported in *Keshav Chandra Joshi and others etc. Vs. Union of India and others*, . In para 23 of the said judgment, the Apex Court has observed thus :

"Ad hoc or fortuitous appointments on a temporary or stop gap basis cannot be taken into account for the purpose of seniority, even if the appointee was subsequently qualified to hold the post on a regular basis. To give benefit of such service would be contrary to equality enshrined in Article 14 read with Article 16(1) of the Constitution as unequals would be treated as equals."

In para 24 of the judgment, the Apex Court has explained propositions (A) and (B) enunciated by the Constitution Bench of the Apex Court in *The Direct Recruit Class-II Engineering Officers" Association and others Vs. State of Maharashtra and others*, . The Apex Court observed thus :

"24. In *The Direct Recruit Class-II Engineering Officers" Association and others Vs. State of Maharashtra and others*, the Constitution Bench of this Court in which one of us (K. Ramaswamy, J.) was a member, in propositions "A" and "B" in paragraph 47 at page 745 (of SCC): (Para 44, at p. 1627 of AIR) stated :--

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

The corollary of the above rule is that where the initial appointment is only ad

hoc and not according to rules and made as stop gap arrangement, the officiation in such post cannot be taken into account for considering the seniority.

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

M/s Mukhoty and Garg repeatedly asked us to apply the ratio in the cases of Narender Chadha and Others Vs. Union of India and Others, , Baleshwar Dass and Others Vs. State of Uttar Pradesh and Others, and AIR 1977 251 (SC) contending that the promotees were appointed to the same post, are discharging the same duties, drawing the same salary, therefore, they should be deemed to be given promotion from their initial dates of appointment. We express our inability to travel beyond the ratio in Direct Recruits case. While reiterating insistence upon adherence to the rule that seniority between direct recruits and the promotees has to be from the respective dates of appointment, this Court noticed that in certain cases. Government by deliberate disregard of the rules promotions were made and allowed the promotees to continue for well over 15 to 20 years without reversion and thereafter seniority is sought to be fixed from the date of ad hoc appointment. In order to obviate unjust and iniquitous results, this Court was constrained to evolve "rule of deemed relaxation of the relevant rules" and directed to regularise the services giving the entire length of temporary service from the date of initial appointment for seniority, To lay down binding precedent the cases were referred to a Constitution Bench. In Direct Recruits case, this Court has laid down clear propositions of general application in items A to K. Therefore, to keep the law clear and certain and to avoid any slant, we are of the considered view that it is not expedient to hark back into the past precedents and we prefer to adhere to the ratio laid down in the Direct Recruits case.

25. As stated, the counsel for the promotees placed strong reliance on proposition "B" while the counsel for the Direct Recruits relied on proposition "A". The controversy is as to which of the propositions would apply to the facts of this case. The proposition "A" lays down that once an incumbent is appointed to a post according to rules, his seniority has to be counted from the date of his appointment and not according to the date of his confirmation. The latter part thereof amplifies postulating that where the initial appointment is only ad hoc and not according to rules and is made as a stop-gap arrangement, the period of officiation in such post cannot be taken into account for reckoning seniority. The quintessence of the propositions is that the appointment to a post must be according to rules and not by way of ad hoc or stop-gap arrangement made due to administrative exigencies. If the initial appointment thus made was de hors the rules, the entire length of such service cannot be counted for seniority. In other words, the appointee would become a member of the service in the substantive capacity from the date of his appointment only if the appointment

was made according to rules and seniority would be counted only from that date. Propositions "A" and "B" cover different aspects of one situation. One must discern the difference critically. Proposition "B" must, therefore, be read along with para 13 of the judgment wherein the ratio decidendi of Narendra Chadha was held to have considerable force. The latter postulated that if the initial appointment to a substantive post or vacancy was made deliberately, in disregard of the rule and allowed the incumbent to continue on the post for well over 15 to 20 years without reversion and still the date of regularization of the service in accordance with the rules, the period of officiating service has to be counted towards seniority. This Court in Narendra Chadha's case was cognizant of the fact that the rules empower the Government to relax the rule of appointment. Without reading paragraph 13 and Proposition "B" and Narendra Chadha's ratio together the true import of the proposition would not be appreciated. We would deal with the exercise of power of relaxing the rule later. After giving anxious consideration, we are of the view that the latter half of Proposition "A" would apply to the facts of the case and the rule laid down in that half is to be followed. If the concerned rules provide the procedure to fix inter se seniority between direct recruits and promotees, the seniority has to be determined in that manner."

The judgment of the Constitution Bench of the Apex Court in *The Direct Recruit Class-II Engineering Officers' Association and others Vs. State of Maharashtra and others*, , as explained in *Keshav Chandra Joshi and others etc. Vs. Union of India and others*, , holds the field and is consistently followed in many later judgments of the Apex Court.

In the judgment reported in *Union of India (UOI) through Chandigarh Administration (U.T.), Chandigarh and Another Vs. Sh. S.K. Sharma, Professor of Civil Engineering Punjab Engineering College, Chandigarh*, , the Apex Court has categorically held that ad hoc service cannot be counted for determining seniority, so also, ad hoc service would not confer any right to claim seniority on the post reckoning ad hoc service. The Apex Court has placed reliance on the judgment of the Constitution Bench of the Apex Court, reported in *The Direct Recruit Class-II Engineering Officers' Association and others Vs. State of Maharashtra and others*, , and more particularly on the below quoted observations :

"Once an incumbent is appointed to a post according to rule, his seniority has to be counted from the date of his appointment and not according to the date of his confirmation. Seniority cannot be determined on the sole test of confirmation, for, confirmation is one of the inglorious uncertainties of government service depending neither on efficiency of the incumbent nor on the availability of substantive vacancies. The principle for deciding inter se seniority has to conform to the principles of equality spelt out by Articles 14 and 16. The corollary of the above rule is that where the initial appointment is only ad hoc and not according to rules and made as a stopgap arrangement, the officiation in such post cannot

be taken into account for considering the seniority."

In the judgment of the Apex Court, reported in *Excise Commissioner, Karnataka and another Vs. V. Sreekanta*, , the same proposition is reiterated by holding that the candidates appointed on ad hoc basis cannot claim that the ad hoc service can be counted for the purpose of seniority. It is clearly laid down that the seniority of ad hoc appointees need to be counted from the date of regularization of their service and not from the date of an ad hoc appointment.

In another judgment of the Apex Court, reported in *P.K. Singh Vs. Bool Chand Chablani and Others*, , it is held that for determination of seniority, services rendered on ad hoc basis prior to regularization cannot be taken into account for determining seniority. This very position is reiterated in the recent judgment of the Apex Court, reported in *Santosh Kumar and Others Vs. G.R. Chawla and Others*, . In the said judgment, it is held that the inclusion of ad hoc services for the purposes of seniority is impermissible even though they are made after satisfying all tests for regular appointments. It is further held that the ad hoc appointments being in nature of stopgap or fortuitous appointments, the said services cannot be counted for seniority.

A common thread which runs through these judgments clearly indicate that a deemed date of seniority cannot be granted from the date of initial appointment, if the initial appointment is not in accordance with the rules of recruitment. If this be the position in law, and as all the Junior Engineers and Assistants to Junior Engineers who are granted such a seniority by the impugned Government Resolution, the same would be illegal, impermissible and unsustainable in law.

18. The Maharashtra Civil Services (Regulation of Seniority) Rules, 1982, regulates the issue of seniority. Rule 4 lays down the general principles of seniority. Sub-rule (1) lays down that the seniority of a Government servant in any post, cadre or service shall ordinarily be determined on the length of his continuous service therein. The first proviso thereto deals with leave, deputation on foreign service, etc. and we are not concerned with the same. The second proviso is crucial and the same reads thus:

"Provided further that, the service, if any, rendered by him as result of a fortuitous appointment except in a case where the competent authority certifies that, it was not expedient/possible or practicable to make a regular appointment strictly in accordance with the ratio of recruitment as prescribed in relevant recruitment rules, with the brief reasons recorded therefor, shall be excluded in computing the length of service and for the purpose of seniority he shall be deemed to have been appointed to the post or in the cadre or service on the date on which his regular appointment is made in accordance with the provisions of the relevant recruitment rules."

In the instant case, the Junior Engineers and Assistants to Junior Engineers, such as, the respondent Nos. 4 and 5 were appointed for a temporary period of six months and the appointment was ad hoc. But the said persons continued in

service till the date of regularization, because of fortuitous circumstance viz. grant of interim order by this Court pending decision of the Writ Petitions which ultimately came to be disposed of as the petitioners therein were granted regularization. The Court left the issue of seniority for adjudication to the Government. The term "fortuitous appointment" is defined in Rule 3(f) and the same reads thus:

" "Fortuitous appointment" means a temporary appointment made pending a regular appointment in accordance with the provisions of the relevant recruitment rules."

Under the rules dealing with seniority, even a temporary appointment pending a regular appointment is termed as a "fortuitous appointment". We have no iota of doubt, that the respondent Nos. 4 and 5's continuation in service from 1990 till their regularization was a fortuitous one which cannot bestow the persons irregularly appointed with the right of seniority vis-a-vis regularly appointed candidates. No doubt, the State Government is empowered to assign deemed date of appointment, rather it could be said that by having recourse to the power under Rule 5, and other enabling powers, the State Government has issued the Resolution dated 8th March, 1999 and 29th April, 1999 and thereby granted the deemed date of seniority i.e. 8th March, 1999 to the irregularly appointed employees.

If that be so, we fail to understand what justification could there be for the State Government to issue a Government Resolution dated 20th November, 2003, more so, when the same goes to abridge the accrued rights of the regularly appointed persons, such as, the petitioners. We hold that the decision contained in the Government Resolution dated 20th November, 2003 is violative of the petitioners right contained in Articles 14 and 16 of the Constitution of India besides the said decision being contrary to various judgments of the Apex Court referred to herein above, including the *The Direct Recruit Class-II Engineering Officers' Association and others Vs. State of Maharashtra and others*, . The petitioners grievance, that they have been discriminated, is justified.

19. This bring us to the adjudication of technical objection raised by the learned Assistant Government Pleader, to the effect that unless and until all the persons who would be benefitted by the impugned Government Resolution are impleaded as party/respondents, the petition ought not to be entertained on merits. It is contended by the learned Assistant Government Pleader, that the petitioners are apprehending that some of the persons who are presently shown below the petitioners in the seniority list of Junior Engineers (Grade-II) would supersede the petitioners by virtue of the impugned Government Resolution and, as such, it was incumbent to implead the said persons, at least, as party/respondents to the petition. In her submission, the said persons are necessary parties and non-joinder ought to result in dismissal of the petition.

As against this, the learned Counsel for the petitioners has submitted that what

is under challenge is a decision taken by the State Government and the same is challenged on the ground of violation of fundamental rights. In this view of the matter, it is contended that it is not necessary to implead any one who could be said to be beneficiary under the said Government Resolution and nonjoinder of such persons would not, in any way, affect the maintainability of the petition. Alternatively, it is submitted that the respondent Nos. 4 and 5 are beneficiaries of the impugned Government Resolution and they could be taken to be representing all the beneficiaries under the said Government Resolutions. Though the respondent Nos. 4 and 5 are not in the seniority list of Junior Engineers (Grade-II), but they are the beneficiaries. In case, the petition succeeds, the respondent Nos. 4 and 5 are put to lose the deemed date of seniority granted by the Government Resolution and, as such, it is claimed that all the beneficiaries are properly represented before the Court as they are represented by respondent Nos. 4 and 5.

The learned Counsel for the petitioners has relied upon a judgment of Andhra Pradesh High Court reported in B. Gopalaiah and Others Vs. Government of Andhra Pradesh and Another, . The learned Judge of the Andhra Pradesh High Court (Coram: Chinnappa Reddy, J.) observed thus :

"This is not case of discrimination of individual against individual. This is a case where a whole class of citizens have been discriminated against and the court cannot refuse to give relief to them on the ground that the class of persons who will be benefitted as a result of the discrimination are not before the Court. The person who complains of discrimination cannot be expected to search the country for all persons who are likely to be benefitted by its discriminatory policy, of course, if the discrimination is in favour of an individual against an individual different considerations might arise."

The learned Judge further proceeded to observe :

"In my opinion, where a scheme formulated by the Government is attacked on the ground of its being discriminatory the position is precisely the same as if a statute is attacked as being discriminatory and it can never be an answer to such an attack that persons likely to be benefitted by a discriminatory statute should be brought before the Court before the statute is struck down."

The said judgment was quoted with approval by the Apex Court in the judgment reported in The General Manager, South Central Railway, Secunderabad and Another Vs. A.V.R. Siddhantti and Others, . In para 20 of the judgment, the Apex Court while repelling a similar objection, held thus :

"The respondents-petitioners are impeaching the validity of those policy decisions on the ground of their being violative of Articles 14 and 16 of the Constitution. The proceedings are analogous to those in which the constitutionality of a statutory rule regulating seniority of Government servant is assailed. In such proceedings the necessary parties to be impleaded are those against whom the relief is sought, and in whose absence no effective decision can be rendered by

the Court. In the present case, the relief is claimed only against the Railway which has been impleaded through its representative. No list or order fixing seniority of the petitioners vis-a-vis particular individuals, pursuant to the impugned decisions, is being challenged. The employees who were likely to be affected as a result of the re-adjustment of the petitioner's seniority in accordance with the principles laid down in the Board's decision of October 16, 1952, were, at the most, proper parties and not necessary parties, and their non-joinder could not be fatal to the writ petition."

In the case of A. Janardhana Vs. Union of India (UOI) and Others, , similar question arose before the Apex Court, as to who are necessary parties when a policy decision of the State is under challenge. In the said judgment, ratio laid down by the Apex Court in the judgment reported in The General Manager, South Central Railway, Secunderabad and Another Vs. A.V.R. Siddhantti and Others, was followed by holding that when the dispute is not an individual dispute against another individual, and a Government decision is under challenge, every beneficiary is not a necessary party.

20. In the result, the writ petition is allowed. The impugned Government Resolution dated 20th November, 2003 is quashed and set aside.

21. Rule made absolute in the above terms. Needless to mention, that the interim order stands vacated. In the circumstances of the case, there shall be no order as to costs.

22. At this stage, the learned Assistant Government Pleader appearing for respondent Nos. 1 and 2, prays for stay of this judgment for a period of six weeks.

No case for stay is made out. Hence prayer is rejected.