

(1992) 07 PAT CK 0021

In the Patna High Court

Case No : Civil Writ Jurisdiction Case No. 474 of 1988

Gopal Prasad and Others and Arun Kumar

APPELLANT

Vs

State of Bihar and Others

RESPONDENT

Date of Decision : 17-07-1992

Acts Referred:

Citation : (1992) 07 PAT CK 0021

Judgement

N. Pandey, J.—These applications have been filed on behalf of the petitioners for quashing the final gradation list of the Assistant Engineers in Bihar Engineering Service Class II (hereinafter referred to as B. E. S. Class II) of the Public Works Department (For short "P. W. D .), published vide notification dated 12-1-1988 contained in Annexure 13 of C.W.J.C. No. 474 of 1988 and Annexure 16 in CWJC No. 3272 of 1988, whereby non-official respondents have been shown senior to the petitioners. In CWJC No. 3272 of 1988, a further prayer is made for quashing Annexure 16/1 dated 9-12-1987, whereby respondent No. 68 has been placed at serial No, 724 .A of the Gradation List.

A further prayer has been made for a direction to the respondent-State of Bihar to place the petitioners at proper place in the aforesaid gradation list and to give them the consequential benefits.

Both the writ applications along with intervention petitions, filed on behalf of Shashibhushan Prasad Singh and Shyam Badan Singh, have been heard together and with the consent of the parties, they are being disposed of by this common judgment

2. The writ petitioners were initially appointed as Assistant Engineers in B. E. S. Class II, henceforth for easy reference they are termed as "Direct Recruits", whereas the non-official respondents in both the applications were appointed as Engineer Assistant or Junior Engineer and subsequently they were promoted to the cadre of B. E. S. Class II.

3. For appreciating the controversy, which has to be resolved, a brief survey of

several sets of facts and rules, relating thereto, are necessary.

Petitioners of CWJC No. 474 of 1988 were appointed as Assistant Engineers against 1973 vacancies. On 12-7-1973, a request was made by the Joint Secretary, PWD to the Bihar Public Service Commission (hereinafter called "Commission") for recommending the names of 79 persons for appointments as Assistant Engineer. On 28-7-1973, the Commission invited applications for filling up those vacancies. In response to the advertisement, the petitioners and almost all the non-official respondents, who were working as Engineer Assistant applied. After holding interview for determining the suitability of the candidates, the Commission vide letter dated 3-9-1974, recommended names of 57 candidates in order of merit. It is stated that none of the non-official respondents qualified for selection. The recommendation was approved by the Cabinet on 4-4-1975. But no notification for appointment was issued. Therefore, the validity of the recommendation expired after one year. However, a request was made by the Government to the Commission for revalidation of the recommendation.

4. In the meantime, on 30-1-1976, the petitioners and others were appointed to the post of Assistant Engineer on ad hoc basis for six months or until the revalidation from the Commission. Subsequently, on receipt of the revalidation, the petitioners were regularised vide notification dated 27-3-1976.

5. The second writ application, namely, CWJC 3272 of 1988 has been filed on behalf of Arun Kumar who is the sole petitioner. He was appointed as Assistant Engineer on 29-7-1974 against a 1972 vacancy. In this case, besides the prayer for quashing Annexure 13, the gradation list, so far as it relates to the petitioner and the non-official respondents, an alternative prayer has also been made for fixing the seniority of those non-official respondents, with effect from their date of joining as Assistant Engineer, pursuant to the notifications dated 20-7-1974 as contained in Annexure 9 to this writ petition.

It is stated that in the notifications itself, it was directed that all the Engineer Assistants named in the notification would continue in the same capacity and will not be relieved, so long a different notification for their posting was issued. Thereafter, on 14-10-1974, another notification as contained in Annexure 10 was issue 1, whereby the Engineer Assistants mentioned in Annexure 9 were posted as Assistant Engineers at different places with effect from their date of joining.

6. On 22nd April, 1974, vide Annexure 5 to CWJC No. 474 of 1988, the Development Commissioner addressed a letter to the Principal Secretary, PWD and the Public Health Engineering Department, communicating a policy decision of the Government, dated 27-3-1972, for abolishing the cadre of Engineer Assistant in a span of three years, in six half yearly phases, on pro rata basis. The first phase of absorption was to be made effective on 30-6-1976. In the said letter, it was asserted that after the conversion of the posts and absorption of Engineer Assistants as Assistant Engineers, the strength of the Assistant Engineer, in B. E. S. Class II will increase. It was said that for the purpose of

recruitment to B. E. S. Class II, the cadre strength will be reckoned as at present and not by including the newly converted posts, created by absorbing the Engineer Assistants. It was made clear that new cadre strength of B. E. S. Class II shall be fixed after the abolition of Engineer Assistants cadre is completed. A copy of the said document has also been annexed as Annexure 4 to CWJC No. 3272 of 1988.

7. Like Engineer Assistants, a scheme was also adopted for absorption of Junior Engineers as Assistant Engineers by surrendering posts of Overseers (Junior Engineers). The said conversion and implementation was to be made as per the resolution of the Finance Department dated 1-3-1975, giving 30% pro-motion to the Junior Engineers as Assistant Engineers.

8. When the conversion of the posts was complete, a provisional gradation list of Assistant Engineers was published on 27-5-1978 (Annexure 10) of CWJC 474 of 1988) wherein, the petitioners (direct recruits) were shown senior to the non-official respondents. It is stated that none of the respondents or any other persons made any representation objecting to their position in the seniority list. It has been alleged that all on a sudden by notification dated 26-9-1976 (Annexure 11 of CWJC No. 474 of 1988), a revised provisional gradation list issued in which non-official respondents were shown senior to the petitioners. Being aggrieved by the aforesaid, the petitioners and other filed CWJC No. 1223 of 1987 for quashing the gradation list as contained in Annexure 11 of that writ application. A Bench of this Court by order dated 30-8-1987, noticing that it was not a final gradation list, permitted the petitioners to withdraw the writ application with an observation that while preparing the final gradation list, the State Government shall take notice of the Rules applicable to the cases of the parties for fixing their seniority. It was also observed until the final decision of the Government, benefits given to the petitioners or the respondents shall be ad hoc and of no consequence in determining their seniority. There after, final seniority list was published on 12-1-1988 wherein the promotees were shown senior to the petitioners.

9. The claim, of the petitioners and the intervenors are identical. Mr. Shree Nath Singh, learned Senior Advocate, appearing on behalf of the intervenors, has, therefore, advanced the main argument. It has been contended that purported promotion of the non-official respondents who were either Engineer Assistants or the Junior Engineers to B. E. S. Class II, has been made in utter contravention of the statutory requirement of the Bihar Engineering Service Class II Rules (hereinafter referred to as "the Rules") as contained in Appendix I of Bihar Public Works Department Code, Vol. II. The mode and manner of selection for promotion as given in the Rules have not been followed. On the contrary, promotions have been effected without adhering to the requirements. It is alleged, while giving promotion to Engineer Assistants, quota rules has not been followed. Several persons have been promoted against the vacancies which should be earmarked for the direct recruits. It is said that assuming these

respondents were promoted on ad hoc basis, in the cadre of Bihar Engineering Service Class II, they cannot be equated with the direct recruits who were appointed on the basis of their suitability and merit. In the alternative, it was urged that seniority of the promotees has to be counted from the date of their regularisation in the cadre and not from the date of appointment on ad hoc basis.

10. For proper appreciation of the controversies it would be appropriate to notice relevant provision of the Rules which are applicable to regulate the method of recruitment to the B. E. S. Class II in the department of Buildings & Roads for Public Works Department. The relevant provisions of the Rules are extracted below:

(1) The Service shall be recruited--

(i) by direct recruitment in accordance with the rules in Part II. or

(ii) by the promotion or transfer of officer already in Government service, permanent or temporary, in accordance with the rules in Part III.

(2) The Governor shall decide in each year in the number of vacancies in the service to be filled in that year by direct recruitment and by promotion respectively.

Rule 1 prescribes two modes of recruitment--

Direct recruitment and by promotion. Rule 2 envisages that the Governor shall decide the number of vacancies to be filled up in a particular year, by direct recruitment and promotion respectively, Part II of the rules deals with the procedure for direct recruitment whereas Part II deals with a procedure for promotion.

11. Admittedly, the petitioners are the direct recruits and their appointments were made against the vacancies of direct recruits notified by the Governor under Rule 2 of the Rules. As noticed, Part III of the Rules deals with promotion of the officers already in Service. Rule 11 (a) of the Rules prescribes procedure to be adopted while giving promotion as Assistant Engineer which runs thus:

11. (a) The Chief Engineer, shall nominate for appointment to the Service such number of Officers not exceeding one and a half times the number of vacancies to be filled as may be fixed in each year by the Governor. The Officers nominated by the Chief Engineer will be arranged in order of preference"

It would be proper in mention that vide a notification dated 3-1-1989, the Governor of Bihar, while exercising his power conferred by the provisions of Article 309 of the Constitution of India, has been pleased to amend Rule 11 (a) with effect from 26th February, 1969 (Annexure 23 of CWJC No. 474 of 1988).

12. Main plank of the argument is that there has been departure, in giving promotion to non-official respondents, of norms prescribed under the Rules as well as different decisions of the Government. It is said, as per the amended Rule

11(a) the Chief Engineer or the Engineer-in-Chief is required to nominate names for promotion to those who are found suitable. Rule 11 (a) says that only the Chief Engineer is empowered and not the Government. The respondents in their counter affidavits have taken a stand that the Government had taken the decision to promote all the private respondents and not the Chief Engineer. In reply to the aforesaid, it is urged that if the Rule empowers the Chief Engineer or the Engineer-in-chief to nominate such officers for the promotion, the Government cannot, in absence of any rule framed under Article 309 of the Constitution of India, take away the power of the Chief Engineer.

It is alleged that all those who were in the cadre of Engineer Assistants have been nominated for promotion en bloc without fixing any quota. There is no document or averment in the counter affidavit to show that while making such nomination, merit and suitability of the Engineer Assistants were examined. It is further urged that as per Rule i 1 (a) of the Rules, the Chief Engineer is required to nominate any number not exceeding 1 1/2 time against the vacancies to be filled up for each year by the Governor. It is further urged that even the decision of the Government dated 22-4-1974 as contained in Annexure 5 as also dated 26-2-1969 as contained in Annexure 15 both of CWJC No. 474 of 1988 prescribing mode of promotion or absorption to the B. E. S. Class II has not been followed.

13. learned Counsel further submitted that in absence of the Chief Engineer, as per rule 11 (a) of the rules, the decision of the Government in such situation was not justified. In support of the aforesaid, reliance has been placed over the decisions in the case of The Purtabpore Co., Ltd. Vs. Cane Commissioner of Bihar and Others, and Ex. Capt. K. Balasubramanian and Others Vs. State of Tamil Nadu and Another, .

It is urged, when a particular statute prescribes a procedure to do a certain thing in a particular manner, the same cannot be changed or altered by an executive instruction. If the statute gives power to do the certain thing in a certain manner, the same has to be done in that manner. A reference has been made to a case of State of Gujarat Vs. Shantilal Mangaldas and Others, . It would be relevant to quote a passage from paragraph 54 of this judgment which runs thus:

54. ...Land required for any of the purposes of a town planning scheme cannot be acquired otherwise than under the Act, for it is a settled rule of interpretation of statutes that when power is given under a statute to do a certain thing in a certain way the thing must be done in that way or not at all

Similar view was taken in the case of Nazir Ahmad v. Emperor 1973 PC 253(1). It would be relevant to quote a passage from the judgment at page 257 column 2 which runs as below:

...The rule which applies is a different and not less well recognised rule, namely that where a power is given to do a certain thing in a certain way the thing must be done in that way or not at all. Other methods of performance are necessarily

forbidden....

14. It was next submitted that while absorbing the promotees, quota rules have been completely violated. Their absorption was made without fixing the number of vacancies and prescribing quota to be filled in.

15. It has been stated that in the years 1973, in the C. E. S. Class II, the total number of vacancies was 152 for appointment as Assistant Engineers out of which 79 posts were to be filled by direct recruitment and the remaining 73 posts had to be filled up by promotion from the rank of Engineer Assistants and Junior Engineers in the said years. Out of 73, 60 posts had to be filled up from Junior Engineers and 13 from Engineer Assistants. For previous year, that is, 1972, there were backlog of 14 posts which were carried over to the year 1973 to be filled up by promotion. In other words, 74 posts of Assistant Engineers had to be filled up by promotion in the years 1973. Against the aforesaid vacancies, it has to be noticed that on 28-12-1973, 57 of the Junior Engineers were promoted to the post of Assistant Engineers and remaining 17 Junior Engineers were promoted on 28-6-1975. Similarly, 13 posts to be filled up by promotion of Engineer Assistants, against 1973 vacancies, were filled up by notification dated 7-4-1974. On the basis of the afore-said, it is stated that the entire quota of Junior Engineers and Engineers Assistant for promotion to the post of Assistant Engineers were filled as per the quota notified. Therefore it is said that absorption of Junior Engineers or Engineer Assistants against their quota indicated above is violative of the Rules and, therefore, the same has to be struck down. In such circumstances, their seniority would be reckoned with reference to the date when a vacancy was available for them and not on the basis of their continuous of Section. In support of this submission, reference has been made to a case of The Direct Recruit Class-II Engineering Officers' Association and others Vs. State of Maharashtra and others, . It will be useful to quote the relevant passage from paragraph 19 of the judgment as below:

It means according to the learned counsel that if an officer was promoted within his quota, the rule would be applicable with reference to the date of promotion and not to the date of confirmation, but where his promotion was in excess of the permissible quota his seniority would be reckoned with reference to the date when a vacancy was available for him and not on the basis of his continuous officiation. He will be entitled to count his experience only on a vacancy being available to him in accordance with the quota rule.

In support of the argument that when promotion is made in excess of the quota, seniority would be reckoned with effect from the date of vacancy within the quota and previous promotion would be illegal. Reference has been made to a case of Keshav Chandra Joshi and others etc. Vs. Union of India and others, wherein their Lordships in paragraph 23 held as follows:

When promotion is outside the quota, the seniority would be reckoned from the date of the vacancy within the quota, rendering the previous service fortuitous.

The previous promotion would be regular only from the date of the vacancy within quota and seniority shall be counted from that of his earlier promotion or subsequent confirmation. In order to do justice to the promotees it would not be proper to do injustice to the direct recruits. The rule of quota being a statutory one must be strictly implemented and it is impermissible for the authorities concerned to deviate from the rule due to administrative exigencies or expediency. The result of pushing down the promotees appointed in excess of the quota may work out hardship but it is unavoidable and any construction otherwise would be illegal, nullifying the force of statutory rules and would offend Articles 14 and 16(1). Therefore, the rules must be carefully applied in such a manner as not to violate the rules or equality assured under Article 14 of the Constitution...

Reliance in this connection has further been placed over the relevant paragraphs viz. paragraphs No. 13 and 21 of the case reported in *The Direct Recruit Class-II Engineering Officers' Association and others Vs. State of Maharashtra and others*, . The relevant passages of these paragraphs are quoted here-under:

If an appointment is made by way of stop gap arrangement, without considering 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

It has, however, been rightly suggested on behalf of the appellants that when recruitment is from more than one sources there is no inherent invalidity introducing quota system, but as was observed in *A.K. Subraman and Others Vs. Union of India (UOI) and Others*, , the unreasonable implementation ,of such a rule may attract the frown of the equality clause. Further, if a rule fixing the ratio for recruitment from different sources is framed, it is meant to be respected and not violated at the whims of the authority. It ought to be strictly followed and not arbitrarily ignored

Reference has also been made to the relevant passage of paragraph 18 of the case reported in AIR SC 284 (supra) which runs thus:

...In order to become a member of the service he/they must satisfy two conditions, namely, the appointment must be in substantive capacity and the appointment has to be to the post in the service according to rules and within the quota to a substantive vacancy...

16. Dr. Sadannand Jha, who has appeared on behalf of the petitioners while adopting the argument of Mr. Shreenath Singh, who in fact had advanced" the

train plank of argument, in support of the writ applications, has contended that almost all the non-official respondents, pursuant to the advertisement contained in Annexure 2 of C.W. J. C. 474 of 1988, for direct appointment had appeared at the test and on publication of the result they were placed below in the merit list. Therefore at the time, they could not be appointed. It is stated that those respondents who could not get their appointment as Assistant Engineer on merit, ultimately, by the impugned, illegal and mala fide method got their entry in the cadre of Assistant Engineers and placed themselves above petitioners in the seniority list. It is said that considering all the factual and legal position, the gradation list of the Assistant Engineers was published in the year 1978 wherein the non-official respondents were placed below the petitioners. As no body objected to the aforesaid gradation list, the position of the petitioners vis-a-vis the non-official respondent in the list continued uninterrupted upto the year 1986. According to him, in case the non-official respondents were aggrieved, they should have in ordinary course challenged the decision of the Government on the basis of which the gradation list was prepared. In the aforesaid background as also in absence of the challenge to the policy decision, it was not open to the respondents to disturb the seniority of the petitioners and push them down the non-official respondents. According to him, in law it was not possible. In support of his contention, reliance has been made to the relevant passage of paragraphs 7 and 10 of the case of K.R. Mudgal and Others Vs. R.P. Singh and Others, . It would be useful to quote the passages as below:

7 The petitioners who filed the writ petition should have in the ordinary course questioned the principle on the basis of which the seniority lists were being issued from time to time from the years 1958 and the promotions which were being made on the basis of the said lists within a reasonable time. For the first time they filed the writ petition in the High Court in the years 1976 nearly 18 years after the first draft seniority list was published in the year 1958. Satisfactory service condition postulate that there should be no sense of uncertainty amongst the Government servant created by the writ petitions filed after several years as in this case. It is essential that any one who feels aggrieved by the seniority assigned to him should approach the court as early as possible as otherwise in addition to the creation of a sense of insecurity in the minds of the Government servants there would also be administrative complications and difficulties. Unfortunately, in this case even after nearly 32 years the dispute regarding the appointment of some of the respondents to the writ petition is still lingering in the Court. In these circumstances we consider that the High Court was wrong in rejecting the preliminary objections raised on behalf of the respondents to the writ petition on the ground of laches

x x x 10. We feel that in the circumstances of this case we should not embark upon an enquiry into the merits of the case and that the writ petition should be dismissed on the ground of laches alone.

17. Dr. Jha next contended that admittedly, the procedure for recruitment and

promotion to the Bihar Engineering Service Class II, is being governed by the Rules. The policy decision of the Government for abolition of the cadre of Engineer Assistants and their absorption as Assistant Engineers as incorporated in Annexure 5 are not in consonance with the Rules. Although the State Government is empowered to frame rules or adopt any policy decision regulating service condition of its employees but the same must be in consonance with the statutory rules. However, in absence of any statutory rules, no doubt the Government can issue executive instructions or adopt any policy decision prescribing procedure for regulating service conditions but the same has to be issued by an order of the Governor. Any such decision not having been issued in the name of the Governor cannot have the test of Article 166(1) of the Constitution of India. In support of this contention, he has placed reliance over a case of *Bachhittar Singh Vs. The State of Punjab*, wherein the Constitution Bench of the Supreme Court held that an order of Revenue Minister is not an order of the State Government, unless it was expressed in the name of Raj Pramukh as required under Article 166(1) of the Constitution of India. The order has to be expressed in the name of the Governor before it is communicated.

In this regard, he has also placed reliance over a case of *State of Bihar and Others Vs. Kripalu Shankar and Others*. In this case also while taking support from the case of *Bachhittar Singh v. State of Punjab (supra)*, their Lordships held that opinion of the Minister or State officials in the file cannot be regarded as an order of the State Government, opinion or decision becomes an order of the Government only when it is issued in the name of the Governor and communicated to the person concerned.

Reliance has also been placed over a case of this Court in the case of *Ashok Kumar Singh v. State of Bihar & others* 1979 BBJC 595. In this case also, with respect to an order issued by the Minister, it was held that of course a Minister can take a decision but it has to be made and expressed in the name of the Governor.

18. Dr. Jha submitted that by an executive instruction the State can make a provision with regard to a service matter which was not covered by the Rules. By the policy decision contained in Annexures 5 and 6 of CWJC 474 of 1988, the State Government cannot be permitted to override any of the provisions of the Statutory Rules, framed under Article 309 of the Constitution. In support of his contention, he has placed reliance over a case of *Paluru Ramkrishnaiah and Others Vs. Union of India (UOI)* and *Another*. While answering similar proposition, their Lordships held that an executive instruction could make a provision only with regard to service matter which was not covered by the statutory rules and that such executive instruction, could not override any provisions of the rules framed under Article 309 of the Constitution.

19. Dr. Jha has also prayed for quashing the notification dated 31-1-1989 (Annexure 23) issued by the State Government during pendency of the application, whereby the rules relating to method of recruitment of the Bihar

Engineering Service Class II in the Public Works Department, issued vide notification 23-12-1938, has been amended, retrospectively that is, from 26-2-1969. It is urged that giving retrospective effect to the aforementioned amendment is bad in law and, therefore, the same is ultra vires to the Rules itself. It has been made with the sole motive to frustrate the claim of the petitioners. Therefore, that part of the notification whereby change has been made according to Mr. Jha is a mala fide exercise of power, to legislate a thing which in fact was not there in the Rules before the said amendment. It is urged that the impugned amendment has been deliberately made in order to safeguard the interest of the non-official respondents.. To elucidate the effect of a mala fide legislation giving its retrospectively reliance has been placed over a case of B.S. Yadav and Others Vs. State of Haryana and Others, in paragraph 78. He has also referred to a case of State of Gujarat and Another Vs. Raman Lal Keshav Lal Soni and Others, where in paragraph 52 of the report it has been held that the legislature is undoubtedly competent to legislate with retrospective effect to take or impair any vested right required under existing laws but since the laws are made under a written Constitution and have to conform to dos and don'ts of the Constitution, neither prospective nor retrospective laws can be made so as to contravene Fundamental Rights. The laws must satisfy the requirements of the Constitution today taking into account the accrued or acquired rights of the parties today. The law cannot say, twenty years ago the parties had no rights, therefore, the requirements of the Constitution will be satisfied if the law is dated back by twenty years. A legislature cannot legislate today with reference to a situation that obtained twenty years ago and ignore the march of events and the constitutional rights accrued in the course of twenty years. That would be most arbitrary, unreasonable and a negation of history. Past virtue (constitutional) cannot be made to wipe out present vice (constitutional) by making retrospective law.

It is further urged by the impugned amendment (Annexure 23) the eligibility criteria of non-official respondents for appointment to the post of Assistant Engineer has to be judged on the relevant date and not subsequently. Vacancies to the posts in question is with respect to the year 1972 or 1973. The eligibility criteria of the candidates, has to be judged at the relevant time of the vacancy. In support of the aforesaid proposition. Dr. Jha has placed reliance over a case of P. Mahendran and others Vs. State of Karnataka and others, . Relevant portion of paragraph 11 of this report reads thus:

11. ...If a candidate applies for a post in response to advertisement issued by Public Service Commission in accordance with requirement , Rules he acquires right to be considered for selection in accordance with the then existing Rules. This right cannot be affected by amendment of any Rule unless the amending Rule is retrospective in nature. In the instant case the Commission had acted in accordance with the then existing rules and there is no dispute that the appellants were eligible for appointment, their selection was not in violation of the Recruitment Rules. The Tribunal in our opinion was in error in setting aside

the select list prepared by the Commission.

20. Mr. Rajendra Prasad Singh has appeared on behalf of the sole petitioner in CWJC No. 3272 of 1988. He has adopted the general arguments of Mr. Shreenath Singh and Dr. Jha so far the facts relate to both the writ applications. However, he has made additional prayer which is exclusively applicable to the facts of the present case. I, therefore, first of all, would like to dispose of those issues which concern this application alone.

The petitioner joined as Assistant Engineer on 1-10-1974 whereas the non official respondents initially were absorbed as Assistant Engineers, on ad hoc basis, for six months vide different notifications dated 13-6-1974 and 20-7-1974. Therefore, on 7-2-1975, the Commission recommended the names of all the non-official respondents except respondents Nos. 14, 20, 61 and 63. Accordingly on 5-5-1975, Annexure 8, the notification was issued, appointing all the non-official respondents except respondents Nos. 14,20,62 and 63. It is stated that prior to the notification dated 5-5-1975, no other order or notification was issued, revalidating the period of ad hoc appointment of the non-official respondents, which was only for a period of six months. According to Mr. Singh, after expiry of six months, it is deemed that these respondents were not in service. Rather the presumption would be that after expiry of six months, there was a break in their service. Therefore, the notification dated 5-5-1975, regularising their services with effect from the date on which they were appointed on ad hoc basis, was completely illegal and without jurisdiction. It is urged that in any view of the matter, the effect of the notification dated 5-5-1975 (Annexure 8) will be from the date on which it was issued and not retrospective. In support of his contention, he has placed reliance over a case of P. D. Agarwal and Ors. v, State of U. P. and Ors. AIR 1987 SC 1976. In the said case it was held that the period of service of purely ad hoc employees or employees on purely officiating basis cannot be reckoned for determination of their seniority as they are not members of service as per the service rules. It would be appropriate to quote the relevant finding of the Supreme Court in the aforesaid report at paragraph 25 as below:

25. We further hold that so far as the temporary Assistant Engineer who have been appointed substantively to temporary posts and have been working for years together after being duly recruited and selected by the Public Service Commission as recorded under the service rule; have become members of the service but so far as purely ad hoc employees or employees on purely officiating basis or employees purely for a temporary period in the cadre of Assistant Engineer in Public Works Department being not members of the service in accordance with the service rules are not entitled to have the benefit of their such adventitious, purely ad hoc and temporary service being not appointment substantively even to a temporary post will not be reckoned for determination of seniority unless and until they become member of service in accordance with the provisions of service rules. Only those ad hoc appointees whose service have been regularised by the regularisation rules framed under proviso to Article 309

of the Constitution after being duly selected by the Selection Committee and becoming member of the service, will be entitled to seniority only from the date of order of appointment after selection in accordance with those regulations as provided in Rule 7 of the Regulation.

21. In my view, the facts of the aforementioned case are quite different. In that case, it was noticed that Rule 23 of U. P. Service Engineer Class II Rules, as amended in 1971, expressly debar Assistant Engineers, who have been appointed long before the appointment of direct recruits under the amended Rules of 1969, to have their long years of service as Assistant Engineer after being appointed substantively and after being members of the service fulfilling all the test prescribed within the meaning of Rule 3 of Rules, 1936 and also Rules 3 (b) as amended by 1969 amendment to be left out in fixation of seniority. Here in the given case, there is no such rule prescribing modality for fixing of seniority. On the other hand, it would be relevant to notice that for regular absorption of the non-official respondents as back as on 28-5-1974, the proposal of the State Government for obtaining concurrence of the Bihar Public Service Commission was made and accordingly on 7-2-1975, the recommendation of the Commission was also obtained by the Government for regularisation of the ad hoc appointment of these respondents. Therefore, in the aforesaid background, it cannot be urged that after expiry of the period of six months, the appointment of non-official respondents which was made on ad hoc basis stands terminated.

22. Yet there is another hurdle against the petitioner in questioning the notification of regularisation of the non-official respondents at such a belated stage which was made as far back as on 7-2-1975. Admittedly, the ad hoc or final absorption of the non-official respondents or Assistant Engineers was not challenged by the petitioners at an appropriate stage. Therefore, in that view of the matter also the petitioners cannot be permitted to question the initial absorption of the non-official respondents or their final regularisation at this stage.

23. The other submission which has been advanced by Mr. Singh for a direction to the respondent State to fix the seniority of those non-official respondents with effect from their date of joining which was pursuant to the notification dated 1-10-1974, as contained in Annexure 10. It is pertinent to notice that the notification as contained in Annexure 9 for ad hoc appointment of certain set of Engineer Assistants, including respondent Nos. 14, 20, 31, 62, 63 and 69, 70 was issued on 20-7-1974 indicating therein that the persons named in the said notification shall not be relieved until a fresh notification for their posting as Assistant Engineer is issued. It was also notified that pending fresh notifications, they shall continue in the same capacity. Thereafter the notifications for their posting and joining were issued on 1-10-1974. It has also been notified that the petitioner joined as Assistant Engineer on 29-7-1974 as direct recruit. Therefore, it is urged that in any view of the matter the seniority of the petitioners vis-a-vis those non-official respondents whose names were mentioned in the notification

Annexure 9, has to be fixed with effect from their date of joining as Assistant Engineer. The petitioner having joined as Assistant Engineer, before the joining of the aforementioned respondents, has to be declared senior, in support of his submission, Mr. Singh has placed reliance over a case of Dr. Amarjit Singh Ahluwalia v. State of Punjab and Ors. 1975 (1) SLR 171. It would be relevant to quote a relevant passage from paragraph 10 of the judgment as below:

10 The test for determining seniority in the integrated cadre laid down by clause (2) (ii) of the memorandum dated 25th October, 1965 was the length of continuous service from the date of appointment in the group. The appellant contended that continuous service in a post could commence only when the incumbent took charge of the post and not earlier and, therefore, though respondents Nos. 3 to 19 were promoted under the order dated 8th April, 1964, their continuous service in the post of promotion in PCMS Class 1 did not commence until after 25th April, 1964 when they took charge of their respective posts of promotion and hence the length of their continuous service in PCMS Class I was less than that of Dr. Jagit Singh and the appellant in Public Health Service, Class I. This contention is fallacious in that it fails to give sufficient importance to the words "from the date of appointment" and ignores the true meaning and effect of the order dated 8th April, 1964, First let us see what the words "date of appointment" mean ? Are they synonymous with date of the order of appointment ? We think not. An order of appointment may be of three kinds. It may appoint a person with effect from the date he assumes charge of the post or it may appoint him with immediate effect or it may appoint him simpliciter without saying as to when the appointment shall take effect. Where the order of appointment is of the first kind, the appointment would be effective only when the person appointed assumes charge of the post and that would be the date of his appointment. It would be then that he is appointed. But in a case of the second kind which is the one with which we are concerned since the order dated 8th April, 1964 appointed respondent Nos. 3 to 19 to PCMS Class I "with immediate effect", the appointment would be effective immediately irrespective as to when the person appointed assumes charge of the post. The date of his appointment in such a case would be the same as the date of the order of appointment. It is, therefore, obvious that so far as respondents Nos. 3 to 19 were concerned, the date of their appointment was 8th April, 1964 and the length of their continuous service in PCMS Class I was required to be reckoned from that date...

24. Normally, in absence of any statutory rule, the seniority of a Government employee, in view of several decisions of the Supreme Court, has to be fixed with effect from the date of entry of such employee in the service either by promotion or by direct recruitment. Apart from aforesaid, in this regard reference can be also made to other cases of Supreme Court, namely, AIR 1977 251 (SC) and Paramjit Singh Sandhu and Others Vs. Ram Rakha Mal and Others, .

There is no denial that Engineer Assistants who were named in the notification

contained in Annexure 9, joined as Assistant Engineers after issuance of notification dated 1-10-1974 (Annexure 10).

It has been noticed by the Supreme Court in the case of Dr. Amarjit Singh that an order of appointment is mostly of three kinds, namely, (i) it may appoint a person with effect from the date he assumed charge of the post, (ii) or it may appoint a person with immediate effect and (iii) it may appoint a person simplicitor without saying as to when the appointment shall take effect.

In other words, where the order of appointment is of the first kind, such appointment would be given effect only when the person concerned assumes charge of the post and accordingly that would be the date of his appointment. On the date of joining itself, it can be said that he is appointed. In the present case, it has been noticed that in the notification as contained in Annexure 9 dated 20-7-1974, Engineer Assistants including respondent Nos. 14, 20, 31, 62, 63, 70 and 79 were appointed on ad hoc basis. It was clearly mentioned that such Engineer Assistants shall not be relieved until a fresh notification for their posting and joining was issued, as result of which, admittedly, such Engineer Assistants continued to function in same capacity so long a fresh notification for their posting was not issued. Ultimately, on 1-10-1974, a notification for their posting and joining as Assistant Engineer was issued. In view of the decision of the Supreme Court, as indicated above, it is obvious that so far as those Engineer Assistants who were appointed on ad hoc basis on 20-7-1974 vide notification as contained in Annexure 9 are concerned, their date of appointment would be 1-10-1974. Therefore, their length of continuous service as Assistant Engineer would be reckoned from the date of their joining.

As I have notice, admittedly, the petitioner assumed charge to the post of Assistant Engineer on 29-7-1974 as a direct recruit. Therefore, the length of his continuous service for the purpose of seniority has to be reckoned from the said date. In that view of the matter, I have no option but to hold that the petitioner in CWJC No. 3272/88 is entitled to get seniority over such Engineer Assistants who assumed charge as Assistant Engineers pursuant to notification dated 1-10-1974.

25. With respect to the claim of the petitioner against respondent No. 68 Ram Krishna Dubey, it is urged that his seniority should be fixed with effect from his date of appointment as Assistant Engineer like the petitioner and not with effect from the date of appointment on ad hoc basis. It is stated that pursuant to the advertisement dated 6-1-1973, respondent No. 68 had also applied for direct recruitment. Subsequently, his name was recommended by the Commission along with the petitioner, placing him at serial No. 33 whereas the petitioner's name at serial No. 19. He was also appointed along with the petitioner vide notification dated 29-7-1974 (Annexure 3). As this respondent was initially appointed as Engineer Assistant, his name was also included in the notification dated 2-7-1974 giving him ad hoc appointment for six months. Pursuant thereto, he joined on 16-7-1974 on ad hoc basis. But while absorbing all other non-

official respondents, pursuant to the recommendation by the Bihar Public Service Commission, the name of this respondent was not included in the notification dated 5-5-1975 (Annexure 8). In fact, when the order of posting" of different Asst. Engineers was issued through notification dated 29-7-1974, the effect of notification with respect to ad hoc appointment of respondent No. 68 was cancelled which can be gathered from the notification as contained in Annexure 3 itself. It is stated that the said order of cancellation was in fact not challenged by respondent No. 68 at any point of time. Rather, the direct recruitment of respondent No. 68 made on 29-7-1974 was confirmed along with the petitioner vide memo No. 11082 dated 9-6-1978 as his ad hoc appointment was already cancelled. A copy of the said notification is Annexure 18 wherein the name of the petitioner was placed at serial No. 130 and the name of respondent No. 68 was placed at serial No. 142. In fact, respondent No. 68 was not confirmed or regularised along with other Engineer Assistants who were absorbed in the first phase. In this circumstance, it is urged that the petitioner is bound to be declared senior to respondent No. 68 who was already below in the merit list as also in the letter of appointment dated 29-7-1974 whereby they were appointed.

26. Mr. Sarjendo Mukherji, appearing for respondent No. 68, submitted that although the name of the petitioner was included in the notification dated 29-7-1974, Annexure 3, appointing him as Assistant Engineer on direct recruitment basis but he did not join as such. In fact, he was appointed as Assistant Engineer as an absorbee in accordance with the Government policy decision dated 22-4-1974 (Annexure 4) vide notification dated 13-6-1974. He also joined as such on 16-7-1974. In fact this respondent objected to the Government with respect to his appointment as direct recruit as Assistant Engineer. The entries in the last column of the notification (Annexure 3) cancelling the earlier notification of the appointment of respondent No. 68 as an absorbee was completely illegal. Subsequently also, this respondent filed a representation on 2-8-1978, claiming his position of seniority in the gradation list above Lallan Prasad Singh at Serial No. 717, that is, just below Ashok Kumar Singh of Serial No. 716. Thereafter on due consideration the Government accepted the claim of the petitioner and allowed his seniority to be maintained as absorbee allotting seniority at serial No. 724-A vide notification dated 9-12-1987 as contained in Annexure 16/1.

27. There is no dispute that respondent No. 68 was initially appointed as Engineer Assistant. In view of the public decision of the State, while abolishing the cadre of Engineer Assistant and absorbing them in the cadre of Assistant Engineers, he along with other Engineer Assistants were appointed on 13-6-1974, as Assistant Engineer on ad hoc basis. Thereafter on 2-7-1974, the order of his posting against the post of Assistant Engineer was issued. In that view of the matter, he joined on 16-7-1974. The notification of his appointment as Assistant Engineer on direct recruit basis was issued on 29-7-1974. It appears before issuance of aforementioned notification, he had already joined on 16-7-1974 on ad hoc basis. It has been categorically stated by the respondents

that he did not join pursuant to the notification dated 29-7-1974, contained in Annexure 3. The petitioner also has not been able to state that the respondent pursuant to the notification contained in Annexure 3 joined as Assistant Engineer.

Only thing pointed out that by the notification contained in Annexure 3 itself where by the petitioner was directly appointed, his initial appointment as Assistant Engineer on ad hoc basis was cancelled. It has been pointed out that against the said order as also for correction in the seniority list, petitioner filed representations before the concerned authorities from time to time. And, ultimately, by the notification dated 19-12 1987, as contained in Annexure 16/1, the claim of respondent No. 68 of his seniority over Sri Lallan Prasad Singh (serial No. 725) was allowed and he was placed at serial No. 724-A which is just below Ashok Kumar Singh (serial No. 724).

In view of undisputed fact that respondent No. 68 joined on 16-7-1974 on ad hoc basis, pursuant to the notification dated 13-6-1974, as also he never joined as Assistant Engineer, pursuant to the notification contained in Annexure 3 appointing him on a direct recruitment basis. I have no option but to hold that the State Government was perfectly justified in making correction in the gradation list vide notification as contained in Annexure 16/1. In that view of the matter, I find no merit in the contention of Sri Singh so far as it relates to respondent No. 68.

28. To answer the main question which is common in both the writ applications, whether the absorption of non-official respondents as Assistant Engineers was in contravention of the statutory requirement of the Rules, it would be appropriate to notice the submissions of the learned advocates appearing on behalf of different respondents.

Mr. Sarjendu Mukherji, Senior Advocate appearing for the respondent Nos. 14, 20, 31 and 68, contended that unlike the Bihar Engineering Service Class I and also the Bihar Electrical Engineering Service Class II Rules, the Bihar Engineering Service Class II Rules to which this writ application is concerned, contain apart from normal provisions for direct recruitment and promotion, a special provision in Rule 1 (ii) for appointment to the service of officers by transfer has also been made. Rule 2 empowers the Governor to decide each year the number of vacancies to be filled up by direct recruitment and promotion, whereas for the purpose of filling up the post by transfer of officers in B.E.S. Class II the Governor is not required to decide the number of vacancies. In part III of the Rules, a procedure for promotion of the officers already in service has been laid down but no procedure has been prescribed regarding appointment by transfer. Therefore, in absence of statutory rule, providing procedure for appointment by transfer, the State Government issued its policy decision dated 22-4-1974 (Annexure 5) supplementing statutory rules, prescribing procedures to be followed for absorption by transfer.

29. It is stated that the policy decision of the Government dated 22-4-1974 as

contained in Annexure 5, to abolish the cadre of Engineer Assistant and absorb them in different phases in B. E. S. Class II is not under challenge. According to him, in fact the petitioners could not challenge the said decision at this stage. Therefore, in absence of challenging the aforesaid decision, the petitioners cannot get any relief in the present writ application.

30. This is not in dispute that Engineer Assistants, pursuant to the policy decision of the State Government for their absorption joined as Assistant Engineer much before the joining of the petitioners. However, their final absorption was subject to the concurrence of the Bihar Public Service Commission, Admittedly, thereafter the Bihar Public Service Commission granted concurrence to their appointment on 7-2-1975. The stand of the petitioners had been that the Engineer Assistant could not have been appointed as Assistant Engineer by absorption before the concurrence of the Bihar Public Service Commission was obtained. To negative the aforesaid contention, Mr. Mukherji referred to the decision in the cases of G.P. Doval and Others Vs. Chief Secretary, Government of U.P. and Others, and S. L. Kaul and Ors. v. Secretary to Government of India, Ministry of Information and Broadcasting, New Delhi and Ors. AIR 1989 SC 2688.

31. In order to justify the policy decision of the Government for absorption of Engineer Assistants, as per the procedure prescribed in Annexure 5, which in fact was in absence of the statutory provision in B.E.S. Class II, learned Counsel has placed reliance over the case of Vinay Kumar Verma and others Vs. State of Bihar and others, . In the said case also there was no statutory provision in the Rules regarding appointment by transfer/absorption. The Supreme Court upheld the decision of the respondents for merger of the District Engineers along with their posts in the Executive Engineers cadre in B. E. S. Class 1.

32. He has further contended that the petitioner cannot get any benefit on the basis of ratio laid down in the case reported in Keshav Chandra Joshi and others etc. Vs. Union of India and others, . This case has no relevancy to the facts of the present case. The said case deals with a matter of seniority between direct recruits and promotees. There was no consideration with respect to appointment by transfer or absorption as in the present case. In that, it was noticed that the statutory rules provide that persons appointed in the substantive capacity, shall be deemed to be in a particular service. For the purpose of determining seniority, no such provision exists in the Rule in question.

33. On the other hand, the cases of Engineer Assistants are fully covered by the decision of the Supreme Court reported in The Direct Recruit Class-II Engineering Officers" Association and others Vs. State of Maharashtra and others, wherein it was held that since respondents continued uninterruptedly till the regularisation or permanency and confirmation on the advice of the Public Service Commission, shall be entitled to count seniority in the cadre. Apart from aforesaid, reference can be made to another case of the Supreme Court of Roshan Lal and Others Vs. International Airport Authority of India and Others, to show under such circumstances, it would be just and proper to determine the seniority of the

parties with reference to the dates of their entry in B. E. S. Class II.

34. M. J. P. Shukla, who appeared on behalf of Respondent No. 57, while adopting the argument advanced by Mr. Mukherji contended that absorption of the Engineer Assistants was not by promotion, rather it was a case of absorption by transfer. He contended that in absence of statutory rules as per the cabinet decision for abolition of the cadre of Engineer Assistants and their absorption as Assistant Engineers the State Government announced its policy decision contained in Annexure 5. Thereafter in different phases all the Engineer Assistants were absorbed as Assistant Engineer.

He further contended that the gradation list which was prepared in the year 1978 was in contravention of all the statutory provisions. The Engineer Assistants including Respondent No. 57 filed representations for correction of seniority list and after consideration of all the relevant materials, as also the law laid down by the Full Bench of this Court in the case of Bishundeo Manto and Ors. v. The State of Bihar and Ors. 1982 BBCJ 45 by the impugned gradation list final correction was made and the Engineer Assistants were declared senior.

35. He further submitted that on behalf of the petitioners, it has been wrongly contended that it was a case of promotion and not absorption. Although in different orders, issued by the State Government, as also in some of counter affidavits, absorption of the Engineer Assistants is referred as Promotion. But in view of the policy decision of the State Government it was categorically mentioned that inclusion of the Engineer Assistants in IV E. S. Class II would be on account of absorption by transfer. Wherever word "promotion" has been used, it is on account of clerical aberration. In fact from the letter of the Finance Department to the Accountant General, Bihar, dated 11-3-1976, it would appear that in case of absorbees on appointment as Assistant Engineer, they were allowed normal pay, vide Rule 78-A (i) of the Bihar Service Code. They will be drawing pay scale next above the pay they were drawing as Engineer Assistants, whereas their juniors who came there by promotion as promotees, draw much higher pay as per Rule 78 read with item No. (i) in Appendix VI of the Bihar Service Code. In the aforesaid circumstances, in order to avoid anomalous situation the State Government decided that for the purpose of pay fixation, absorbees would get the benefits available to the promotees. In the said letter it was clearly mentioned that the word "promotion" has only been used for the purpose of pay fixation.

36. While justifying the stand of the Government in adopting a policy decision for absorption of the Engineer Assistants, he contended that on account of administrative exigencies, the State Government is entitled and has power to re-organise the existing cadres or amalgamate some of them and, therefore, such policy decision is not open to judicial review unless it is proved to be mala fide, arbitrary or irrational. He has further contended that in absence of statutory rules, under the provisions of Rules of Executive Business, the State Government or its officials are authorised to issue notifications like the policy decision in

question. It has been noticed that in the particular rule, there was no provision for absorption of the ex cadre Engineers Assistants in the Cadre of Assistant Engineers. Therefore, in the aforesaid background, if the policy decision is not in conflict with Rules or contrary to its any provision, the executive can issue executive directions to do a thing in a particular manner. In support of his contention, he has placed reliance over the following decisions of the Supreme Court in the cases of:

- (i) B.N. Nagarajan and Others Vs. State of Mysore and Others, .
- (ii) A. Sanjeevi Naidu, etc. Vs. State of Madras and Another, .
- (iii) Devdutta and Ors. v. State of M. P. and Ors. 1991 (1) (All India Services Law Journal Vol. 1) 168 SC.
- (iv) Director, Lift Irrigation Corporation Ltd. and Others Vs. Pravat Kiran Mohanty and Others, .
- (v) Bishundeo Mahto and Ors. v, The State of Bihar and Ors. 1982 BBCJ 45.

I shall consider and refer to the aforementioned cases subsequently at the time while recording my finding on the issue.

37. Mr. Sunil Kumar, learned Advocate, has appeared on behalf of the respondent No. 19. Besides the relevant contention made by the learned Advocates for the other respondents, he contended that the gradation list in question was prepared after taking into consideration the initial date of ad hoc appointment of the non-official respondents i.e., 13-6-1974, the date of the appointment of the petitioner of C.W.J.C. No. 3272 of 1988 i.e., 29-7-1974 and the date of appointment of the petitioners of C.W.J.C. No. 474/88 i.e., 30-1-1976.

It is stated that the petitioners have not challenged the initial appointment of the non-official respondents nor they have challenged the policy decision of the State Government contained in Annexure 5 for merger and absorption of the posts of Engineer Assistants. Therefore, in absence of challenge having been made to the policy decision, the petitioners cannot be allowed to challenge the resultant action of the aforementioned decisions. In other words, according to him, a thing which cannot be done directly, the petitioners wanted to get it done indirectly.

He contended that admittedly absorption of Engineer Assistants to B. E. S. Class II is by abolishing and upgrading the post of Engineer Assistants. When it is admitted that absorption of the Engineer Assistants an Assistant Engineers was on account of merger, it can be safely held that Part III, Rule 11 of the rules has no application to the facts of the present case. Similarly, the question of fixing the number of vacancies and quota by the Governor as per Rule 2 of the rules does not arise. This was not a case of either direct recruitment of promotion.

An argument was advanced on behalf of the petitioners that names of the non-official respondents were not sent by the Engineer-in-Chief, as required under Rule 11 of the Rule before the Commission for concurrence, the recommendation

by the Commission in favour of non-official respondents was of no consequence. In order to negative the aforesaid contention, learned Counsel has referred to the letter of the Commission as contained in Annexure 9/1 dated 7-2-1975 wherein a reference to the letter of the Chief Engineer dated 28th May, 1974 has been made. It is stated that by the aforementioned letter, the Chief Engineer had sent a proposal before the Commission for concurrence with respect to the names of non-official respondents. Therefore, there is no substance in this argument of the learned Counsel for the petitioners also.

Mr. Sunil Kumar in support of his aforementioned contentions has also placed reliance over the cases of Manohar Singh Sahay and Co. Vs. Jogendra Singh Kalra and Another, , Rabindranath Bose and Others Vs. The Union of India (UOI) and Others, , Kartik Charan Jha and six Others Vs. The State of Bihar and 18 Others, and an unreported case, namely, CWJC No. 127 of 1972. I shall discuss the facts and findings of the aforementioned cases subsequently while recording my findings on the merit and contentions raised.

38. Mr. Shivesh Chandra Mishra has appeared on behalf of respondent No. 62, Ashok Kumar. He has also adopted argument advanced on behalf of different advocates appearing for the respondents. However, he has drawn my attention towards Annexure-B to the counter affidavit of respondent No. 62 wherein it was decided that the placement of particular respondents in the gradation list was with respect to their respective dates of notification for entry in the cadre and, therefore, the seniority was fixed accordingly. It is stated that initially, name of this respondent was not included in the first phase of the list but by Annexure B, dated 12-9-1977 his name along with respondent No. 63 was included and accordingly correction was made in the seniority list.

39. Learned Advocate General, appearing for the State, contended that there is no substance in the argument advanced on behalf of the petitioners that the promotion of the Engineer Assistants as Assistant Engineer was not in accordance with Rule. It was a case of abolition of the cadre and absorption. The "rule" has no application in such cases. After abolition of the cadre, it had to merge with the cadre of the Assistant Engineers. At the time of merger it was decided that for purpose of conversion of the post of absorption, ten posts of Engineer Assistants are equivalent to seven posts of Assistant Engineers and total conversion was to be made in that ratio. In the "Rules" there is no provision for merger or transfer of a cadre to other. Therefore, in absence of any provision in the "Rules" on account of administrative exigencies, the State Government was quite competent to adopt a policy decision for such merger and absorption. The procedure and desirability etc., for absorption has to be traced out in the policy decision itself. Conditions of the rules were practically waived out. While referring to Paragraph 2 (vii) of the policy decision, he submitted that for absorption of the Engineer Assistants the recommendation of the Board or the Chief Engineers was not required. However, the concurrence of the Bihar Public Service Commission was necessary. He also referred to the condition in

Paragraph 4 of the policy decision wherein it was made clear that owing to conversion and absorption, the cadre strength will increase but for the purpose of recruitment to B. E. S. Class II cadre, the strength will still to be reckoned as at present and not by including the newly converted posts created specially to absorb the Engineer Assistants. Requirement of Rule 2 for fixing the number of vacancies by the Government was not applicable in the case of absorption.

It is stated in absence of any statutory rule for merger or absorption to B. E. S. Class II, the State Government was quite competent to adopt the policy decision in question.

40. The matter of policy does not attract the applicability of the equality clause. It may cause hardship to any individual but the same cannot be questioned unless the decision is arbitrary, irrational and mala fide. It is discretion of the State to have difference cadres or one integrated cadre in a particular class of service, In support of his contention he has placed reliance over the cases of (i) Reserve Bank of India Vs. N.C. Paliwal and Others, ; B.M. Shukla and Ors. v. The State of Bihar and Ors. 1976 (1) SLR 256 , K.S. Vora and Others Vs. State of Gujarat and Others, , Vinay Kumar Verma and others Vs. State of Bihar and others, and (v) Kartik Charan Jha and six Others Vs. The State of Bihar and 18 Others, .

He has further urged that the petitioners are not entitled to any relief unless the policy decision of the State Government, as contained in Annexure 5 is successfully assailed. Admittedly, the petitioners have not questioned the" jurisdiction of the State in adopting a policy decision for absorption of the Engineer Assistants as Assistant Engineers. Whether in absence of challenge to the policy decision, the petitioners are entitled for any relief ? In order to answer the aforesaid proposition, reliance has been placed over the following decisions:

- (i) Karam Pal etc. v. Union of India and Ors. 1985 (1) SLR 639;
- (ii) V, T. Khanzode and Ors. v. Reserve Bank of India and Anr. 1982 (1) SLR 731; and
- (iii) Kamal Kanti Dutta and Others Vs. Union of India (UOI) and Others, .

It was lastly contended that if the merger and absorption of the Engineer Assistants are on account of policy decision of the State, it cannot be successfully assailed. In the result, the seniority of the direct recruits vis-a-vis mergees/ absorbees shall be fixed strictly with reference to the date of their entry in that service either by promotion, absorption or by process of direct recruitment. In support of the aforementioned contentions, reliance has been placed over the decisions in the following cases:

- (i) Nirmal Kumar Chaudhary and Ors. v. State of Bihar and Ors. 1988 (1)SLR 611.
- (ii) AIR 1977 251 (SC) .
- (iii) Paramjit Singh Sandhu and Others Vs. Ram Rakha Mal and Others, .

41. After examining different set of facts and considering submissions advanced on behalf of the parties, in my view, the main question emerges for consideration whether absorption of the Engineer Assistants in different phases to Bihar Engineering Service Class II is by way of promotion or it is a case of absorption on transfer from a different service. If this is a case of promotion, whether the absorption of Engineer Assistants has been made in consonance with the statutory requirements of the Rules, framed under the Bihar Public Works Department Code to regulate the recruitment and promotion etc. to B. E. S. Class II of the Public Works Department and Irrigation Department.

42. According to the petitioners, the absorption of Engineer Assistants have been made by way of promotion, therefore, the same can only be done as per the requirement of the "Rules* whereas according to the respondents, this was not. a case of promotion rather it was on account of abolition of the cadre of Engineer Assistants and their absorption as Assistant Engineers. There is no provision under the P. W. D Code or under the Rules laying down criteria for absorption by transfer to Bihar Engineering Service Class II. There-fore, the absorption of Engineer Assistants has to be governed under the policy decision of the Government contained in Annexure 6 to C.W.J.C. No. 474 of 1988 and Annexure 4 to the other writ application.

43. I have noticed different set of facts, rules and several decisions of the Supreme Court as also of this Court as detailed above. Accordingly, having given anxious consideration in the facts and circumstances of the case, I am constrained to hold that entry of Engineer Assistants to Bihar Engineering Service Class II, pursuant to the policy decision of the State Government, dated 22nd April, 1974, was on account of abolition of cadre and consequent thereto transferring their service for absorption as Assistant Engineers. In other words, their absorption as Assistant Engineers cannot be termed as promotion, as envisaged under the Rules. Their absorption as Assistant Engineers has been made in accordance with the procedure prescribed under the policy decision itself.

44. I have noticed the laboured and learned argument of Mr. Shreenath Singh and Dr. Jha who. with their charismatic skill, tried to impress upon the Court to hold that absorption of the Engineer Assistants in B. E. S. Class II was made in utter disregard and contravention of the statutory requirements of the Rules framed under the P. W. D. Code, Since the argument of the learned Advocates prima facie was so attractive and interesting, I could not check myself but to notice their entire argument, supported by the provisions of law and different authorities of the Supreme Court as also of this Court. But upon consideration of certain facts and on interpretation of the policy decision of the State Government, I express my inability to hold that absorption of the Engineer Assistants was on account of their promotion as argued by Mr. Shreenath Singh and, therefore, their promotion was not in accordance with the Rules.

45. No doubt, in any event, on interpretation of the policy decision, if it was found that absorption of the Engineer Assistants was by way of promotion, in view of

the learned argument of Mr. Shreenath Singh as also different decisions placed by him, the Court would have no option but to hold that the promotion of the Engineer Assistants was in contravention of the statutory requirements. But since I have arrived at a different conclusion that this was not a case of promotion, it is not necessary to re-examine and consider the same set of arguments again.

46. It would be relevant to sketch as to what was the necessity for the State Government to adopt the policy decision for absorption of the Engineer Assistants as Assistant Engineers. From different set of arguments and the facts brought on the record, it appears that the Engineer Assistants although having possessed requisite educational qualifications for the appointment as Assistant Engineers, on account of certain administrative exigencies, as also considering the unemployment problem were employed as such and accordingly a separate cadre of Engineer Assistants was created. In the year 1973, State Government on the recommendation of the Cabinet, decided to abolish the cadre of the Engineer Assistants and absorb them in the cadre of Assistant Engineers. Accordingly, on 224-1974, a notification was issued communicating the decision of the Government to abolish the cadre of Engineer Assistants and their absorption as Assistant Engineers. The final absorption of the total strength of the Engineer Assistants was to be made in six phases by converting the posts of Engineer Assistants to that of Assistant Engineers. In case of shortage of posts due to conversion, for all the number of incumbents in the cadre, the State Government had to take steps for sanction of further posts. However, for absorption of Engineer Assistants as Assistant Engineers, the Selection of the Board of Chief Engineers was not necessary, But the concurrence of the Bihar Public Service Commission, for final absorption of the Engineer Assistants, was to be obtained.

Condition No. (iy) of the Policy decision indicates that owing to con-version of posts of Engineer Assistant Engineers to those of Assistant Engineer and absorption of the existing strength as Assistants Engineers, the strength of Assistant Engineers in Bihar Engineering Service Class II shall increase.

But for the purpose of recruitment to Bihar Engineering Service Class II, the strength will still be reckoned as at present and not by including newly converted posts, created specifically to absorb the Engineer Assistants. In other words, owing to conversion and absorption, the cadre strength will increase but for the purpose of direct recruitment, the cadre strength will be the same.

As it has been noticed, two modes of recruitment have been prescribed under the Rules, that is, direct recruitment and promotion. As per the requirement of Rule 2 the Governor has to fix the uumber of vacancies to be filled up by direct recruitment and promotion out of the cadre strength of B. E. S. Class II. Therefore, in this view of the matter, by the policy decision it made clear that for the purpose of direct recruitment, as per the provision of the rules, on account of conversion and absorption, the cadre strength will still be reckoned as at present and not by adding newly converted posts. It has been argued on behalf of the

petitioners that no quota as per the rule was fixed by the Government for absorption by the Engineer Assistants and for direct recruitment of the Assistant Engineers with respect to cadre strength which has increased on account of conversion and absorption.

I do not find any merit in this submission. As per the policy decision, the quota was to be fixed only with respect to present cadre strength of the Assistant Engineers and not by including newly converted posts.

It was also decided that in addition to phase-wise absorption, the Engineer Assistants shall also be entitled to 20% promotion on the basis of their quota in the cadre of Assistant Engineers, till the final abolition of the cadre of Engineer Assistants. In view of the aforesaid, the Engineer Assistants were entitled for 20% quota in the present cadre strength of Assistant Engineers and not by including newly converted posts until final abolition of the cadre. It will also be relevant to notice that absorption of the Engineer Assistants was by way of converting their posts as Assistant Engineers. In other words, the post of Engineer Assistants were upgraded. Admittedly, before upgradation or conversion, such posts were held by Engineer Assistants. I fail to understand what grievances the petitioners had if the Engineer Assistants were absorbed in the cadre along with their posts.

47. It has been noticed that the decision of the State Government as to the absorption of Engineer Assistants in the cadre of Assistant Engineers is not under challenge. The absorption of the Engineer Assistants took place in the year 1974 itself. The petitioners have rightly not challenged the absorption of the Engineer Assistants and the policy decision. Because the validity of absorption of the non-official respondents cannot be challenged at this stage i.e. after such a long delay in view of the principle laid down by the Supreme Court in the case of *Roshan Lal and Others Vs. International Airport Authority of India and Others*, .

48. A question arises whether the State Government had power to adopt a policy decision for abolition of the cadre of Engineer Assistants and their absorption as Assistant Engineers. It has been noticed that under the Rules framed under the Bihar PWD Code, there are three modes of recruitment, to B. E. S. Class II, namely, direct recruitment promotion and transfer with respect to those persons who are already in service. Admittedly, there is no provision under the Rules or/and circular to regulate the cases of merger or absorption of different cadre to the cadre of B. E. S. Class II. It is well settled where statutory rules are silent, the Government can adopt a policy decision and issue circular or resolution, to fill up gaps in the Rules. In such a situation, the policy decision, circular or notification issued by the State Government will have the full force of statutory law. In this regard, reference can be made to the case of *Sant Ram Sharma Vs. State of Rajasthan and Another*, . Similar view was taken by this Court in the case of *Kartik Charan Jha and six Others Vs. The State of Bihar and 18 Others*, . The facts of the case of *Kartik Charan Jha* and the present case are quite similar. In that case the State Government decided to merge Junior Branch and Senior

Branch into one unified cadre. Junior Branch officers were merged in three phases. At that time there were 300 junior officers. The dispute arose between direct recruits and merged officers. All the mergees had become senior branch officers before the direct recruits could join. According to them mergees were ex-cadre. Direct recruits claimed their appointment against declared vacancies as per rule by the Government. It would be proper to quote relevant findings of the report from paragraph 11 as below:

11. Having held that the "Mergees" entered the cadre of Senior branch officers, question now arises whether the direct recruits, who had been appointed against the declaration of vacancies by the Governor for 1974, they should be permitted to rate their seniority from that date. If the old order had continued, it can-not be doubted that the year of allotment of the direct recruits would have been 1974. But in the changed circumstances, it is difficult to hold that the direct recruits can reckon their seniority from 1974. The quota rule for appointment to the Senior Branch evaporated with the merger...

Further:

Thus the importance attached to year of allotment in 1974 disappeared in 1975. Consequential change were required to be made in the 1953 Rules. That is why, it was ordered that the rules should be suitably amended. Unfortunately, no step has been taken in this regard. In the circumstances, however, I have no doubt that the year of allotment lost all significance. That having lost significance and the "Mergees" having joined the rank of Senior Branch officers at a point of time when the direct recruits were not in existence, the former must reckon their seniority from the time they became members of the cadre of the Senior branch officers. The direct recruits were nowhere till December, 1976, when they were appointed by Annexures 2 and 3. Till the entire batch of "Mergees" had filed the rank of Senior branch officers, the direct recruits had not found their berth in the Senior branch. The position is, therefore, obvious that the "mergees" must be held to be senior to the direct recruits.

In this connection, it would be useful to quote passage from paragraph 13 of this report also as under:

13. learned Counsel for the direct recruits (petitioners in CWJC No. 2335 of 1982) contended that the circular cannot be given the status of statutory rule and, therefore, it cannot be brought in aid to the "mergees". I regret I have difficulty in accepting this submission. It was laid down way back in the case of Sant Ram Sharma Vs. State of Rajasthan and Another, , that where the rules are silent, Government circular resolution may well fill the gap....

49. Yet another reference can be made to a case of B. M, Shukla and Ors. v. The State of Bihar and others, 1976 (1) SLR 256. It would be appropriate to quote the passage of the report from paragraph 5 as below:

5. There can be no doubt that ordinarily the respondents as well as the

petitioners formed one unit although it may have been a heterogeneous conglomeration. That, however, does not conclude matters. There can be no doubt that Government has the power to create a cadre, to split a cadre or to amalgamate two separate cadres into one. The only restriction in the matter of splitting or amalgamation of cadres it must be done on a rational and reasonable differentia. If a nexus can be found between the act of the State Government and the object in view, such a basis for classification must be held to be constitutionally valid....

In the case of Reserve Bank of India and Ors. v. N. C. Paliwal and Ors. AIR 1976 SC 2346 a similar controversy to that of the present case arose for consideration before the Supreme Court and their Lordships after considering the relevant facts held thus:

15. Now, the first question which arises for consideration is whether the Reserve Bank violated the constitutional principle of equality in bringing about integration of non-clerical with services. We fail to see how integration of different cadres into one cadre can be said to involve any violation of the equality clause. It is now well settled, as a result of the decision of this Court in Kishori Mohanlal Bakshi Vs. Union of India, Article 16 and a fortiori also Article 14 do not forbid the creation of different cadres for Government service. And if that be so, equally these two Articles cannot stand in the way of the State integrating different cadres into one cadre, it is entirely a matter for the State to decide whether to have several different cadres or one integrated cadre in its services. That is a matter of policy which does not attract the applicability of the equality clause....

While dealing with the power of an employer to frame rules even though prospect of promotion in future were likely to be prejudiced by induction of new set of rules to regulate the seniority, the Supreme Court in the case of K.S. Vora and Ors. v. State of Gujarat and Ors. AIR 1978 SC 2348, held that if the rules were made bona fide to meet the exigency of the service, no entertainable grievances can be made. While repelling the main contention that the Rules regarding seniority was retrospective in operation and takes away the vested right of the appellants of their prospect of promotion, the Supreme Court in the aforesaid case in paragraph 2 (2nd placitum) held as follows:

Prior to the bifurcation of the State of Bombay into two States.--Maharashtra and Gujarat the Subordinate Secretariat Service was divided into four grades (i) Clerk-cum-typist, (ii) Junior Assistant; (iii) Senior Assistant: and (iv) Superintendent. After the formation of the Gujarat State, the State decided at stages to switch over to the common cadre in respect of all the four grades of the subordinate service. Before common grades have been formed promotion was granted department wise, When ultimately a common cadre came into existence it was realised that if seniority as given in the respective departments--were taken as final for all purposes there would be prejudice. Undoubtedly the common cadre was for the purpose of increasing the efficiency by introducing a spirit of total competition by enlarging the field of choice for filling up the

promotional posts and in the interest of discipline too after common cadre was formed, the general feeling of dissatisfaction on account of disparity of seniority became apparent. The 1977 Rules were introduced in this background to ease the situation. The scheme of this rule protected the rank then held by every member of the service notwithstanding alteration of seniority on the new basis. This, therefore, made it clear that accrued benefits were not to be interfered with, to that extent, the 1977 Rules were retroactive. In spite of the protection of Rule regarding the post then held, the Rule (Rule 4) brought about a change in the inter se seniority by adopting the date of initial recruitment and the length of service became the basis for refixing seniority. Total length of service for such purpose is a well known concept and could not be said to be arbitrary. Undoubtedly, one of the consequences of the change in the basis was likely to affect prospects of promotion--a matter in future but when no challenge could be made to creation of common cadre by the Government and in fact no such challenge was raised in the petition and second-ly the rules were made bona fide to meet exigencies of service no grievance could be made of the rules.

In the case of Vinay Kumar Verma and others Vs. State of Bihar and others, , a question arose for consideration whether by an executive order the State Government can merge the cadre of district engineers which is a part of Rural Engineering Organisation, with the cadre of Executive Engineer, governed by statutory rules, called "the Bihar Engineering Service Rules, 1939". The Supreme Court while upholding the decision of this Court in paragraph 11 held thus:

11. We agree with the High Court that the appellants, who were Assistant Engineers in Bihar Engineering Service, Class II; were not affected adversely by the impugned order in any manner. The District Engineers were merged in the cadre of the Executive Engineers along with the permanent posts which they were holding on the date of merger. The cadre of the Executive Engineers was thus enlarged with the result that more vacancies would become available in future to be filled by way of promotion from the cadre of Assistant Engineers. The merger would thus operate to their advantage rather than disadvantage.

Reference has also been made to the case of Director, Lift Irrigation Corporation Ltd. and Others Vs. Pravat Kiran Mohanty and Others, wherein it was decided that the Government or the Corporation on account of administrative exigency is entitled to and has power to re-organise the existing cadres or amalgamate the same or carve out a separate cadre. The decision to amalgamate the existing cadres into two cadres was on account of administrative exigencies. Policy decision was not open to judicial review unless it is mala fide, arbitrary or bereft to any discriminable principles. In the aforementioned case, on account of adjustment of the cadre the writ petitioners lost some place in seniority. It was held that an employee has no fundamental right for promotion but had only right to be considered for promotion, For such action of the State, it cannot be said that there has been violation of the rights guaranteed under Articles 14 and 16 of the Constitution.

50. In view of the facts stated above, it has to be held that the State Government had an authority to adopt a policy decision for the merger of the cadre of Engineer Assistants by abolition of their cadre and absorbing them as Assistant Engineers.

51. Coming to the contention of Dr. Jha that since the decision of the Government has not been issued in the name of the Governor, therefore, in view of the provisions of Article 166(1) of the Constitution, this cannot be termed as an order of the Government or a notification issued on behalf of the Government. I have already noticed the cases over which he has placed reliance, namely *State of Bihar and Others Vs. Kripalu Shankar and Others*, *Bachhittar Singh Vs. The State of Punjab*, and 1959 BBCJ 395 (supra). I have also discussed the contention of Dr. Jha in detail while noticing his general argument. I am unable to bear with the aforementioned contention, firstly, on the ground that the impugned policy decision was enforced as far back as in the year 1974. This is not the case of the petitioner that they had challenged the policy decision on any occasion earlier. On the other hand, in the present case also no prayer has been made for quashing the said policy decision. In that view of the matter, at this stage, it would not be proper and justiceable to unsettle the things which took effect as far back as in the year 1974. The Supreme Court in the case reported in *Roshan Lal and Others Vs. International Airport Authority of India and Others*, held that the validity of appointment by absorption cannot be challenged after such a long period. Similar view was taken in the case of *Rabindranath Bose and Others Vs. The Union of India (UOI) and Others*, and their Lordship in paragraph 35 of the report held as follows:

35. We are not anxious to throw out petitions on this ground, but we must administer justice in accordance with law and principles of equity, justice and good conscience. It would be unjust to deprive the respondents of the rights which have accrued to them. Each person ought to be entitled to sit back and consider that his appointment and promotion effected a long time ago would not be set aside after the passing of a number of years...

52. Apart from the aforesaid, it is admitted position that there was no statutory rule, dealing with the case of merger or absorption as discussed above. It is not obligatory under the provisions of Article 309 of the Constitution to make rules of recruitment etc. before a service can be constituted or a post is filled up. The State Government has executive power in relation to all the matters to make laws through its executive power. Under the Rules of Executive Business, the Government officials are authorised to issue notifications on behalf of the Government. Similar is the position of Development Commissioner in the present case. It is not necessary to mention that if there is a rule or an Act on the subject, the executive cannot ignore or act contrary to it. In this regard, a reference can be made to a decision of the Supreme Court in the case of *B.N. Nagarajan and Others Vs. State of Mysore and Others*, .

53. On the other hand, the respondents have strongly contended that in absence

of challenge to the policy decision of the Government, the petitioners cannot be allowed to challenge the resultant action. The Supreme Court while dealing with a similar contention in the case of Karam Pal etc. v. Union of India and Ors. (1985) 1 SLR 639, held as follows:

13. In course of the hearing counsel for the petitioner referred to instances where a direct recruit coming into the cadre several years after others coming into the cadre from the select list had been assigned seniority over such promotees. This was explained by counsel for the respondents to have been the outcome of giving effect to clause 3 of Regulation 3 as it stood prior to December, 1977 without the proviso. The instances relied upon were found to be even prior to the introduction of the proviso. In the absence of challenge to the Rules and the Regulations resultant situations flowing from compliance of the same are not open to attack. Occasion for similar grievance would not arise in future as the proviso in the relevant regulation and clause (4) and (5) of the Regulation 3 will now meet the situation.

14. Neither in the writ petitions nor in argument before us any challenge was advanced against the vires of the Rules. One of the known patterns of constituting public service, particularly in the executive side, is to draw officers both by promotion as also by direct recruitment. The promotion is fixed depending upon the nature of the service, therefore, availability of suitable man power and other relevant considerations. The petitioners have, rightly not challenged before us the scheme under which a moiety of the substantive vacancies in the Assistants' grade is to be filled by direct recruitment and the other by promotion through select lists.

While summing up the case, the Supreme Court, finally concluded in paragraph 17 as follows:

17 In fact, unless the Rules and Regulations are successfully assailed, the select lists are not at all disputable.

53-A. The petitioners have, therefore, rightly not challenged the decision of the Government for integration of cadres into one cadre by abolition of the cadre of Engineer Assistants. The decision of the Government did not violate the equity clause. Even Article 14 or 16 do not forbid creation of amalgamation of different cadres by the Government, This is a matter of policy. In this regard a reference can be made to the case of V. T. Khanzode and Ors. v. Reserve Bank of India and Anr. 1982 (1) SLR 731, wherein it has been held in paragraph 41 as follows:

41 while setting aside the judgment of the High Court, this Court held that the integration of different cadres into one cadre did not involve violation of the equality clause and that neither Article 14 nor Article 16 forbids creation of different cadres in Government service. Whether there should be a combined seniority in different cadres or groups was, according to the Court, a matter of policy which did not attract the applicability of the equality clause. The integration of non-clerical with clerical services which was effectuated by the

Combined Seniority Scheme was, in the circumstances, held to be not violative of the guarantee contained in Articles 14 and 16.

54. It is also relevant to notice that in such a situation, where persons from ex-cadre are being adjusted to the cadre, hardship is bound to cause to some of the persons. This is well settled that such individual hardship cannot stand in the way of the State to frame a rule, objectively, with respect to the service condition of its employee. For such hardship, it would not be safe to test the constitutionality of service rule. In this regard a reference can be made to the case of Kamal Kanti Dutta and Others Vs. Union of India (UOI) and Others, of the report reads as follows:

52. In regard to the individual instances cited before us as exemplifying the injustice caused to the promotees, it is not safe to test the constitutionality of a service rule on the touchstone of fortune of individuals. No matter with what care, objectivity and fore-sight a rule is framed, some hardship, inconvenience or injustice is bound to result to some members of the service. The paramount consideration is the reconciliation of conflicting claims of two important constituents of service, one of which brings fresh blood and the other mature experience.

55. Now coming to the other grievance of the petitioners that in any view of the matter, seniority of the non-official respondents in the cadre of Assistant Engineers should be fixed with effect from their date of final absorption which was made after receipt of concurrence of the Bihar Public Service Commission. Admittedly, the rule in question does not contain any provision for promotion to the cadre nor in the policy decision contained in Annexure 5 such provision finds place. In such a situation, it has been repeatedly held by the Supreme Court that unless some special rule consistent with Articles 14 and 16 of the Constitution exists, the seniority of the Government servant is determined with effect from the date of entry in service. The seniority had to be fixed on the basis of total length of service in the grade and on the basis of determining inter se seniority. In support of the aforesaid proposition reference can be made to the case of Nirmal Kumar Chaudhary and Ors. v. State of Bihar and Ors. 1988 (1) SLR 681 . Reference in this regard can also be made to the case of AIR 1977 251 (SC) .

In this connection, reference can be made to another decision of the Constitution Bench of the Supreme Court in the case of The Direct Recruit Class-II Engineering Officers' Association and others Vs. State of Maharashtra and others, , whereof sub-para (B) of paragraph 44 reads thus:

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

It would also be useful to notice a finding of the Supreme Court from paragraph 13 of the case reported in AIR 1989 1688 (SC) wherein it was held that seniority

should be fixed with effect from the date of upgradation and not with effect from actual inclusion. The relevant finding of the report is quoted as below:

13 It may be that the actual inclusion was made at a later date, but the Union of India was quite justified in fixing the inter se seniority of the Monitors with effect from June 31, when the posts were upgraded and became equivalent to Grade IV posts in the C. I. S.

56. There is no dispute that in view of the policy decision of the State, the posts of Engineer Assistants were abolished and they were merged with the cadre of Assistant Engineers by way of absorption. This is an admitted fact that initial absorption of the Engineer Assistants as Assistant Engineers was on ad hoc basis and subsequently on receipt of the recommendation by the Commission, notification for final absorption was issued. According to the petitioners, the respondents are not entitled to count their seniority with respect to any period prior to their final absorption after receipt of the recommendation of the Commission.

I have noticed the rival contention that after approval of the Commission, the ad hoc absorption of the non-official respondents has been followed by confirmation and final absorption. In such a situation, the Supreme Court in the case of G.P. Doval and Others Vs. Chief Secretary, Government of U.P. and Others, , held thus:

15...It is thus well settled that where official appointment is followed by confirmation unless a contrary rule is shown, the service rendered as officiating appointment cannot be ignored for reckoning length of continuous officiation for determining the place in the, seniority list. Admittedly, that has not been done and the seniority list is drawn up from the date on which the approval/selection was made by the Public Service Commission in respect of each member of the service, which is clearly violative of Article 16 and any seniority list drawn up on this invalid basis must be quashed.

57. It has already been noticed that there is no statutory rule or circular laying down criteria for fixing seniority of Assistant Engineers. In view of the several decisions of the Supreme Court, under the circumstances mentioned above, the length of continuous officiation prescribed a valid principle of seniority.

For the reasons stated above, I have no option but to reject the submission made by the learned Counsel for the petitioners and the intervenors in this regard and hold that seniority of the non-official respondents (absorbees) in the cadre of Assistant Engineers has to be fixed with reference to their date of initial entry in the cadre of Bihar Engineering Service Class II.

58. In the premises aforesaid, the writ application bearing C.W.J.C. No. 474 of 1988 is dismissed. However, writ application bearing C.W.J.C. No. 3272 of 1988 partly succeeds to the extent of finding which has been recorded in paragraphs 23 and 24 of this judgment. But in the circumstances of the case, there shall be

no order as to costs.

I.P. Singh, J.

59. I agree.