

(1999) 04 PAT CK 0021
In the Patna High Court
Case No : C.W.J.C. No. 10944 of 1992

Gokul Prasad Singh and Others

APPELLANT

Vs

The State of Bihar and Others

RESPONDENT

Date of Decision : 16-04-1999

Acts Referred:

Assistants of Secretariat and Attached Offices Joint Cadre Act, 1989 — Section 10, 3, 4, 5, 5(1)
Assistants of Secretariat and Attached Offices Joint Cadre Rules, 1989 — Rule 1, 10, 13, 14, 14(2)
Constitution of India, 1950 — Article 14, 16, 16(1), 309
Displaced Persons (Compensation and Rehabilitation) Act, 1954 — Section 40

Citation : (1999) 2 PLJR 216

Hon'ble Judges : B.P. Singh, J;A.N. Trivedi, J

Bench : Division Bench

Advocate : Shailendra Kumar Sinha, Bijoy Kumar Sinha, in C.W.J.C. No. 10944 of 1992, Tej Bahadur Singh, Ram Kishore Singh, Braj Nandan Tiwary, Binod Kumar, in C.W.J.C. No. 9641 of 1993, Pushkar Narain Shahi, Partha Sharthy and Dharendra Kumar, in C.W.J.C. No. 5313 of 1994, for the Appellant; S.D. Yadav, S.B.N. Singh, Arjun Pd., in C.W.J.C. Nos. 10944 of 1992 and 9641 of 1993, F.A. Khan, P. Rajan, in C.W.J.C. No. 5313 of 1994, Vishwa Nath Ram and R.N. Mukhopadhaya for the private Respondents in C.W.J.C. No. 10944 of 1992, for the Respondent

Judgement

B.P. Singh, J.—These three writ petitions have been heard together as most of the issues involved are common. In all the three writ petitions, the Petitioners have challenged the legality and correct-ness of the final gradation list of Assistantsts published on,3rd of August, 1992 pursuant to rules framed under the, Assistants of Secretariat and Attached Offices Joint Cadre Act, 1989 (Bihar Act 9 of 1989) (hereinafter referred to as the Joint Cadre Act). The rules, (hereinafter referred to as the "Joint Cadre Rules") which have been framed pursuant to the Rule making power vested in the Government u/s 10 of the Act, dated 28th May, 1992 were published in the Gazette on the 1st of June, 1992 but are deemed to have come into effect from 30th August, 1988. Rule 14 of the

Rules lays down the principles for determination of inter-se seniority of Assistants in the joint cadre.

2. The Petitioners in CWJC Nos. 10944 of 1992 and 5313 of 1994 have challenged the validity of the aforesaid Rule 14, particularly Clauses (Kha) (Ga) and (Gha) of Sub-rule 2 thereof. In CWJC No. 9641 of 1993, the Petitioners, though they have not challenged the validity of the rules, have challenged the correctness of the final gradation list published, and have prayed for a direction to the Respondents to place them at proper places in the gradation list which according to them, has been prepared in an arbitrary and discriminatory manner. In sum and substance, the grievance of the Petitioners is that the inter-se seniority of the Petitioners, vis-a-vis, those recruited on, the basis of competitive examinations should be determined by reference to the dates on which they were placed on probation. Their case is that even though they were appointed much earlier than the direct recruits appointed pursuant to the competitive tests held in the years 1971 and 1973, and even though they were placed on probation much earlier than the dates on which such direct recruits were appointed, by an improper interpretation of the rules, they are sought to be placed below the direct recruits recruited through the competitive examinations; who, regardless of their date of appointment, are placed en block above them. Their grievance is that by issuance of the impugned gradation list, the settled seniority of the Petitioners is sought to be disturbed, and that too after the matter had been finally decided by the High Court in favour of the Petitioners.

3. The representative facts may be taken from CWJC No. 10944 of 1992.

There are six Petitioners in this writ petition. Previously, in the Secretariat and its attached offices of the Govt. of Bihar, there were posts of lower Division Assistant and Upper Division Assistant which were ultimately merged into one cadre of Assistants, with effect from 1.3.1977. Subsequently, in the year 1988, an ordinance was issued, which was subsequently replaced by an Act in the year 1989, giving effect to the Government's decision to prepare a joint cadre of Assistants of the Secretariat and the attached offices of the Govt. of Bihar. It is the case of the Petitioners, and not disputed by the Respondents, that the posts of Lower Division Assistant and Upper Division Assistant were filled up on the basis of general competitive examinations held for the purpose. However, between the years 1962 and 1972 such general competitive examinations were not held, and therefore, having regard to the exigencies of work, Assistants were appointed during this period from other sources on temporary or ad hoc basis. Such appointments were made from amongst the Lower Division Assistants and Upper Division Assistants who were eligible for appointment as Assistant. The Petitioners claim that they were initially appointed as Clerks and Typists in different departments of the Government of Bihar on the basis of tests held by the departments between the years 1967 and 1970. In the year 1970, the Petitioners, as well as some other Clerks and Typists similarly appointed, were found to be surplus, but the Government took a policy decision to absorb them

on the post of Assistant in the Personnel Department, and for putting them on probation and subsequent confirmation. The Petitioners so appointed joined the Personnel department as Assistants on different dates between 18th March, 1971 and 1st of May, 1971, They claim that in accordance with the circulars then applicable they were put on probation on different dates between 18th March, 1974 and 1st May, 1974, after they completed three years continuous service and thereafter they were confirmed on completion of the period of probation of two years.

4. It is not disputed that in the year 1971 a limited competitive test was held, which has been treated as equivalent to regular competitive test. Though the said examination was held in the year 1971, some appointments were made by order dated 27.4.1973. Subsequently in the year 1973, a regular competitive test was also held, but based on the result of the said test, the first batch of appointees were appointed by order dated 22.2.1975. The appointees appointed on the basis of the competitive tests were placed on probation from the date of their joining. Their period of probation was also two years. Thereafter they were to be confirmed, if their performance was found to be satisfactory.

Unfortunately the appointments made on the basis of 1971 limited competitive examination, were not made in one batch, and in fact the last appointee appointed on the basis of 1971 limited competitive examination was appointed as late as in the year 1986. Similarly those appointed on the basis of 1973 regular competitive examination were appointed in four batches in the years 1975, 1977, 1980 and 1981. It would thus appear that successful candidates of the 1971 and 1973 competitive tests were appointed in phases over a period of about 15 years.

5. The case of the Petitioners is that in the gradation list published on 31st of March, 1973, the Petitioners were shown between serial Nos. 106 and 115 whereas the directly recruited Assistants on the basis of competitive test were shown between serial Nos. 135 to 143. Reliance is placed on Annexure-1 which purports to be an extract of the said gradation list. The private Respondents in this writ petition were appointed by the process of direct recruitment in the year 1975.

6. Since large number of Assistants had been appointed from different sources, some on the basis of regular competitive examinations, and others from amongst eligible Clerks and Typists, the vexed question of determining their inter-se seniority was under consideration of the Government which was attempting to work out a fair and just solution. Ultimately by the resolution dated 30th March, 1981 published in the Bihar Gazette on 6th of May, 1981 issued by the department of Personnel and Administrative Reforms, Govt. of Bihar (Annexure-2), the Government notified its decision to determine their inter-se seniority in the manner laid down in the resolution.

7. The resolution, Annexure-2 dated 30th March, 1981 notices the-fact that general competitive examinations had not been held between the years 1962 and

1972 and therefore ad hoc appointments were made from different sources to the vacant posts of Assistant to carry on the work in the departments. The resolution specifies five such sources from which appointments were made as follows:

- (i) Those Assistants appointed on temporary basis from out of the unsuccessful candidates of the general competitive test held in the year 1961.
- (ii) Those Assistants appointed on ad-hoc basis after the year 1962 from amongst retrenched employees, Correspondence Clerks, Typists and others appointed on temporary basis from the open market on temporary basis.
- (iii) Those temporary assistants appointed on the basis of special test held by the department of Finance in the year 1966.
- (iv) Those temporary assistants appointed on the basis of the special examination held by the Finance Department in the year 1971 limited to Class III Clerical employees.
- (v) Those appointed on the basis of general competitive test held in the year 1973 by the department of Personnel.

The resolution proceeds to state that the circulars issued from time to time for granting permanency to the Assistants appointed from the different sources had proved ineffective, and several representations had been received in this connection. After considering those representations and after a comprehensive examination of the matter, the Government had decided to take a decision with regard to granting permanency to the appointments made to the posts of temporary Assistant from different sources as follows.

- (a) All the departments of the Government be requested to make permanent those posts of temporary Assistant which existed on 2nd of March, 1986, if there was likelihood of such posts continuing in future. By doing so, permanent posts would become available for the temporary Assistants.
- (b) On such permanent posts becoming available, all temporary Assistants appointed on ad hoc basis may be declared on probation after completion of three years continuous service, provided their services are found to be satisfactory. Those appointed on the basis of the result of 1971 and 1973 competitive tests be declared on probation with effect from the dates of their appointment and be confirmed on successful completion of the period of probation of two years. There shall be no requirement of their having to pass any test.
- (c) If after following the procedure under paragraph (a), the requisite number of permanent posts as required under paragraph (b) do not become available for placing the temporary Assistants on probation, then, according to need, shadow posts may be created with effect from the date on which they are required, and be continued till such time as regular posts, do not become available.

The rest of the decision is not very relevant.

The Petitioners contend that the aforesaid resolution of the Government Annexure-2, put at rest the controversy, if any, with regard to inter-se seniority of Assistants recruited from different sources. The seniority of the Assistants was to be determined by reference to the date on which they were put on probation, and therefore the Petitioners were treated as senior to the private Respondents and others who were appointed on the basis of the competitive tests. The Petitioners contend that since they were appointed in the year 1971 on temporary basis, they were put on probation in the year 1974. The Respondents who were appointed on the basis of the competitive tests were appointed thereafter, and therefore having regard to the dates on which the Petitioners and others were put on probation, the Petitioners ranked senior to the directly recruited Respondents. The Government published a seniority list in the year 1981 showing the Petitioners as senior to the Respondents.

8. The Government resolution, Annexure-2, dated 30th March, 1981 was challenged before this Court in several writ petitions filed by aggrieved persons, including direct recruits, who had been selected on the basis of the 1971 and 1973 competitive tests, but the batch of writ petitions filed before this Court was dismissed by a division bench of this Court by its judgment and order dated 19th May, 1983 holding, that the resolution dated 30th March, 1981 of the State Government did not call for any interference as the same could not be held to suffer from unreasonableness, arbitrariness or any other legal infirmity. It is not disputed before us that SLP preferred against the said judgment of the High Court was also dismissed by the Supreme Court, and therefore the judgment attained finality. Ultimately by issuance of office order dated 21st December, 1984, Annexure-2/3, the Government issued a list indicating the dates on which the Assistants were put on probation and the dates of their confirmation. The Petitioners were shown to have been placed on probation on different dates in the year 1974 and confirmed with effect from different dates in the year 1976. Similarly direct recruits were shown to have been placed on probation with effect from the dates of their appointment and confirmed on different dates on completion of two years probationary period. The office order dated 21st December, 1981 however, stated that the inter-se seniority of these Assistants shall be determined later.

9. After the judgment and order of this Court in the pending writ petitions, the Secretary, Department of Personnel and Administrative Reforms addressed a letter dated 14.8.1987 (Annexure-2/4) to all the Departments of the Government, heads of department etc. explaining the decision. It was stated that the High Court had upheld the validity of resolution No. 257 dated 30th March, 1981. The High Court had therefore upheld the decision contained in the resolution to put on probation the Assistants recruited from different sources (other than competitive tests) and appointed on temporary or ad-hoc basis, on their completing three years of continuous satisfactory service. The candidates

who had been appointed on the basis of the competitive tests were to be placed on probation from the dates of their appointments. In this background, and after considering all aspects of the matter, the Government had decided that the following principles shall be adopted.

(i) Those appointees who were put on probation earlier shall rank senior to those Assistants put on probation later.

(ii) The inter se seniority of Assistants appointed on the basis of the competitive test shall be decided on the basis of their position in the merit list of the said examination.

(iii) It was directed that inter se seniority of the Assistants shall be determined in accordance with the above clarification.

10. The case of the Petitioners is that when the matter was so settled by a decision of the High Court which attained finality, and the principles of determination of inter se seniority were clarified consistent with the Government resolution dated 31.3.1981, the matter should have been taken as settled. However by an indirect method adopted by the Government, the question of seniority which had been settled, was sought to be unsettled later. A seniority list was prepared- in the light-of the order of the High Court and the resolution of the Government dated 31.3.1981 which has been annexed as Annexure-3/1 in which the Petitioners were shown between serial Nos. 53 and 62 while the private Respondents were shown between serial Nos. 64 and 131. This seniority list was of the junior selection grade Assistant/Assistants as on 1.9.1987.

11. It appears that the Government took a decision on August 30, 1988 (which is Annexure-2 in CWJC No. 5313 of 1994) to prepare a joint cadre of Assistants of the Secretariat and attached offices of the Government, and with that in view an ordinance was promulgated known as Assistants of Secretariat and Attached Offices Joint Cadre Ordinance 1988. The same was replaced by an Act of Legislature known as "the Assistants of Secretariat and Attached Offices Joint Cadre Act, 1989 which was published in the Bihar Gazette on 10th of August, 1989.

Clause 4 of the Ordinance laid down the rule regarding the determination of seniority. Clause 4(1) provided as follows:

4. Determination of Seniority.-(1) Seniority of assistants of the combined gradation list shall be determined in accordance with the extant government circulars about fixation of seniority of assistants in the Secretariat departments and attached offices.

It would thus appear that the Ordinance provided for the determination of seniority in accordance with the extant Government circulars in the absence of statutory rules, which necessarily included the Government resolution dated 31.3.1981 providing for determination of seniority by reference to the date on which an Assistant was appointed on probation.

The Ordinance was replaced by the Joint Cadre Act which enacted a new provision with regard to determination of seniority. u/s 4 of the Joint Cadre Act a combined gradation list of the Assistants, selection grade Assistants, Section Officers, Registrars and Under Secretaries of the Secretariat department and attached offices as on 30th August, 1988 was to be prepared separately for each of the aforesaid categories of employees and their seniority was to be determined in the manner prescribed in Section 5. Sub-Section 1 of Section 5 provides that the seniority of the Assistants of the combined gradation list shall be determined in the manner prescribed in the Rules. u/s 10 of the Act, the State Government was empowered to frame rules to implement the provisions of the Act by notification published in the official gazette.

12. A provisional gradation list of Assistants was prepared by the government on 1.9.1990 (Annexure-4/1) when the Rules which were required to be framed u/s 10 of the Act had not been framed. The Petitioners were placed at appropriate places in the said provisional gradation list on the basis of the dates with effect from which they were put on probation, which was taken to be the date of entry into the service, but those appointed on the basis of the competitive examination held in the year 1973 were placed en-block above them, even though they were actually appointed in the year 1975 and onwards, much after the dates on which the Petitioners were placed on probation with effect from different dates in the year 1974. However Rules were framed later u/s 10 of the Act which were published in the official gazette on 1.6.1992, though they are deemed to have come into effect from 30th August, 1988. Rule 14(2) provides the manner in which the inter se seniority of Assistants has to be determined. Rule 14(2)(ka) lays down the, rule for determining the inter se seniority of Assistants appointed on the basis of competitive tests and lays down the rule that their inter se seniority shall be determined on the basis of their position in the merit list of the relevant competitive test. This rule is applicable even if the successful candidates of a particular competitive test are appointed on different dates in different years. The Petitioners have no grievance so far as the principle with regard to determination of inter se seniority of direct recruits is concerned.

Rule 14(2)(Kha) provides that the inter se seniority of candidates appointed from different sources, other than those recruited on the basis of competitive tests, before 2nd March, 1976 shall be determined on the basis of the date from which they are declared to be on probation after completing three year of service. This rule also does not harm the Petitioners.

Rule 14(2)(Ga) relates to Assistants appointed from other sources after 2nd March, 1976 and in their cases also their inter se seniority has to be determined by reference to the dates on which they are put on probation after completing three years service.

Rule 14(2)(Gha) is the rule which offends the Petitioners. It provides that the inter se seniority of candidates appointed on the basis of competitive examinations and those appointed from other sources shall be determined on the

basis that those appointed on the basis of competitive tests shall rank senior. The Assistants appointed from other sources shall be placed in the seniority list on the basis of the date of their being put on probation below all successful candidates appointed on the basis of the result of a competitive examination.

13. The Petitioners are aggrieved by Rule 14(2)(Gha) since it provides that in deciding inter se seniority of candidates appointed through regular competitive examinations and those appointed from other sources, all the Assistants appointed on the basis of the result of any competitive examination shall en-block rank senior to Assistants appointed from other sources regardless of their actual date of appointment. Thus the Assistants appointed from other sources have to be placed according to the date of their being put on probation below all the candidates appointed on the basis of the result of a competitive test. In sum and substance those appointed on the basis of competitive test shall rank senior to those appointed from other sources, regardless of the date of their appointment to the service. After all the candidates selected on the basis of a competitive test have been placed en-block, the candidates selected from other sources shall be placed below them. The Petitioners submit that this rule is arbitrary and unreasonable and is in clear breach of Articles 14 and 16 of the Constitution of India. It is also their submission that the seniority once settled cannot be disturbed in this manner by retrospective operation of the rules. The length of continuous service has always been considered to be a safe guide for determination of seniority. A deviation from the said settled principle in the manner sought to be done under the Rules by its retrospective operation is clearly arbitrary, because the impugned rule would have the effect of conferring seniority on Assistants appointed on the basis of the result of a competitive examination over candidates who may have been appointed from other sources several years before them. It was submitted that as a result of the retrospective operation of this rule, Petitioner No. 1 who was put on probation on 18.3.1974 would rank junior to a candidate appointed on 26.12.1978 on the basis of the result of the competitive examination. That is why in the final gradation list, the name of Petitioner No. 1 who was put on probation on 18.3.1974 appears at serial No. 1153 while a candidate recruited on the basis of competitive test on 26.12.1978 appears at serial No. 1087. If one goes by the date on which an Assistant was put on probation, the name of Petitioner No. 1 should have appeared at serial No. 467 of the final seniority list and not at serial No. 1153.

14. At the time when these Petitioners filed their writ petition (CWJC No. 10944 of 1992), the final gradation list had not been published, but the Petitioners had gathered information that even in the final gradation list, the Petitioners were shown as junior to the private Respondents. They therefore, filed a representation on 16.10.1992 following their earlier representation dated 8.2.1991 in which they had challenged the correctness of the provisional seniority list published on 1.9.1990. Since the Petitioners did not expect any prompt reply from the Respondents, they filed the instant writ petition before this Court.

15. It is not in dispute that a final gradation list was published on the 3rd of August 1992 and a copy of the same has been annexed in the connected writ petition. (CWJC No. 9641 of 1993) An analysis of the said gradation list would show that those placed first in the final gradation list are the Assistants who were appointed between the years 1960 and 1970 on the basis of general competitive examinations held earlier, as also those who were appointed from other sources during those years. They also include unsuccessful candidates of the 1961 competitive examination, and those from the pool of retrenched employees.

Next come the names of those candidates who are selected on the basis of the result of the limited competitive examination held by the Department of Finance in the year 1971 whose names appear between serial Nos. 179 to 373. The Assistant whose name appears at serial No. 179 was appointed on the 17th of April, 1972, while the Assistant whose name appears at serial No. 373 was appointed on 6.8.1973. The arrangement of their names however is in the same order in which their names appeared in the merit list of the said examination, and includes a few candidates appointed even in the years 1974, 1975, 1977, 1984 and 1986, though most of the candidates appear to have been appointed in the years 1972 and 1973.

From serial No. 374 onwards are Assistants appointed from different sources in the year 1972. The Assistant at serial No. 374 is shown to have been appointed on 29.1.1968 and put on probation on 29.1.1972. The names of the candidates that follow are arranged in the order of seniority based on the dates with effect from which they were put on probation. The last such candidate is at serial No. 466 who is shown to have been appointed on 30.12.1969 and put on probation on 30.12.72.

Thereafter the names of Assistants appointed on the basis of the 1973 general competitive examination have been shown from serial Nos. 467 to 1087, and their names also appear to have been arranged in the same order in which their names found place in the merit list prepared on the basis of the result of the said examination. The Assistant at serial No. 467 is shown to have been appointed on 5.3.1975 and put on probation on the same date while the Assistant at serial No. 1087 is shown to have been appointed on 26.12.1978, but the date with effect from which he was put on probation has not been shown as it was not available. It is however clear that the Assistants whose names appear from serial Nos. 467 to 1087 in the final gradation list consist of Assistants appointed between the years 1975 and 1981. Most of them appear to have been appointed between the years 1975 and 1978, though there are isolated cases of appointments made in the years 1979 and 1981.

Thereafter appear the names of candidates appointed from other sources, and the first such name is at serial No. 1088, an Assistant appointed on 2.1.1970 and put of probation on 2.1.1973.

The names of the Petitioners in CWJC No. 10944 of 1992 appear between serial

Nos. 1153 and 1165, while the names of the Petitioners in CWJC No. 9641 of 1993 appear later between serial Nos. 1335 and 1383.

16. It therefore appears that all the candidates appointed on the basis of the 1971 limited competitive examination, regardless of the dates of their appointment, have been shown as senior to other candidates appointed in the year 1971. Thereafter names appear of the candidates who were appointed from other sources in the year 1972. Thereafter the names of all candidates appointed on the basis of the result of the general competitive examination held in the year 1973 have been shown en-block as senior to other candidates appointed in the year 1973, even though the first candidate appointed on the basis of the general competitive examination of the year 1973 was appointed on 5th of March, 1975, while the Assistant appointed from other sources who was put on probation on 2.1.1973 has been shown below those appointed on the basis of the 1973 test.

CWJC No. 9641 of 1993

17. The Petitioners in CWJC No. 9641 of 1993 claim that they were appointed to the post of Assistant in the Education department and joined their posts between 14.1.1966 and 2.7.1974. They were so appointed after they had passed the noting and drafting examination and after they had been declared successful in the departmental examination conducted by the Respondents. Their appointment as Assistants was necessitated on account of the fact that between the years 1962 and 1972 general competitive examinations were not held and there was need for Assistants to carry on the day to day work in the departments. So far as these Petitioners are concerned, they were not aggrieved by the issuance of the provisional gradation list on 1.9.1990 since they were appropriately placed in the seniority list following the principles laid down in the resolution of the Government dated 30th March, 1981 as clarified in letter dt. 14.8.1987. However, in the, final gradation list significant changes were brought about as a result of which the Petitioners were brought down in the seniority list, and those who were appointed on probation later, were placed above them, since they had been appointed on the basis of the result of the competitive tests. The Petitioners filed representations on 17.9.1992 and 5.6.1992, but inspite of several reminders and personal approaches, no action was taken by the Respondents to redress their grievance.

At the hearing of the writ petition, counsel for the Petitioners did not press the writ petition on behalf of Petitioners 1 to 5 since they have already been promoted, but he pressed the writ petition on behalf "of the remaining Petitioners.

18. The Petitioners have further submitted that though the gradation list issued on 3.8.1992 purports to be a final gradation list, several correction slips have been issued even after the publications of the final gradation list and they have annexed one such letter No. 398 dt. 28.10.1992. The Petitioners have further submitted that their representation should have been considered under Rule 16

of the Rules and the Respondents should therefore, be directed to issue suitable correction slips in the case of the Petitioners showing them at the appropriate places in the final gradation list. It is their grievance that Petitioners 6 to 12 were appointed between 14.1.1970 and 15.2.1971. Applying the rule of seniority as laid down in the Government circular dated 30.3.1981 the respective dates on which they were put on probation should be between 14.1.1973 and 15.2.1974 on completion of three years of service after initial appointment. However, while the final gradation list correctly mentions the date of their initial appointment, they are shown to have been placed on probation with effect from 1.3.1977 with the result that they have come down several hundred positions in the gradation list. Similarly Petitioners 13 to 17 who were appointed between 1.8.1972 and 2.7.1974 should have been shown in the final gradation list as having been put on probation between 1.8.1975 and 2.7.1977. In the final gradations list, though their dates of initial appointment have been correctly shown, they are shown to have been put on probation with effect from different dates in August, 1977. The Petitioners have therefore, submitted that the apparent error in the final gradation list ought to have been corrected and corrections slips to have been issued in favour of these Petitioners as well. On account of the incorrect dates with effect from which, they are shown as having been put on probation Petitioners 6 to 12 have been shown between serial Nos. 1341 to 1350 whereas appointees of 1973 have been shown between serial Nos. 467 and 1087;. Similarly the remaining Petitioners have also been shown lower in the final gradation list between serial Nos. 1374 and 1383.

CWJC No. 5313 of 1994

19. In CWJC No. 5313 of 1994, the Petitioners are those assistants who were initially appointed in the office of the Advocate General between 18th June, 1974 and 19th November, 1982. It is their case that they were originally appointed as Assistants in the office of the Advocate General pursuant to advertisements issued and tests conducted for selection of candidates. At the time when they were appointed, the Assistants of the office of the Advocate General belonged to a distinct cadre, not in any manner connected with the cadre of assistants in the Secretariat or the attached offices. Though a decision was taken as early as on 22nd of May, 1967, to create a joint cadre, a final decision was taken for the creation of a joint cadre of assistants only on 30th August, 1988 when the Government resolved to create a joint cadre. The said resolution was published in the Gazette on the 31st August, 1988 (Annexure-2). The Ordinance that followed provided that seniority of assistants of the combined gradation list shall be determined in accordance with the extant Government circulars about fixation of seniority of assistants in the Secretariat departments and attached officers. The Ordinance was followed by the Joint Cadre Act of 1989, but even till then the cadre of Assistants in the office of the Advocate General was not declared as an attached office. It was so declared only on 27.2.1991 by publication of resolution of the Personnel and Administrative Reforms department, Annexure-4. A perusal of Annexure-4 would show that the resolution dated 30th July, 1976, the officer

of the Advocate General was declared to be an attached office of the department of law, but pursuant to the said resolution of office of the Advocate General was treated as an attached office only for the purpose of giving to the Assistants the benefit of the pay scale. As regards other things, the resolution was not followed. Keeping in view these facts it was decided that the office of the Advocate General be declared as the attached office of the Law Department, so that the Assistants employed in the office of the Advocate General may become members of the Joint cadre, and their appointment/promotion etc. shall be made by the Personnel Department of the State Government.

It therefore, appears that the Assistants employed in the office of the Advocate General became members of the Joint cadre only after it was declared to be an attached office by issuance of resolution, Annexure-4, dated 27.2.1991, The Joint Cadre Rules had already come into effect from 30th August, 1988, though they were notified on 1st of June, 1992. The provisional seniority list was issued on 1st September, 1990 when the Petitioners who were employed in the office of the Advocate General were not the members of the joint cadre of Assistants, and therefore their names were not included therein. The Petitioners contend that since they were also appointed on the basis of tests held by the office of the Advocate General, they should also be equated with those Assistants who were selected on the basis of the general competitive test. There was, therefore, no justification for placing them lower in the gradation list, much below the appointees who were appointed on the basis of the 1973 general competitive test. It is also submitted that the name of Petitioner No. 9 had been omitted from the final gradation list, perhaps by mistake. The Petitioners prayed that Rules 14(2)(kha)(ga) and (gha) of the Joint Cadre Rules should be quashed as being arbitrary inasmuch as they deprived the Petitioners of their accrued and vested rights relating to seniority. They have prayed for a direction to the Respondents to grant seniority to the Petitioners and others similarly placed by reckoning, the date of their initial appointment as Assistants in the same manner as Assistants appointed on the basis of regular competitive test.

20. In CWJC No. 10944 of 1992, a counter affidavit has been filed on behalf of the State of Bihar and its officers. In the counter affidavit, it has been pleaded on behalf of the State that the seniority of the Petitioners has been fixed in accordance with the Joint Cadre Rules of 1988. the Petitioners had not passed the prescribed examination for recruitment of Secretariat Assistants and therefore their seniority has been fixed in accordance with Rule 14(2)(Kha) and (Gha). The seniority of those Respondents who were appointed on the basis of competitive tests has been determined in accordance with Rule 14(2)(ka) and (Gha). Section 5 of the Act lays down that the seniority of the Assistants of the Combined gradation list shall be determined in the manner prescribed in the Rules, and therefore, the Rules have been strictly followed in the matter of determination of inter se seniority. It is submitted that in view of the Act and Rules, there has been a change of situation since 30th August, 1988 on introduction of Joint Cadre.

21. It is also submitted that in earlier batch of writ petitions, namely, CWJC No. 1276 of 1981 and analogous matters, this Court had decided that resolution No. 257 dated 30th March, 1981 was legal and valid, but it also made certain observations pursuant to which the rules have been validly framed laying down the correct principles. It is stated that the seniority list prepared on 1.9.1987 was according to rules prevalent at that time. Now, in the changed situation, separate rules have been framed in the light of the judgment and order of this Court in the aforesaid writ petition with the result that the old gradation list has no existence. In sum and substance the plea of the State is that having regard to the observation made by this Court in CWJC No. 1276 of 1981 and analogous matters, new rules have been framed. Whatever may have been the position before the new rules were framed, in the changed circumstances, the old gradation list has no existence and the seniority has to be re-determined in accordance with the new rules.

22. A counter affidavit has also been filed on behalf of some of the private Respondents. In the counter affidavit it has been submitted that the view of the court in its judgment of this Court in, CWJC No. 1276 of 1981 and analogous cases, seniority has been correctly decided by the State Government on the basis of the said decision. It has been emphasised that between the years 1962 and 1971, large number of persons were appointed as Assistants in, different departments without any advertisement and without any competitive examination. They were so appointed illegally by the backdoor method. It is stated that even Respondent No. 16 was appointed in a similar manner on 4th of February, 1970. In the year 1971 a special competitive examination was conducted and several persons who had been appointed illegally as Assistants, were allowed to appear in the said examination. Respondent No. 5 who was already working against class III post in the lower scale appeared, in the 197 Special Examination and was successful with the result he was appointed as lower division Assistant on 11th August 1973. Even those who were selected on the basis of the limited competitive examination were told that after holding of general competitive examination for, filling up the posts of lower division Assistants, those appointed on the basis of limited competitive examination may have to be reverted to their original posts. A general competitive examination was held in the year 1973 and Respondent No. 3 also took a chance and appeared in the said competitive examination. Similarly Respondent No. 16 who had already been appointed on 4th November, 1970 also took the said 1973 examination. The result of the said examination was published towards the end of the year 1974 and vide order dated 22nd February, 1975, the first batch of lower Division Assistants was regularly appointed including the replying Respondents. The replying Respondent joined their posts on different dates between February, 1975 and March, 1975. Respondent No. 5 who was already working in the Public Works Department was re-allocated to the Education department. Similar letters were issued to the other replying Respondents. Respondent No. 17 who was already serving in the Personnel and Administrative

department since 4th February, 1970 after his regular appoint-merit dated 22nd February, 1975, was reallocated to the Personnel and Administrative Reforms department.

23. The Respondent-State took a decision to regularise the service of the backdoor entrants and hence a resolution dated 30th March, 1981 was issued to the effect that such illegal entrants to the service will be treated as on probation with effect from the date on which they completed three years of service after their initial appointment and will be treated as having been regularly appointed. They were to be confirmed two years thereafter if their services were found to be satisfactory. This resolution of the Government was challenged by a number of Assistants who, in the mean-time were appointed as lower Division Assistants on the basis of the result of the general competitive test held in the year 1973 though the appointment orders were issued later in 1975. The said writ petition being CWJC No. 1707 of 1981 was heard along with another writ petition being CWJC No. 1276 of 1981 and the aforesaid batch of writ petition was disposed of by judgment and order dated 19th of May, 1983 by a division bench of this Court. The validity of the resolution dated 30th March, 1981 was upheld, but while upholding the said resolution, this Court held that the persons belonging to the first category i.e. those who were appointed in pursuance of the 1973 examination, their rights should be safeguarded whenever there was any occasion for promotion to the higher post. All other factors being equal, the lower division Assistants appointed on the basis of their success in the general competitive examination held in the year 1973 should receive due recognition in determining the rules of seniority as between the persons recruited from other sources. Thereafter vide resolution dated 30th August, 1988 the cadres of ministerial staff, including the Assistants of different departments of the State Government in its Secretariat and attached offices were merged. An Ordinance was passed which was replaced by the Act and in accordance with Section 5 of the Act, rules have been framed. The rules taking into account the judgment and order of this Court aforesaid has given preference in the matter of seniority to candidates who have entered into the service through the 1975 competitive examination, over others who were appointed without following the normal procedure of appointment. The replying Respondents have therefore justified the principle of seniority laid down in Rule 14 of the Rules. It is their submission that the rules of seniority have been prepared keeping in view the judgment of this Court aforesaid and there is no justification for reviewing the matter which the said judgment of this Court has attained finally.

24. In CWJC No. 9641 of 1993, a counter affidavit has been filed on behalf of the State. The said counter affidavit is on the same lines as the one filed by the State in CWJC No. 10944 of 1992. In paragraph 12 of the counter affidavit, it is admitted that Respondents 6 to 17 were appointed on different dates between 14.1.1970 and 2.7.1974, but the date with effect from which they were put on probation has been shown as 1.3.1977 in the case of Respondents 6 to 12 and 1.8.1977 in the case of Respondents 13 to 15 and 2.8.1977 in the case of

Respondents 16 and 17. It is stated that the seniority of the Petitioners has been fixed on the basis of the date of probation which was received from the Education department.

25. In CWJC No. 5313 of 1994 a counter affidavit has been filed on behalf of the State in which the same submissions have been reiterated as have been advanced in the other two writ petitions. With regard to Petitioner No. 9 it is stated that the inclusion of his name in the gradation list at the appropriate place was under active consideration of the Personnel and Administrative Reforms department.

26. It was submitted on behalf of the Petitioners that the Joint Cadre Rules which were framed under the Joint Cadre Act have been given retrospective operation. There is nothing in the Act which either expressly or by necessary implication authorised the Government to frame rules with retrospective effect. The Rules framed in exercise of power of sub-ordinate legislation must normally operate prospectively, in the absence of any express legislative provision which authorises the government to frame rules retrospectively. Even if the law so provides, that law has to be tested on the touchstone of Articles 14 and 16 of the Constitution of India if they affect the conditions of service.

It was also submitted that by retrospective operation of a rule, the conditions of service cannot be so changed as to take away any vested or accrued right, which has vested or accrued under the law then in force, in the absence of any good reason, a rule which seeks to deprive a government servant of the right which has accrued or vested in him under the Rules then existing should be held to be unreasonable and arbitrary, and therefore invalid.

In CWJC No. 9641 of 1993, it was additionally submitted that the date With effect from which the Petitioners were deemed to have been placed on probation was governed by the resolution dated 30th March, 1981. The gradation list in so far as it ignores this principle and gives an arbitrary date of probation is defective and ought to be corrected by the Respondent-State.

The Petitioners in CWJC No. 5213 of 1994 contend that upon declaration of the establishment of the Advocate General as an attached office, the Assistants employed in the office of the Advocate General cannot be discriminated against and cannot be deprived of the benefit which was given to other employees employed in the attached offices. They should also be treated as on probation with effect from the date of their initial appointment, and their seniority should be determined by reference to the dates with effect from which they were so appointed on probation.

The Petitioners in this writ petition have in fact submitted that since they were appointed as Assistants on the basis of a departmental test held by the concerned department, they should be equated with the candidates who have been appointed on the basis of the general competitive examination.

27. On the other hand the State as well as private Respondents have submitted that Rule 14 of the Rules is valid and has been framed having regard to the observations of this Court in the batch of writ petitions decided earlier, upholding the constitutional validity of the government resolution, dated 30th March, 1981.

It is further submitted that those who were appointed on the basis of the result of the competitive tests held for the purpose of selecting candidates for appointment as Assistants form a separate class than those who were appointed on ad hoc/temporary basis having regard to the exigencies of service without following the normal rule of advertising the post and holding the competitive examination. The Government was, therefore, justified in giving weightage to the former class of Assistants who were recruited by the normal method of recruitment and whose appointment from the very inception was regular and against the sanctioned posts.

28. Before advertng to the submissions urged at the bar, I may notice the authorities cited on behalf of the Petitioners.

Reliance was placed upon a decision of the Supreme Court in *Hukam Chand etc. Vs. Union of India (UOI) and Others*, . In that case rules were framed by the Central Government in exercise of the powers conferred by Section 40 of the Displaced Persons (Compensation and Rehabilitation) Act, 1954. The aforesaid section provided that the Central Government may, by notification In the official gazette, make rules to carry out the purposes of the Act. A question arose whether the power conferred u/s 40 empowered the Central Government to make retrospective rules even inferentially. The Court noticed that Section 40, though it conferred upon the Central Government the power of making rules to carry out the purposes of the Act, there were no provision in the section which either expressly or by necessary implication showed that the Central Government had been vested with power tot make rules with retrospective effect. Upholding the contention that the Central Government was not empowered to frame rules retrospectively, the Court observed:

The extent and amplitude of the rule making power would depend upon and be governed by the language of the section. If a particular rule were not to fall within the ambit and purview of the section, the Central Government in such an event would have no power to make that rule. Likewise, if there was nothing in the language of S. 40 to empower the Central Government either expressly or by necessary implication, to make a rule retroactively, the Central Government would be acting in excess of its power if it gave retrospective effect to any rule. The underlying principle is that unlike Sovereign Legislature which has power to enact laws with retrospective operation, authority vested with the power of making subordinate legislation has to act within the limits of its power and cannot transgress the same. The initial difference, between subordinate legislation and the statute laws lies in the fact that a subordinate law making body is bound by the terms of its delegated or derived authority and that Court of law, as a general rule, will not give effect to the rules, thus made, unless

satisfied that all the conditions precedent to the validity of the rules have been fulfilled (See Craies on Statute Law p. 297 Sixth Edition). In AIR 1977 251 (SC) , the Supreme Court observed that seniority, normally, is measured by length of continuous officiating service-the actual is easily accepted as the legal. This does not preclude a different prescription, constitutionality test being satisfied.

In T.R. Kapur and Ors. v. State of Haryana and Ors. 1986 (Supplement) SCC 584, a question arose whether benefits acquired under the rules made under proviso to Article 309 regarding qualifications for promotion can be taken away retrospectively by an amendment to the disadvantage of a government servant. It was held that right to be considered for promotion is a condition of service, and a benefit acquired under the existing rules could not be taken away by retrospective operation of the amendment of the amended rule unless it satisfied the tests of Articles 14 and 16 of the Constitution of India. In this context, it was observed:

It is well settled that the power to frame rules to regulate the condition of service under the proviso to Article 309 of the Constitution carries with it the power to amend or alter the rules with a retrospective effect: B.S. Vadhera v. Union of India, Raj Kumar v. Union of India, K. Nagaraj v. State of A.P. and State of J and K v. Triloki Nath Khosa. It is equally well settled that any rule which affects the right of a person to be considered for promotion is a condition of service although mere chances of promotion may not be. It may further be stated that an authority competent to lay down qualifications for promotion, is also competent to change the qualifications. The rules defining qualifications and suitability for promotion are conditions of service and they can be changed retrospectively. This rule is however subject to a well recognised principle that the benefits acquired under the existing rules cannot be taken away by an amendment with retrospective effect, that is to say, there is no power to make such a rule under the proviso to Article 309 which effects or impairs vested rights. Therefore, unless it is specifically provided in the rules, the employees who are already promoted before the amendment of the rules, cannot be reverted and their promotions cannot be recalled. In other words, such rules laying down qualifications for promotion made with retrospective effect must necessarily satisfy the tests of Articles 14 and 16(1) of the Constitution: State of Mysore v. M.N. Krishna Murty, B.S. Yadav v. State of Haryana, State of Gujarat v. Raman Lai Keshav Lal Soni and Ex Captain K.C. Arora v. State of Haryana.

In this case, it was held that the rule did not satisfy the tests of Articles 14 and 16 of the Constitution of India.

In State of Bihar and others Vs. Sri Akhouri Sachindra Nath and others, . Respondents 1 to 5 were directly recruited in the quota of direct recruits when the promotees Respondents 6 to 23 were not born in the cadre of Assistant Engineer in the Bihar Engineering Service Class II, as they entered into the said service by promotion after the direct recruits. Seniority was sought to be

conferred on the promotees by giving them retrospective promotion in their 25% quota for the year 1958. Upholding the judgment and order of this Court quashing the impugned government order conferring seniority by granting retrospective promotion, the Supreme Court held that it is well settled that no person can be promoted with retrospective effect from a date when he was not born in the cadre so as to adversely affect others. It is well settled by several decisions that amongst members of the same grade, seniority is reckoned from the date of their initial entry into the service. That being the position in law the Respondents No. 6 to 23 could not be made senior to Respondents No. 1 to 5 by the impugned government orders as they entered into the service by promotion after Respondents 1 to 5 were directly recruited in the quota of direct recruits.

In *Bhey Ram Sharma and others Vs. Haryana State Electricity Board and others*, , those who had applied in response to a subsequent advertisement were selected and appointed before those who had applied in response to an earlier advertisement. Rejecting the claim for seniority of those who were appointed later though pursuant to the earlier advertisement, the Court observed that it was well known that while determining the seniority of an officer, the date of his appointment is a more important factor than the date of his joining. In many compelling circumstances like accident, the distance at which particular candidate resides and the time taken by him to join cannot be ignored. It is almost settled that while determining the inter se seniority amongst officers recruited from different sources or between the officers appointed by the same process of different times, the date of entering into service is relevant. A person who entered in the service first shall rank senior unless there is some rule providing otherwise which can be held to be consistent with Articles 14 and 16 of the Constitution. Their lordships referred to several decisions of the Supreme Court in support of this proposition.

In *Uday Pratap Singh and Others Vs. State of Bihar and Others*, , the Respondents were appointed as direct recruits in the senior branch of the Bihar Finance Service which originally consisted of a senior branch and a junior branch, the latter being a feeder cadre for promotion to the former. Under the Bihar Finance Service Rules, 1953 framed under Article 309 of the Constitution of India seniority was to be reckoned from the date of the substantive appointment of the incumbent concerned. The Appellants were recruited to the junior branch. By a resolution dated 1.4.1975, the State Government decided that both the senior and- junior branches of the service be merged with effect from 1.4.1974. Pursuant to this decision, by a government notification dated 2.11.1975 a number of officers belonging to junior branch were appointed in the senior branch with effect from 1.4.1974, and therefore they claimed seniority in the merged cadre with effect from 1.4.1974. Their claim was accepted by the Government but rejected by the High Court in a writ petition filed by the direct recruits. The appeal before the Supreme Court was also rejected holding that it was well settled by an executive order the statutory rules cannot be whittled down nor can any retrospective effect be given to such an executive order so as

to destroy any right which had crystallised. It was held that the Appellants had entered the merged cadre of the senior branch only on 2.11.1975 while the Respondents had entered the senior branch as direct recruits prior thereto. If the Appellants were to be treated as senior to the Respondents, that was clearly violative of the constitutional rights guaranteed to the Respondents under Articles 14 and 16 of the Constitution of India.

The next case relied upon by the Petitioners is the one reported in *Union of India (UOI) and Others Vs. Tushar Ranjan Mohanty and Others*, . In this case, Respondent No. 1 who was a member of the Indian Statistical Service belonging to the general category was appointed along with Respondents 2 to 9 who belonged to the Scheduled caste. Respondent No. 1 being senior to Respondents 2 to 9 in the grade challenged his supersession before the Central Administrative Tribunal which upheld his seniority over Respondents 2 to 9. Subsequently Rule 13 was amended with retrospective effect from 27.11.1972 by notification dated 20th February, 1989. On the basis of this amendment, the Appellant, Union of India, sought quashing of the tribunal's decision in respect of the promotion of Respondent No. 1. Respondent No. 1 in turn, challenged the validity of the retrospective amendment of the Rules. The appeal by the Union of India was rejected and after exhaustive consideration of the decisions bearing on this subject, the Court dismissed the appeal. It noticed the earlier decision of the court in *P.D. Aggarwal and Others Vs. State of U.P. and Others*, where the Supreme Court had considered the effect of retrospective legislation on the vested rights of the affected person and had held that the amendment made with retrospective effect took away the vested rights of the Assistant Engineer appointed against the temporary post. Undoubtedly the Government has got the power under proviso to Article 309 of the Constitution to make rules and amend the rules giving retrospective effect. Nevertheless, such retrospective amendments cannot take away the vested rights and the amendment must be reasonable, not arbitrary or discriminatory violating Articles 14 and 16 of the Constitution. After noticing the authorities, the Court concluded;

The legislature and the competent authority under Article 309 of the Constitution of India have the power to make laws with retrospective effect. This power, however, cannot be used to justify the arbitrary, illegal or unconstitutional acts of the Executive. When a person is deprived of an accrued right vested in him under a statute or under the Constitution, and he successfully challenges the same in the Court of law, the legislature cannot render the said right and relief obtained nugatory by enacting retrospective legislation.

Accordingly, the court held that retrospective operation of the amended Rule 13 could not be sustained as it took away the vested rights of general category candidates senior to Respondents 2 to 9. The Court therefore declared amended Rule 13, to the extent it had been made operative retrospectively, to be unreasonable, arbitrary and as such violative of Articles 14 and 16 of the Constitution of India.

Lastly, reliance was placed upon a decision of the Supreme Court reported in *Chairman, Railway Board and others Vs. C.R. Rangadhamaiah and others*, . After an exhaustive consideration of the authorities on the subject, the Court laid down the principle thus:

It can, therefore, be said that a rule which operates in futuro so as to govern future rights of those already in service cannot be assailed on the ground of retroactivity as being violative of Articles 14 and 16 of the Constitution, but a rule which seeks to reverse from an anterior date a benefit which has been granted or availed of e.g., promotion or pay scale, can be assailed as being violative of Articles 14 and 16 of the Constitution to the extent it operates retrospectively.

As to what is meant by the expression vested rights or accrued rights the court observed:

In many of these decisions the expression "vested rights" or "accrued rights" have been used while striking down the impugned provisions which had been given retrospective operation so as to have an adverse effect in the matter of promotion, seniority, substantive appointment, etc., of the employees. The said expressions have been used in the context of a right flowing under the relevant rule which was sought to be altered with effect from an anterior date and thereby taking away the benefits available under the rule in force at that time. It has been held that such an amendment having retrospective operation which has the effect of taking away a benefit already available to the employee under the existing rule is arbitrary, discriminatory and violative of the rights guaranteed under Articles 14 and 16 of the Constitution.

29. I shall first take up the submission that there is no warrant for giving retrospective operation to the Joint Cadre Rules so as to affect the vested rights of the Petitioners who were senior to the Assistants appointed on the basis of the result of the competitive tests. As is apparent from a mere reading of the preamble of the Joint Cadre Act, 1989, the law was enacted with a view to make a law with regard to a joint cadre and also combined gradation list each for the Assistants, selection grade Assistants, Section Officers etc. of the Secretariat and its attached offices, and for confirmation and promotion to higher posts. Before the ordinance was promulgated, which was replaced by the aforesaid Joint Cadre Act, every department of the State Government in the Secretariat and its attached offices had separate cadre of Assistants, and promotion of the Assistants to higher posts within the department/ attached offices used to be made from amongst the Assistants, Section Officers, etc. in the cadre of Assistants of the department/ attached offices concerned based on the department-wise/attached office wise gradation list. The Government took a decision on 30th August, 1988 to create a joint with a combined gradation list each for Assistants, Selection grade Assistants, Section Officers, Registrars and Under Secretaries in the Secretariat department and its attached offices with effect from the said date. It was with a view to achieve this objective that the

Joint Cadre Act was enacted. u/s 3 of the Act, the posts of Assistants of the Secretariat and its attached offices were constituted in one joint cadre with effect from 30th August, 1988. With the coming into effect of the Act, all the Assistants of the Secretariat and its attached offices became members of the joint cadre of the Assistants, and promotion of the Assistants to the higher posts was to be made on the basis of their place in the combined gradation list which was to be prepared irrespective of the departments/ attached offices where such posts exists. u/s 4 of the Act, a combined gradation list of the Assistants, selection grade Assistants, Section Officers, Registrars and Under Secretaries of the Secretariat department and the attached offices as on 30th August, 1988¹ was to be prepared separately for each of the aforesaid categories of the employees, and their seniority was to be determined in the manner prescribed in Section 5. Section 5 provides that the seniority of the Assistants of the combined gradation list shall be determined in the manner prescribed in the Rules. Rule 10 provides that the State Government shall make rules to implement the provisions of the Act by notification published in the official Gazette. On a plain reading of the Preamble to the Joint Cadre Act and its relevant provisions, it is clear that instead of department-wise, attached office-wise gradation list, the Act sought to create a joint cadre by bringing all the posts in the Secretariat departments and the attached offices in one cadre. Such joint cadre was constituted with effect from 30th August, 1988. Seniority of the Assistants in the combined gradation list of the joint cadre was to be determined in the manner prescribed in the Rules. Rules were notified vide notification dated 28th May, 1992 published in the Gazette extraordinary on the 1st of June, 1992. Rule 1 itself provides that the rules shall be deemed to have come into effect from 30th August, 1988. It cannot be said that there is anything unreasonable in giving effect to the Rules from 30th August, 1988 because the joint cadre was created with effect from 30th August, 1988, which was the date on which the Government had taken a decision to constitute a joint cadre.

30. As is apparent on a plain reading of Section 106f the Joint Cadre Act, the State Government was required to make rules to implement the provisions of the Act. Since separate gradation lists in respect of Assistants of the various departments of the Secretariat and its attached offices existed, and the Assistants belonged to different cadres, it became necessary for the Government to frame Rules with a view to giving effect to its decision to create a joint cadre of the Assistants of the Secretariat departments and the attached offices. In other words, the rules had to be framed with a view to implement the provisions of the Joint Cadre Act by determining the principles on the basis of which the inter se seniority of the Assistants and other grades who were borne on separate cadres and were merged in one cadre, was to be decided. By the very nature of the rule making power conferred on the Government u/s 10 of the Act, there was no scope for re-determining the seniority of the Assistants in respect of any period prior to 30th August, 1988. No such power has been conferred either expressly or by necessary implication. The inter-se seniority of the assistants in

the different cadres which were to be merged, could not be altered by framing rules. Only the principles for determining the seniority of the assistants in the merged cadre could be prescribed, without disturbing the inter-se seniority of assistants in the same cadre. It, therefore, appears to me that under the Act, the Government was authorised to frame rules with a view to implement the provisions of the Act which included the power to prescribe by Rules, the manner in which the seniority of the Assistants of different cadres was to be determined in the combined gradation list of the joint cadre after merger without in any manner disturbing the existing seniority of assistants in the same erstwhile cadre.

31. Counsel for the Petitioners submitted that even though the rules are deemed to have come into effect from 30th August, 1988, Rule 14, in effect, has retrospective operation inasmuch as Rule 14(2)(Gha) seeks to lay down a new rule for the determination of seniority of assistants appointed on the basis of general competitive examinations and those appointed from other sources even before 30th August, 1988; Rule 14(2)(Gha) really supersedes the earlier principle on which inter se seniority of such categories of assistants was determined in the past, and lays down a new rule by operation in which even those assistants who were appointed from other sources and who were declared senior to the assistants appointed on the basis of the competitive examination by reckoning their seniority from the date on which they were put on probation, have now been placed below the assistants appointed on the basis of competitive tests. It was submitted that the rule in force was that the date on which an assistant was appointed on probation determined his seniority. Thus, even if a person appointed on probation earlier, was confirmed later, his seniority was to be determined by reference to the date on which he was appointed on probation, and not by reference to the date of confirmation. This principle had been clarified in the circular of the Government of Bihar, Department of Personnel dated October 22, 1975, Annexure-1/1. To this extent, there is no real difficulty. The problem arose on account of the fact that no competitive tests were held between the years 1962 and 1971 for filling up the posts of Assistants in the various departments of the Secretariat. With a view to carry on the day to day work, and having regard to administrative exigencies, the Government decided to appoint eligible assistants on temporary or ad hoc basis even without holding a competitive test. Large number of such appointments were made in the different departments over the 10 years when no competitive examinations were held.

32. The first limited competitive test was held in the year 1971, and thereafter a general competitive test was held in the year 1973. A question arose as to how the assistants appointed without following the normal procedure should be treated. The matter had engaged the attention of the Government for a considerable period and the Government was finding it difficult to satisfy the claims of different sections. It may here be noticed that there were no statutory rules applicable to the cases of assistants appointed on temporary/ ad hoc basis, and therefore the Government had to take a decision in the matter by an

executive order in the absence of statutory rules. It appears that after great deal of deliberation, the Government sought to resolve the issues by issuance of resolution No. 257 dated 30th March, 1981. I have earlier referred to the contents of this resolution. In sum and substance it provided that those appointed on temporary/ ad hoc basis during the period 1962 to 1971 shall be placed on probation on completing three years continuous service from the date of their initial appointment as assistants and on successful completion of the period of probation of two years, they shall be confirmed in service, Similarly those appointment on the basis of competitive examinations were to be placed on probation with effect from the date on which they were appointed. It would thus appear that those appointed on temporary or ad hoc basis did not get the benefit of first three years of service as they were put on probation after completing three years of service after their initial appointment. They were thereafter deemed to have been appointed on probation. Once the principle was decided, the rest was merely a matter of application of the circulars/rules then of force. The Government had decided that seniority in the cadre shall be decided by reference to the date on which an Assistant was appointed on probation. In the absence of statutory rules, the Government Resolution determined the principle of seniority and crystallised the rights of the assistants to reckon their seniority with effect from the date on which they were appointed on probation. The inter se seniority of the Assistants initially appointed on temporary/ ad hoc basis and those appointed in the regular manner was therefore to be determined by reference to their respective dates with effect from which they were appointed on probation. As would be apparent from Annexure-2/3 dated 21st December, 1984 in CWJC No. 10944 of; 1992, an office order dated 21st December, 1982 was issued giving, effects Government resolution No. 257 dated" 30th March, 1981. In the aforesaid list, the assistants have been shown to have been appointed on probation with effect from the dates mentioned in Column No. 4 and confirmed with effect from the date mentioned in column No. 5. The Petitioners have all been shown to have been put on probation with effect from different dates between 18th March, 1974 and 1st of May, 1974 and their confirmation dates were also shown between 18th March, 1976 and 1st of May, 1976. Similarly, those appointed on the basis of the competitive tests held in the years 1971 and 1973 are shown to have been appointed on probation with effect from the dates of appointment, and confirmed two years thereafter. It is wroth noticing that on the basis of the result of the 1971 Limited competitive test, the appointment were made in the years 1972, 1973 and even) later. A few appointments were also made in the year 1986. Similarly on the basis of the 1973 general competitive examination, appointments were made in March 1975 and large number of appointments were made in the years 1976, 1977 and 1978. In accordance with the principle determined under the Government resolution No. 257 dated 30th March, 1981, the inter se seniority of the assistants so appointed on the basis of result of the combined competitive examinations and those appointed from other sources was to be determined by reference to the date with effect from which they were put on probation. The

Petitioners, therefore, rightly submitted that they had both vested as well as accrued right under the rule/circulars then in forces to claim seniority by reckoning the date of their appointment on probation. Many of the assistants appointed on the basis of the 1971 and 1973 competitive examinations, who were appointed on probation on dates later than the dates on which the Petitioners were appointed on probation, were junior to the Petitioners, and this was the settled position when several writ petitions were filed in the High Court challenging the constitutional validity of the aforesaid Government resolution No. 257 dated 30th March, 1981. It has, therefore, rightly been contended that applying the principles for determination of seniority as was applicable earlier, and reading the same with the principles enunciated in the Government resolution No. 257 dated 30th March, 1981, the Petitioners were entitled to be treated as senior to those appointed on probation with effect from later dates, even though they were appointed on the basis of the result of the competitive examination held in the years 1971 and 1973. The High Court dismissed the writ petitions as it found no reason to interfere with the Government resolution dated 30th March, 1981. It therefore followed that applying the principles laid down in the aforesaid resolution dated 30th March, 1981, the inter se seniority of the Assistants whether appointed from other sources or on the basis of competitive examination, was to be determined by reference to the date on which they were appointed on probation. Giving effect to these principles, the gradation list of Assistants as on 1.9.1987 placed the Petitioners between serial Nos. 53 and 62 while the Respondents were between serial Nos. 64 and 131 in the gradation list (Annexure-3/1). This position continued till the impugned Joint Cadre Rules were framed in the year 1992, though with effect from 30th August, 1988. Under the Joint Cadre Rules, the principle for determining inter se seniority was changed to the detriment of the Petitioners. It was laid down that all the appointees appointed on the basis of the result of the 1971 and 1973 competitive tests were to be placed en bloc above the appointees appointed from other sources, regardless of the dates of their actual appointment. This is what has adversely affected the Petitioners because the final gradation list has been prepared in such a manner that even though appointed in the year 1975 and later years those candidates who were appointed on the basis of the result of 1973 competitive examination have been placed en bloc senior to all other appointees appointed from other sources and put on probation in the year 1973 and 1974 i.e. much before the date of appointment of the direct recruits on the basis of 1973 competitive tests. Not only this, even those appointed in the years 1976, 1977, 1978 and later years are treated as senior to those appointed on probation in the years 1973 and 1974. There can, therefore, be no dispute about the fact that pursuant to Rule 14(2)(Gha), the seniority list has been prepared in such a manner as to do away with the earlier principle of determining inter se seniority by reference to the date of appointment on probation. Moreover a person appointed in the year 1975, on the basis of 1973 competitive test is conferred seniority over the appointees of the years 1973 and 1974 i.e. with effect from the date on which he was not even born in the cadre. This appears to be highly

arbitrary and unreasonable.

33. Having regard to the principles enunciated by the Apex Court which I have noticed earlier, I have no hesitation in coming to the conclusion that the Joint Cadre Rules, 1992 do have the effect of depriving the Petitioners of their accrued rights vested in them under the rules/circulars earlier in force determining the principle relating to inter se seniority. By the impugned rules, those who were senior have been shown as junior, and those actually appointed several years after the Petitioners have been shown much above them in the combined gradation list. Though there is no warrant for giving to the Rules retrospective operation, the rules determining seniority have been so framed that they must of necessity have retrospective operation, thereby disturbing the settled inter se seniority of the Petitioners and the private Respondents. The impugned Rule 14(2)(Gha) which seeks to lay down a new rule for determining inter se seniority by discarding the earlier principles in force, has the effect of taking away the vested rights and accrued rights of the Petitioners who were entitled to count their seniority with effect from the date on which they were put on probation. The deprivation of the accrued rights crystallised under the relevant resolution of the Government, in the absence of statutory rules, is arbitrary and unreasonable. Rule 14(2)(Gha) in effect seeks to revert from an anterior date the benefit which had been granted to the Petitioners under the Government resolution dated 30th March, 1981 which held the field in the absence of statutory rules.

34. It was submitted on behalf of the Respondents that Rule 14 has been framed with a view to give effect to the judgment of this Court in CWJC No. 1276 of 1981 and analogous writ petitions dated 19th May, 1983. On the other hand, the Petitioners contend that the Respondents having challenged and failed to assail the constitutional validity of the Government resolution dated 30th March, 1981, cannot take advantage of the said judgment and the observations made therein do not justify the framing of a rule like Rule 14(2)(Gha) so as to operate retrospectively. Since both the parties have relied upon the observations of this Court in paragraph 47 of the judgment the same is reproduced below:

On the strength of the principle laid down in these cases, my concluded opinion is that the resolution dated 30.3.81 of the State Government does not call for any interference as the same cannot be held to suffer from unreasonableness, arbitrariness or any other legal infirmity. I would like to add that the right that has accrued to the employees of the first category should be safeguarded whenever there is any occasion for promotion to the higher post. All other factors being equal the Lower Division Assistant appointed on the basis of their success in the examination held in the year 1973 should receive due recognition in determining rules of seniority as between persons recruited from other sources.

35. On a plain reading of the paragraph quoted above there can be no doubt that the resolution No. 257 dated 30th March, 1981 was held not to suffer from unreasonableness, arbitrariness or any other legal infirmity. Logically, therefore the principles enunciated in the said resolution were held to be valid and

governed the cases of the parties. The said resolution in so far as it is relevant for the present purpose, laid down the principle for determining inter se seniority by reference to the date on which an assistant was appointed on probation. In the case of candidates appointed on the basis of competitive tests, their date of appointment was considered to be the date on which he was placed on probation. In the case of candidates appointed from other sources, and not on the basis of the combined competitive examination, their date of appointment on probation was considered to be the date on which he completed three years continuous service after his initial appointment. Once the respective dates of probation were determined, one appointed on probation, earlier was to be declared senior to one who was appointed on probation later, regardless of the procedure followed for his appointment. Having upheld the resolution dated 30th March, 1981, this Court no doubt made certain observations to safeguard the right of the employees of the first category, meaning thereby the assistants appointed on the basis of the combined competitive examination. All other factors being equal, the Assistants appointed on the basis of their success in the examination held in the year 1973 should receive due recognition in determining the rules of seniority as between the persons recruited from other sources. The observations do not justify the framing of rules which are constitutionally invalid. The observation that those appointed on the basis of competitive examination should receive due recognition was prefixed by the words all other factors being equal. It, therefore, logically follows that if appointed on the same day, perhaps the rule that may be framed may prescribe some advantage in favour of those appointed on the basis of competitive test. These observations do not in any manner justify the framing of a rule which has the effect of disregarding Seniority which stood settled in accordance with the principles then in force. The court was aware of the fact that the resolution dated 30th March, 1981 determined the manner in which the date of appointment on probation was to be fixed, and in accordance with the settled norms find circulars then in force seniority inter se depended on the date of appointment on probation which was treated to be the date with effect from which a candidate was deemed to have been appointed to the service. If this Court really wanted to disturb the settled position, it could have done so in clear words, and perhaps it may have been necessary then to strike down the resolution dated 30th March, 1981 as being unreasonable and arbitrary. Having upheld the aforesaid resolution dated 30th March, 1981 it would be difficult to accept the submission that the Court wanted the settled position to be reversed by the rules subsequently made. I have, therefore, no hesitation in coming to the conclusion that the observation of this Court as contained in paragraph 47 of its judgment in the earlier batch of writ petitions does not help the case of the Respondents. This Court never intended to authorise the Government to frame a rule in such a manner as to deprive any of the Assistants of their vested or accrued rights relating to seniority. If the Court really wanted to unsettle the position as it obtained by operation of the resolution dated 30th March 1981, it would have struck down the resolution as invalid. The Court did not intend to do so, and therefore the observations must

be understood to provide a guidance for the future, and not as a direction to change the rule with retrospective effect.

36. This takes me to a consideration of the case of the Petitioners in CWJC No. 5313 of 1994 who have claimed that they should be equated with Assistants who were recruited pursuant to general competitive tests. Their case is that the office of the Advocate General held tests for selecting candidates and therefore, the State was not justified in discriminating between them and other candidates selected on the basis of competitive tests. This submission cannot be accepted, because admittedly the Petitioners never took the general competitive tests held in the year 1971 or in the year 1973. Like the other Petitioners who were candidates