
(2012) 11 PAT CK 0012
In the Patna High Court
Case No : CWJC No"s. 141 and 880 of 2008

Hem Kant Roy

APPELLANT

Vs

The Government of Bihar and Others

RESPONDENT

Date of Decision : 06-11-2012

Acts Referred:

Constitution of India, 1950 — Article 14, 16, 16(1), 309

Citation : (2013) 2 PLJR 316

Hon'ble Judges : Navaniti Pd. Singh, J

Bench : Single Bench

Advocate : Abhay Singh, Binod Kanth, Jitendra Singh, Rajendra Narain, Umesh Kumar, Subodh Jha, Kunj Bihari Sharan, Abhinav Shrivastava, Gopal Prasad Roy, Sarvesh Kumar Singh, Kamal Kishor Jha, Brisketu Sharan Pandey, Anil Upadhyay and Ms. Anju Narain, for the Appellant; Subhash Pd. Singh, Bajrangi Lall, Satish Narain Singh, Ms. Rani Kumari for the State of Bihar, Mr. Dhruba Mukherjee for the State of Jharkhand, Kumar Brajendra Nath and Subodh Chandra Jha for the BPSC, for the Respondent

Judgement

Navaniti Pd. Singh, J.—All these writ petitions were heard at length and with consent of parties are being disposed of at this stage itself. These seven writ petitions have been filed at different times by officers of the Bihar Forest Service, a service of the State Government under the Bihar Forest Service Rules, 1953 (hereinafter referred to as the Rules), as amended from time to time. Ultimately, the question to be determined by this Court is, as to the dispute regarding inter se seniority of various petitioners and private respondents of the said service because during long pendency of these writ petitions, the Government has, on 2.7.2010, published and notified the final gradation list.

2. The first four writ petitions were filed prior to the publication of the final gradation list and as such, by various applications in view of subsequent events, the final gradation list is now in question. I may indicate that out of the first four writ petitions, two of them virtually became infructuous upon publication of the final gradation list but were not permitted to be withdrawn by this Court as the

petitioners were respondents in the last three writ petitions filed later challenging the final gradation list. Position of parties having materially changed in the final gradation list. Court thought it proper to decide once and for all, all disputes of inter se seniority so that the matter could effectively be put to rest in presence of all parties concerned and/or affected.

3. In CWJC No. 141 of 2008, which was filed on 2.1.2008 the sole petitioner Hem Kant Roy, who is positioned at serial no. 212 in the final gradation list (now published), had originally challenged that he ought to have been shown senior to private respondents No. 5 to 15, who were direct recruits, pursuant to advertisement issued in 1985 and who were appointed on 14.12.1987 as against the 40 vacancies advertised. The apparent ground was that he had been appointed and was working as Assistant Conservator of Forest (ACF) since 31.3.1986 but was wrongly shown as appointee with effect from 26.12.1989. He claims his appointment vide amended Rule 3 (aa). By amendment petition, he has challenged the final gradation list in which he has been placed at serial no. 212 whereas the contesting respondents are in the group starting with serial no 121 upto 157. Therefore, in this case, the question would be as to the relative date of appointment of the petitioner in the service vis-a-vis the private respondents.

4. In CWJC No. 880 of 2008, again filed by petitioner Hem Kant Roy on 9.1.2008, he had originally challenged the validity of appointment of the private respondents No. 6 to 13 and consequential seniority given to them over the petitioner. The private respondents are direct recruits appointed pursuant to advertisement issued in 1985 but were appointed after initial appointments, as per advertisement, had been completed. They were, thereafter, from the panel already prepared subsequently appointed on 13.4.1988 and 10.8.1989. During pendency of the writ petition, by amendment petition, the final gradation list was brought on record by which petitioner was given seniority over this group of appointees. Petitioner was placed at serial No. 212 and the private respondents were placed in the group from serial 321 to serial 338. This petition, in view of the final gradation list, virtually became infructuous but in view of the fact that these very private respondents had challenged the final gradation list including the position given to the petitioner, this writ petition was not permitted to be withdrawn so that the matter could effectively be decided.

5. The third writ petition that is CWJC No. 4855 of 2008 has been filed by Digambar Thakur on 17.3.2008. This petitioner is one from the group of those Range Officers of Forest who were shown to be promoted in this service with effect from 30.3.1990 though promotions were granted in the years, 1990, 1991 and 1992. Petitioner is at serial no. 272 and this group is positioned between serial nos. 250 to 276. Petitioner originally claimed that the appointments of the private respondents being respondents No. 6 to 23 were illegal and, as such, they could not be granted seniority over the petitioner and his group. These respondents were direct recruits of 1988 and 1989 pursuant to the

advertisement issued in the year 1985 wherein initial appointment of 39 persons has already been made, these respondents were subsequently appointed from the same list beyond the advertisement and consequently petitioner claimed seniority over them. Upon final gradation list being published, these respondents having been pushed down to serial nos. 321 to 338, the grievance was over but now he (petitioner) claims seniority over the direct recruits who were appointed on 30.3.1990 pursuant to advertisement issued in 1987 claiming that they were then wrongly appointed and at best being appointments pursuant to the same transaction, petitioner, being promotee, would rank senior. Out of this group of 35 direct recruits, 19 were made, by amendment petition, respondents No. 24 to 33 and they figure in the final gradation list between serial No. 215 to serial No. 249 with the exception of respondent No. 34 Hem Kant Roy and respondent No. 35 Nagendra Choudhary. In respect of respondent No. 34 Hem Kant Roy, the challenge now is that there was no vacancy for his appointment. He has been placed at serial No. 212, as noted earlier. So far as respondent No. 35 is concerned, he has been placed at serial No. 266 in the final gradation list above the petitioner who is at serial No. 272. The challenge is that respondent No. 35 Nagendra Choudhary was also a promotee and promoted in the same transaction as the petitioner from Range Officer of Forests where he was junior to the petitioner and as such, on promotion, he has to remain junior. It may be noted here that pursuant to notices issued to respondent No. 35, which was validly served, he has chosen not to contest and has not entered appearance.

6. The fourth writ petition is CWJC No. 6639 of 2009 and filed by three petitioners, namely, Awadhesh Kumar Ojha, Sanjay Kumar Sinha and Sudhir Kumar. The writ petition was filed on 18.5.2009. These writ petitioners are from the group of direct recruits who were appointed in the service on 30.3.1990 pursuant to advertisement issued in 1987. Originally, the writ petition was filed claiming seniority over the direct recruits appointed on 13.4.1988 and 10.8.1989 pursuant to advertisement issued in 1985 but after completion of appointments on vacancies advertised in that advertisement and beyond the advertised post. Upon the final gradation list having been published, these respondents being respondents No. 5 to 12 have been shown junior to the petitioners and, as such, the grievance of the petitioners, having been redressed, they had sought to withdraw the writ petition which was not permitted inasmuch as the question of seniority of the petitioners vis-a-vis the respondents was challenged by the respondents in other writ applications. In the final gradation list, these petitioners have been positioned between serial Nos. 215 to 249 and, as noticed earlier, the respondents have been positioned at serial Nos. 321 to 338.

7. The fifth writ petition being CWJC No. 10925 of 2010 has been filed on 14.7.2010 by Mihir Kumar Jha and Sunil Kumar Sinha challenging the final gradation list. They are the direct recruits appointed on 13.4.1988 pursuant to advertisement of 1985 but were appointed after the advertised vacancies were filled up. They have been positioned at serial Nos. 322 and 326 in the final gradation list which is dated 2.7.2010. They challenge their relegation below

several groups. First they challenged the seniority given to two promotees of the year, 1987 who have been placed at serial Nos. 167 and 209. The latter already having retired and are respondents No. 8 and 9. Then the challenge is to respondents No. 10 and 11 being appointees with reference to amended Rule 3(aa), namely, T.N. Jha and Hem Kant Roy who have been positioned at serial No. 211 and 212 respectively. Then the challenge is to the seniority given to the direct recruits pursuant to advertisement of 1987 who were appointed on 30.3.1990 and who are grouped from serial 215 to serial 249. These direct recruits are respondents No. 12 to 20. They also claim seniority over the promotees who have been promoted with effect from 30.3.1990 and who are grouped from serial 250 upto 289. They are respondents 21 to 32.

8. The sixth and the seventh writ petitions being CWJC No. 11160 of 2010 by Patanjali Kumar Choudhary and Dinesh Kumar Das and CWJC No. 11337 of 2010 by Nand Kumar Manjhi and Naresh Prasad having been filed on 9th and 20th of July, 2010 are by the same group of persons and for the same relief as of the fifth writ petition being CWJC No. 10925 of 2010 (Mihir Kumar Jha and Another). In the last writ petition that is the seventh writ petition, respondent No. 25 Ramchandra Pandey has been positioned at serial no. 268. While supporting his position above the writ petitioners, he has claimed seniority over respondent No. 24 Nagendra Choudhary who is at serial no. 266 both being promotees, on the ground that Ramchandra Pandey (respondent No. 25) was senior as Range Officer of Forests and on promotion, he has been wrongly shown junior to Nagendra Choudhary (respondent No. 24).

9. In order to appreciate the controversy in detail, I deem it proper to first give a very brief factual configuration before adverting to facts in detail.

10. There are basically four groups of petitioners and one individual who are contesting inter se seniority matter upon publication of the final gradation list on 2.7.2010.

11. The first group, which I will refer to as direct recruits of the first phase of 1985 advertisement, is placed at serial no. 121 to 157 in the final gradation list. They are in all 39 in number appointed against advertisement issued in 1985 for 40 vacancies. They were appointed on 14.12.1987. One person, out of 40 appointed, resigned.

12. The next group, which I would refer to as direct recruits of the second and third phase pursuant to advertisement issued in 1985 after 40 vacancies, as advertised, had been filled up. In this group, 10 were appointed in 1988 and 8 in 1989. They had failed to make to the merit list for appointment at the first instance. This group is now positioned at serial nos. 321 to 338 in the final gradation list.

13. The third group are direct recruits appointed on 30.3.1990 pursuant to advertisement issued in 1987 and are positioned between serial Nos. 215 to 249.

14. The fourth group is of the promotees from the Range Officer of Forests who were promoted in 1990, 1991 and 1992 but with effect from 30.3.1990 and are positioned at serial Nos. 250 to 276 in the final gradation list.

15. The individual concerned is petitioner Hem Kant Roy who is respondent in several writ applications as well. He is a deemed direct recruit in terms of Rule 3(aa) of the Rules being originally Range Officer of Forests. He was originally appointed as ACF in 1986 but subsequently has been shown to be effectively appointed on 26.12.1989 to this cadre and is positioned at serial no. 212 in the final gradation list.

16. The direct recruits of the second and third phase of 1985 advertisement contend that they were appointed in 1988 and 1989 and their seniority must be reckoned from those dates. They have wrongly been relegated to the bottom of the seniority list below everybody whereas the other parties to the writ petition justify this action of the State contending that they had wrongly secured appointment having failed to be selected as against advertised post. Their appointments being rank illegality, they were rightly pushed down in the merit list after being regularized in the year 2005 instead of being dismissed.

17. The next major controversy of seniority is as between the direct recruits appointed on 30.3.1990 and the promotees who have been shown to be promoted with effect from the same date.

18. Petitioner Hem Kant Roy claims that direct recruits of first phase of 1985 advertisement were wrongly appointed in 1987. He was appointed as ACF on 31.3.1986 but wrongly shown to be appointed with effect from 26.12.1989. As such, he would rank senior even to this group of first phase direct recruit appointees. His seniority must be reckoned from 1986 when he was initially appointed as ACF and not from 26.12.1989. He should be treated as direct recruit in terms of Rule 3(aa) and not a promotee.

Facts

19. In 1985, pursuant to assessment, as made by the State Government, a request was made to the Bihar Public Service Commission (BPSC) for selecting and making recommendation for appointment to 40 vacant posts of ACF. On 24.7.1985, BPSC issued advertisement for 40 permanent posts of ACF in the pay scale indicated therein. The selection process started for the said 40 posts of ACF.

20. On 31.3.1986, Hem Kant Roy, on completion of Honours course and standing first therein, appointed as ACF and posted as such.

21. On 12.6.1987, Government again assessed further vacancies for appointment of direct recruits to the post of ACF as 40 and requisitioned BPSC for selection and recommendation.

22. In between 20.6.1987 to 17.10.1987, about 52 Forest Rangers were promoted to the Bihar Forest Service as ACF. They now figure at serial nos. 158

to 210 in the final gradation list.

23. It appears that BPSC, pursuant to the first advertisement issued on 24.7.1985, finalized the list for appointment of 40 ACF and sent it to the State Government. Some persons like Mihir Kumar Jha, Sunil Kumar Sinha, Nand Kumar Manjhi and others, who could not make it to the merit list and were, thus, not recommended for appointment by BPSC, petitioned the Minister for Forest and Environment on 21.8.1987 that as there existed more vacancies for direct recruits, notwithstanding the advertised vacancies having been recommended to be filled, they should also be considered and appointed. Again, similar application was also made on 6.11.1987 to the Secretary of the Department of Forest and Environment by the said persons.

24. It is curious to note that the vacancies first quantified and advertised on 24.7.1985 were only 40 which had already been recommended to be filled up by persons selected by BPSC and further, at the instance of State, on 12.6.1987, 40 more vacancies were sought to be filled up by fresh second advertisement, yet the State started considering these representations by persons who could not make it to the merit list pursuant to the first advertisement.

25. In the meantime, pursuant to recommendation as first made by BPSC, on 14.12.1987, 40 appointments of direct recruits to the post of ACF were made on permanent basis. It may be noticed that one of them resigned after joining. These are direct recruits of 1985 advertisement appointed in first phase and figure at serial nos. 121 to 157 in the final gradation list.

26. Pursuant to the further request of the State as made on 12.6.1987 for appointment of 40 more ACF, on 19.12.1987 BPSC advertised the second time for filling up by direct recruitment 40 more permanent posts of ACF on the pay scale so notified.

27. Notwithstanding the aforesaid, on persuasion of the State, from the merit list already prepared by BPSC pursuant to the first 1985 advertisement, BPSC sent 10 further names of persons who had not qualified earlier for appointment as ACF. This included Mihir Kumar Jha, Sunil Kumar Sinha, Patanjali Kumar Choudhary. Nand Kumar Manjhi and others and notwithstanding that the advertised vacancies had already been filled up, on 13.4.1988 these 10 persons were appointed as ACF. These are referred to as the direct recruit of 1985 in the second phase. Again, as there was further persuasion of the State, BPSC was requested to send 8 more names from the same very old list of 1985 advertisement. It is on record that BPSC protested that it could not be done but apparently surrendered before the State. The protest of BPSC is dated 25.6.1988. Pursuant to the request of the State, again 8 names were received from BPSC from the list of unsuccessful candidates of 1985 advertisement and they were then appointed on 10.8.1989 as ACF. This is referred to as the direct recruits appointed in third phase from 1985 advertisement.

28. As indicated above on 12.6.1987 itself. State had requested for 40 more

recommendations for direct appointment as ACF from BPSC pursuant to which BPSC had issued the second advertisement on 19.12.1987. The process of selection had started. While this was pending, it appears in the Department, on 9.7.1989, it was found that there were 81 vacancies in the cadre of ACF (Bihar Forest Service). It was pointed out that the quota of direct recruit and promotees to these posts being half and half, there would be position for 41 promotees from Forest Rangers to the post of ACF. It was noted that so far as 40 direct recruits to the post of ACF is concerned, BPSC had already issued advertisement on 19.12.1987 and the selection process had already started. Therefore, the necessity now for starting the process for promotion to the 41 available posts for promotees was required to be taken up.

29. It may be noted here that while this matter was being departmentally considered, on 30.3.1990, 35 appointments of direct recruits to the post of ACF were made by the State upon recommendation of BPSC pursuant to the 1987 second advertisement. In view of these appointments of direct recruits having been made on 30.3.1990, in the Department, decision was now taken that promotions should be finalized to the post of ACF at an early date and it was decided that the promotees would be granted promotion with effect from 30.3.1990, the date of appointment of the direct recruits. Apparently, this was because if the promotees and the direct recruits can be shown to be appointed on the same date then by virtue of Rule 35, the promotees would rank senior.

30. It appears, in the meantime, State, on 24.7.1989, published the then final gradation list. It may be noted here and will be discussed later that this final gradation list had shown the promotees of the year 1987 to be senior to the direct appointees of the first phase pursuant to 1985 advertisement which appointments were made on 14.12.1987. This led to litigation which was ultimately set at rest by the Apex Court in the case of Sanjay K. Sinha-II and Others Vs. State of Bihar and Others, While doing so, the Apex Court reversed the judgment of this Court in the case of Sanjay Kumar Sinha-II and Others Vs. The State of Bihar and Others, and quashed the final gradation list dated 7.3.1989. These promotees were directed to be pushed down in the list below these direct recruits.

31. It appears on 4.6.1990 pursuant to recommendation of the Departmental Promotion Committee, BPSC recommended the names for promotion of 10 Range Officers of Forest to the post of ACF in the cadre of Bihar Forest Service and, accordingly, State, on 17.8.1990, notified promotion to these 10 persons but with effect from 30.3.1990. Similarly, upon BPSC's recommendation dated 6.3.1991, 16 Range Officers of Forest were granted promotion by the State on 18.7.1991 but with retrospective effect on 30.3.1990. Again, pursuant to BPSC's recommendation dated 8.4.1992, 6 more Range Officers of Forest were granted promotion by the State on 2.9.1992 with effect from 30.3.1990. Thus, the total number of promotees to the post of ACF, which promotions were granted in 1990, 1991 and 1992, were 32 in all. They were all granted promotion

retrospectively with effect from 30.3.1990.

32. At this stage, it may be noted that so far as Hem Kant Roy is concerned who, as noted above, was appointed as ACF on 31.3.1986, there was a controversy raised. The Bihar Forest Service Rules, 1953 was amended on 26.12.1989 and Rule 3(aa) was inserted with retrospective effect. In various writ petitions filed to which Hem Kant Roy was also a party, this Court in the case of Shyam Bihari Prasad and Others vs. Union of India and Others and analogous cases since reported in 1996 (1) All PLR 425 held that Rule 3(aa) could not be made with retrospective effect. It would have prospective application only. It also, inter alia, held that Hem Kant Roy who fulfils the requirements of the said Rule could only be granted substantive promotion to the post of ACF in the cadre of Bihar Forest Service not before 26.12.1989 which position was again reiterated on the writ petition filed by Hem Kant Roy being the case of Hem Kant Roy Vs. The State of Bihar and Others, Accordingly, State notified and changed the date of substantive appointment of Hem Kant Roy as ACF in the cadre of Bihar Forest Service with effect from 26.12.1989. He has been shown as promotee instead of direct recruit as envisaged under Rule 3(aa).

33. Another important fact to be noted is that so far as the 18 direct recruits appointed in the second and the third phase pursuant to the advertisement issued in 1985 are concerned, there was serious objections being raised about the legality of their appointment. At one stage, the departmental Minister opined for their dismissal. The controversy was because the number of posts advertised was 40 in 1985. They were all filled up. The panel exhausted. Yet from the same panel and from the unsuccessful candidates, without further advertisement or examination, these 18 persons were appointed in 1988 and 1989, as noted above ignoring the fact that fresh recruitment process for 40 vacancies had already been initiated. The matter ultimately reached the Governor during President's Rule and a decision was taken by the Governor based on the two options available, that is, either to dismiss them and create litigations or to treat them as regularized. The Governor agreed with the recommendation to treat them as regularized and, as such, these 18 direct appointees of the second and third phase of 1985 advertisement were deemed to be regularized by order of the Governor on 3.10.2005. These facts are apparent from the file notings made available on the record of the case though no notification or order was immediately issued. It appears on 4.10.2010, though recognizing the service of these persons, it was notified that their service as ACF would be deemed to be regularized in view of order dated 3.10.2005. It may be noted that this notification is only in respect of 8 persons out of 18 such appointees. State explains that the reason for leaving out 10 is that upon bifurcation of the State, the remaining have gone to the State of Jharkhand and are not in Bihar Forest Service since 15.11.2000.

34. In view of various litigations, concluded and pending in relation to the issue of seniority, under directions from the Apex Court and this Court, State took up

the task of finalizing the gradation list. While doing so, it appears they found that in the cadre of Bihar Forest Service, there appeared to be only 133 substantively sanctioned posts. On number of occasions, in course of this litigation, this Court and the Court hearing the matters earlier, had called senior Government officials including the Secretary of the Department and the Principal Chief Conservator of Forests to explain the position but they were equally at loss. Some Governmental notifications, show that the sanctioned strength of the cadre was 277. Some show that the sanctioned post in the cadre were 172. Some show it was only 133. In the case of Sanjay K. Sinha-II (supra), the Apex Court had assumed it, upon certain affidavits to be 133 only. While undertaking this exercise, State was at a loss as to how promotions and appointments were made ignoring quota for the promotees and the direct recruits. As noticed by the Apex Court also, promotees were at a point of time occupying 84% of the posts as against 50%. Out of 125 ACF, 105 were promotees. In that view of the matter, it was thought proper by the State to create supernumerary posts all along.

35. Apparently, the calculations were being made by the Department on the basis of 277 sanctioned posts all along which was shown to be wrong by the Apex Court in the case of Sanjay K. Sinha-II (supra).

36. Here, it may be necessary to dilate a bit. As noticed above, apparently State was proceeding on the basis of 277 sanctioned posts in the cadre of Bihar Forest Service. This was sought to be done on basis of a notification in the form of resolution issued on 12.8.1987. The subject of the said notification was "determination of cadre strength of Bihar Forest Service". This notification showed the cadre strength totaling to 277 which has been noticed by the Apex Court in its judgment in the case of Sanjay K. Sinha-II (supra).

37. Sanjay K. Sinha-II, who was a direct recruit of the first phase pursuant to advertisement of 1985, and others had challenged the seniority given to the promotees of the year 1987 over them. The writ petitions were filed in the High Court in the year, 1989 when the first final gradation list was published showing the promotees senior to the direct recruits. One of the grounds raised before the High Court as well as the Apex Court in appeal was that this notification could not be said to be a notification creating sanctioned permanent posts. This notification was issued at the instance of the Departmental Minister without approval of the Finance Department or the Council of Ministers. If that be the position then there was no position available for the promotees who were already in excess of their quota. This Court did not accept the contention but the Apex Court held in Sanjay K. Sinha-II (supra) that there was difference between determination of cadre strength and creation of sanctioned post. The notification did not create sanctioned post. As noticed above, the Apex Court decided the matter in the year, 2004 assuming the cadre strength to be 133 and, thus, right from the time the said notification was issued in the year 1987, State had proceeded on a wrong premise of cadre strength being 277 for more than a decade and a half and all the calculations based on the wrong premise caused all

the confusions all along till it was finally set at rest in 2004 by the Apex Court. It was because of this reason there being substantial number of ACF promoted/recruited from time to time in excess of sanctioned post there became necessity now to create supernumery posts.

38. Supernumerary posts/shadow posts were so created in different numbers starting even prior to 1985 and they continue till date. This creation of super numeric posts/shadow posts were duly notified by the State on 9.3.2010 as in absence thereof at various point of time, large number of persons appointed/promoted and working as ACF would have to be declared redundant. For doing this, this time the concurrence of the Finance Department, Personnel Department (General Administrative Department) and Cabinet approval was taken. This having been done, on 31.3.2010, State published provisional gradation list and called for objections. Serious objections were raised from different groups. State constituted an Expert Committee of three members to consider and make recommendations upon the objections raised. The Committee made its recommendation after considering the objection on 29.6.2010 and it is pursuant to that that the final gradation list was published on 2.7.2010 which is subject matter of challenge before this Court by various groups, as noted earlier.

39. Upon these facts, first Mr. Abhay Singh and Mr. Jeetendra Singh, learned Senior Counsel appearing for the petitioners in the fifth, sixth and the seventh writ petitions, being writ petitions by Mihir Kumar Jha and others, Patanjali Kumar Choudhary and another and Nand Kumar Manjhi and another being direct recruit in the second and the third phase of 1985 advertisement, vehemently argued that they being appointees of the years, 1988 and 1989, their seniority has to be determined from the date of their initial appointment in the cadre of Bihar Forest Service. The validity of their appointments cannot be questioned as some persons of the group of 1990 direct appointees had challenged their appointments before the Jharkhand High Court which had refused to entertain the delayed challenge on behalf of those petitioners, though the learned Senior Counsel admit that the legality of appointment on merit was not decided. It was, thus, contended that the question of legality of their appointments was, thus, not open to question whatever may be the facts. It was, further, contended that pursuant to another dispute as between different set of persons and these petitioners, State had issued a notification on 23.6.1996 notifying their date of appointment as of 13.4.1988 and 10.8.1989, as the case may be, for the purposes of reckoning their seniority. The subsequent notification issued on 4.10.2010 by the State showing their confirmation in service with effect from 3.10.2005 itself showed that this date of confirmation would not affect their seniority. The date 3.10.2005 was the date when order of confirmation was passed and showing the date from which they were confirmed in service, thus, recognizing their regularization. State could, thus, not push them down at the bottom of the seniority list treating them to be valid entrant in the cadre with effect from 3.10.2005 when their services were confirmed. On the other hand, Mr. Binod Kanth, learned Senior Counsel appearing for the direct recruits of

1990, namely, Awadhesh Kumar Ojha and others as also Mr. Rajendra Narayan, learned Senior Counsel appearing for the promotees, who were promoted with effect from 30.3.1990 being Digambar Thakur, vehemently opposed the stand of the direct recruits of the second and third phase of the 1985 advertisement. They contend that the State, while finalizing the gradation list, rightly took into account the rank illegality in the appointment of these direct recruits of the second and third phase of the 1985 advertisement who were confirmed in the service only with effect from 3.10.2005 when the Governor, during the President's Rule, instead of ordering their dismissal, taking a sympathetic view of their long service, agreed to treat them as regularized. Shri Kanth and Shri Narayan, learned Senior Counsel did not press for their dismissal on ground of their rank illegal appointment but submitted that considering the precarious nature of their appointment and their confirmation in service with effect from 3.10.2005, notwithstanding the notification dated 4.10.2010, they would have to be necessarily pushed down in the gradation list as was rightly done by the State. Their illegal service tenure before confirmation was rightly not taken into account for reckoning seniority by State. They supported the State action in that regard as envisaged in the final gradation list published on 2.7.2010.

40. I may also note here that Shri Abhay Singh and Shri Jeetendra Singh, learned Senior Counsel also endeavoured to submit that all along their petitioners, direct recruits of 1985 advertisement in the second and third phase, were shown as senior to others which long standing seniority should not now be disturbed. To the contrary, Shri Kanth submitted that through in the first final gradation list, these direct recruits were there in 1989 but his clients were not there as they were appointed in 1990. This seniority list was quashed by the Apex Court in 2004. In between whenever a seniority list was published, they had raised objections all along which was never finally decided by the State. Ultimately, now in 2010, State considered the objections finally and accepted their objections and rightly relegated them to the lower position. They had never accepted the seniority issue.

41. Independent of this, Shri Binod Kanth, learned Senior Counsel appearing for Awadhesh Kumar Ojha and others being direct recruits appointed on 30.3.1990 contends that the final gradation list, notified by the State, is correct in so far as the promotees of the years, 1990, 1991 and 1992 who were given retrospective promotions with effect from 30.3.1990 but have been shown junior to these petitioners. He submitted that when the process of recruitment of Awadhesh Kumar Ojha and others was initiated by the State on 12.6.1987, no steps for promotion of these promotees were taken up. On their own showing, steps were initiated only on 9.7.1989 and, as such, it could not be urged that these direct recruits and the promotees were appointed in the cadre in the same transaction so as to give seniority to the promotees over the direct recruits. It was his further contention that the promotees could not be given retrospective promotion from a day when they were not even borne in the cadre so as to adversely affect the seniority of the direct recruits who were already in the cadre before

recommendations of the promotees for their promotions were made. To the contrary, Shri Rajendra Narayan, learned Senior Counsel appearing for the promotee Digambar Thakur contested this stand vehemently. He would submit that if, as assumed by the Apex Court, that there were only 133 sanctioned posts in the cadre then the appointment of the direct recruits on 30.3.1990 was beyond the available sanctioned posts and, thus, would be nullity and they would not get seniority over the promotees. Alternatively, he submitted that the direct recruits and the promotees were appointed in the cadre in the same transaction and, as such, the promotees even though appointed in the cadre at a later date, they would get their seniority from the date of appointment of direct recruit and would rank senior by virtue of Rule 35 of the Rules. In reply, Shri Kanth pointed out, which position could not be contested by Shri Narayan, that if the position that there were only 133 sanctioned posts be accepted then all the promotions granted to the promotees with effect from 30.3.1990 would itself also become illegal inasmuch as adequate number of vacancies as against the sanctioned posts for promotees were not available. Shri Kanth further contended that in view of the scheme of the Rules, State having quantified the vacancies for direct recruits, having requested BPSC to select through test and recommend for appointment of 40 direct recruits, upon their selection and upon their substantive appointment on various pay scales on sanctioned post, they duly entered the cadre on 30.3.1990 which could now not be contested. Thus, according to Shri Kanth, the promotees having been rightly considered to be appointees in the cadre, ignoring the retrospective date of appointment, was a right decision by the State and should not be interfered with.

42. Shri Gopal Rai, learned Advocate appearing on behalf of petitioner Hem Kant Roy who, as noted above, is petitioner in two writ applications, has raised two contentions. His first contention is that Hem Kant Roy having been first appointed as ACF with effect from 31.3.1986, the direct recruits appointed pursuant to advertisement of 1985 in the first phase who were appointed on 14.12.1987, would not rank senior to him for two reasons. Firstly, he was appointed in 1986 and they were appointed in 1987 and secondly, he was wrongly shown subsequently as an appointee with effect from 26.12.1989 and in any view of the matter, the direct recruits of the first phase of the 1985 advertisement were wrongly appointed as there were no vacancy for them, they had to be pushed down. Opposing these prayers, Mr. Rajesh Singh, learned counsel appearing for the appointees of the first phase, pursuant to 1985 advertisement which phase included the appointment of Sanjay K. Sinha-II, contended that the Apex Court, in the case of Sanjay K. Sinha-II (*supra*), had clearly held the appointment of this group to be valid and it was no more open to question by Hem Kant Roy. He further submitted that Hem Kant Roy was initially appointed in 1986 as ACF in anticipation of Rule 3(aa) which Rule was introduced only on 26.12.1989 with retrospective effect. This question vis-a-vis Hem Kant Roy and the retrospectivity of the said Rule was subject matter of two writ petitions being the case of Shyam Bihari Prasad (*supra*) and in the case of Hem

Kant Roy (supra) wherein this Court clearly held that the insertion of Rule 3(aa) could not be with retrospective effect and Hem Kant Roy could not be appointed in terms of the said Rule prior to 26.12.1989 when the Rules were notified. Thus, Shri Rajesh Singh, learned counsel supported the State action as reflected in the final gradation list as against the stand taken by Shri Gopal Rai, Advocate for the petitioner Hem Kant Roy.

43. These are the major legal issues, apart from minor issue with regard to three individuals who are respondents from the group of promotees with regard to their inter se seniority on the ground that in the seniority of Forest Rangers (now Range Officer of Forest), they being senior on promotion, their seniority should be maintained.

44. Before proceeding further, I may note that in the present case, the ultimate dispute with regard to inter se seniority of the parties is in dispute in the cadre of Bihar Forest Service.

45. Normally and ordinarily, seniority in a cadre has to be determined on basis of length of due service in the cadre. This is of course subject to statutory Rules or instructions in that regard. The question of length of due service in the cadre is essentially a question of fact and normally facts found would determine and answer these questions. It is, therefore, first necessary to note the statutory provisions in regard to the Bihar Forest Service which is governed by the Bihar Forest Service Rules, 1953, as amended from time to time. The said Rules were framed with reference to proviso to Article 309 of the Constitution by the Governor of Bihar superseding the earlier Rules of 1947.

46. So far as material for the present litigation, it may be noted that the Rules, as originally enacted, was apparently for the first time amended in 1970 with effect from 13th February, 1970. By this amendment in Part-V of the Rules dealing with promotion of Rangers, as they were then known, Rules 36 and 37 were substituted. These two Rules, till its further substitution in 1989, inter alia, provided for a Committee to consider the promotion of Forest Rangers and their appointment in the cadre which would not be less than 50% of the cadre. The promotions would be according to seniority. The recommendations of the Committee would then be sent to the BPSC. Rule 37 provided that the BPSC would then examine the matter and make recommendations to the Governor. In the Rules, as originally enacted, there was a proviso to Rule 3(b). That provided that in the cadre, strength of the promotees would not be less than 25%. With effect from 7th September, 1972, this proviso was substituted whereby it was now provided that in the cadre strength, not less than 50% would be of the promotees appointed to the cadre. The promotees were from the Rangers. In 1985, with effect from 30th August, 1985, Rule 29 was substituted. Rule 29 is in Part-II of the Rules dealing with direct recruits. Thereafter, substantial amendments were made in the Rules on 26th December, 1989. It is by this amendment Rule 3, sub-rule (aa) was introduced with retrospective effect which, as noted above, has been held to be bad in so far as its retrospective operation is

concerned. In the scheme of the Rules, Forest Rangers were now named as Range Officer of Forest. There were other amendments which will be noticed hereafter. The net effect of all these amendments being taken into account, the provisions of the Rules, in so far as relevant, are being quoted hereunder:--

2. Definitions.--

(iii) "Member of the Service" means a person appointed to Service under the provisions of these rules.

... ..

(vii) "The Service" means the Bihar Forest Service.

3. The appointments to the service shall ordinarily be made by--

... ..

(aa) The Range Officer of Forests, who passes the Ranger Course securing Honours shall be eligible for admission to the 2nd year/2 (two) years of State Forest Service Course in Forestry conducted by Government of India. They shall be treated as direct recruit to the Bihar Forest Service Cadre (as Assistant Conservator of Forests) and the provisions as laid down in the Rule 29, shall be applicable to these selected Range Officers of Forests.

(Proviso in Hindi stipulating not less than 50% of the cadre strength to be filled up by promotion).

4. The Governor shall decide from time to time the number of vacancies to be filled by direct recruitment and/or by promotion respectively.

Part II Direct Recruitment

5. The Commission shall announce in each year in such manner as they think fit, the number of vacancies in the Service to be filled by; direct recruitment on the result of a Competitive Examination and shall invite applications from candidates eligible under Rule 6. The Competitive Examination will be conducted by the Commission.....

22. The marks obtained at the viva voce test shall be added to the marks obtained at the written examination and the candidate's place will depend on the aggregate of both. The names of candidates will then be arranged by the Commission in order of merit. From the list of candidates so arranged, the Commission shall nominate such number of candidates for this service as may have been fixed by the Governor. This list shall be submitted to the Governor (by such date in each year as the Governor may fix).

29. Finally, selected candidates shall be appointed on probation for a period of two years in the service as Assistant Conservator of Forests and shall be required to undergo a professional training for a period of two years at the Forest Research Institute and College, Dehra Dun. After the successful completion of

the said training, they shall be confirmed as against the permanent posts of Assistant Conservator of Forests whenever available. Period of probation of a candidate may, in case he fails to complete the training successfully, be extended for a maximum period of two years and in case he fails to complete the said training he shall be treated to be unfit and on being unfit his appointment shall be terminated. During the period of probation they shall be entitled to the Time Scale Pay.

35. Seniority of officers appointed to the Service shall be determined with reference to the date of their substantive appointment to the Service:

Provided that--

(i) in the case of members of the Service appointed by direct recruitment at the same time, their seniority inter se shall be in the order of merit in which their names are placed in the list of successful candidates at the Final Examination of the Indian Forest College, Dehradun;

(ii) in case where appointments are made to the Service both by direct recruitment and promotion of selected Rangers at the same time, promoted members of the Service shall be senior to the members directly recruited; and

(iii) the seniority inter se of dangers on substantive appointment to the service by promotion at the same time shall be the seniority inter se held as Rangers.

36 (i) Selected Range Officers of Forest shall be considered for promotion under sub-clause (i) of clause (b) of Rule 3 on the basis of merit-cum-seniority on the recommendation of the Departmental Promotion Committee with the concurrence of the Bihar Public Service Commission.

(ii) The number of Range Officer of Forests selected and recommended for promotion to the service will be double the number of vacancies to be filled by promotion.

(iii) The list of selected Range Officers of Forests shall be prepared on the basis of merit-cum-seniority and their records of service, performance and annual confidential remarks.

37. "After scrutinizing document forwarded by the Secretary to Government, Forest Department, the Commission shall send to the Governor their recommendation about the suitability of the Officers of promotion to the service".

38. The final selection of officers to be promoted shall be made by the Governor after considering the recommendations made by the Commission under Rule 37.

47. From the scheme, as obtaining from the Rules, it would be seen that members of service [(Rule 2(iii))] means persons appointed to the service under the provisions of these Rules and of course the service means the Bihar Forest Service. Direct recruitment is by competitive examinations to be conducted by the BPSC and promotions from selected Range Officers of Forest primarily on

basis of seniority-cum-merit. There is an exception in shape of Rule 3(aa), as quoted above, where a meritorious Range Officer of Forest is treated as direct recruit to the service.

48. The entry point for the Bihar Forest Service cadre is as ACF in terms of Rule 29. So far as direct recruits are concerned, apart from other, reference must be made to Rule 22 wherein after the Governor has decided the vacancy in terms of Rule 4 and BPSC announces the examination for the said seats in terms of Rule 5 and examinations are held and selections made in accordance with part-II of the Rules. In terms of Rule 22, the BPSC would prepare a merit list and nominate the number of candidates for this service as fixed by the Governor in terms of Rule 4 for appointment in terms of Rule 29. At this juncture, it may be noticed that the quota of the promotees, as it now stands, is not to be less than 50% of the cadre strength.

49. Same argument on behalf of the promotees was made, though not vehemently pursued, that this stipulation of quota of promotees being not less than 50% by virtue of proviso to Rule 3(b) would entitle the Government to fill up the cadre with promotees to any extent above 50%. In my view, this is incorrect and too broadly stated. It has been strongly disapproved by the Apex Court in the case of Sanjay K. Sinha-II (supra). What it only means is that they can occupy not less than 50% of the cadre strength. It may be marginally more. The reason is obvious. If there are vacancies in the cadre, filling them up with direct recruits, is a long time consuming process because of which the work may suffer whereas promotees are available, ready at hand and to temporarily tide over the crisis, some promotees may be brought marginally in excess of 50% quota but while doing so, State is not authorized to delay the direct recruitment and fill up the cadre with promotees. The Apex Court in the case of Sanjay K. Sinha-II (supra) noted that when promotees of the year, 1987 were brought in the cadre, there were already 105 promotees as against total 125 strength and, thus, promotees were occupying 84% of the posts which was deprecated by the Court and as a consequence whereof the 1987 promotees were directed to be pushed down in seniority below the 1987 direct recruits of the first phase of 1985 advertisement.

50. I may also notice that in service jurisprudence, what is commonly understood as the cadre strength, is the number of permanently substantively sanctioned post in respect of the cadre. As noted earlier in the judgment, this itself has been subject matter of serious controversy. The Apex Court in the case of Sanjay K. Sinha-II (supra), in view of conflicting stands and affidavits, had to assume it to be 133. Even before this Court, as noted earlier, State was totally at a loss of the correct figure in this regard. When the question of creating supernumerary/ shadow posts came up for consideration, on basis of the judgment of the Apex Court noted above, they have also assumed it to be 133 and, accordingly, created supernumerary post to accommodate the excess appointments all along. As noted above, earlier this confusion was primarily because of the notification

issued by the State Government being Resolution of the Department in the year, 1987 showing 277 sanctioned posts which was found not sustainable by the Apex Court because while notifying the said resolution, admittedly, the concurrence of the Finance Department or the Personnel Department or the State Cabinet was not taken. In view of the said 1987 Resolution right from 1987 upto 2004 when the Apex Court held it to be bad, State worked out vacancies on basis of this assumed figure of 277 which became the necessity to be regularized by creation of supernumerary post both for promotees and direct recruits.

51. It may also be pertinent to note here that so far as the direct recruits of the 1985 advertisement in the first phase and the direct recruits who were appointed with effect from 30.3.1990 were so selected and appointed on basis of vacancies notified by the Governor and pursuant to competitive examination and selection and consequent to recommendation of the number notified by the BPSC. So far as the 18 direct recruits appointed in the second and third phase pursuant to 1985 advertisement are concerned, they were, admittedly, beyond the notified vacancies, beyond the advertised vacancies and had not managed to make it to the merit list and without further advertisement or selection, from the old panel, they were picked up and appointed by the State. Thus, the dispute is with regard to their legality of appointment and consequential placement in the final gradation list.

52. First, let me consider less thorny issues. Petitioner Digambar Thakur, promotee with effect from 30.3.1990 in CWJC No. 4855 of 2008 has challenged the seniority over him as given to respondent No. 35, Nagendra Choudhary. It was rightly submitted that petitioner Digambar Thakur and respondent Nagendra Choudhary were both promotees of the same batch where he was senior. Upon promotion simultaneously the seniority cannot change even though Nagendra Choudhary claimed to be from reserved category. This is correct. Seniority in the feeder cadre has to be maintained especially when promotions are in the same transaction. Similar is the case of Ram Chandra Pandey at serial No. 268 vis-a-vis Nagendra Choudhary at serial No. 266. This would be consistent with proviso (iii) to Rule 35. Thus, the final gradation list to that extent will have to be revised accordingly.

53. Now coming to the pleas of Hem Kant Roy, petitioner in the first two writ applications. In my view, he cannot, after the judgment of the Apex Court in the case of Sanjay K. Sinha-II (supra), challenge the validity of their (direct recruits of 1985 advertisement in the first phase) very appointments. They were duly appointed against vacancy notified for direct recruits. They were duly selected, substantively appointed and posted on 14.12.1987.

54. So far as the shifting of his (Hem Kant Roy's) appointment from 31.3.1986 to 26.12.1989 is concerned, that too cannot be questioned as he has already suffered two adverse judgments which have attained finality being the cases of Shyam Bihari Prasad (supra) and Hem Kant Roy (supra) wherein this Court clearly held that Rule 3(aa) which was introduced on 26.12.1989 on basis of

which he claimed entry into the service could not be made retrospective. It was prospective. Thus, his entry in Bihar Forest Service as a direct recruit in terms of Rule 3(aa) can at best be co-terminus with the Rules aforesaid, with effect from 26.12.1989 and not before. The direct recruits being appointees with effect from 14.12.1987 would, thus, undoubtedly be senior to Hem Kant Roy who entered service validly with effect from 26.12.1989. The final gradation list is, thus, correct in this aspect of the matter and needs no interference.

55. There is yet another controversy with regard to Hem Kant Roy. Digambar Thakur, promotee with effect from 30.9.1990 challenged that after Rule 3(aa) was introduced on 26.12.1989, Hem Kant Roy had not attained the merit consideration of the said Rule. In my view, the fact is that Hem Kant Roy had attained the merit status while the Rules were already in active contemplation which was the reason why it was sought to be given retrospectively. It was because of this that Hem Kant Roy was brought into the service on 31.3.1986 as ACF itself. Upon this Court disapproving retrospectivity of the Rules and clearly holding that Hem Kant Roy cannot be made ACF before 26.12.1989 that his date of substantive appointment was shifted from 31.3.1986 to 26.12.1989. It is not in dispute that he fulfils the requirement of Rule 3(aa) as on 26.12.1989. Hem Kant Roy, though a Ranger at that time, he showed extraordinary merit. He not only passed the Rangers Course securing Honours, he topped his batch. In State Forest Service Course, in Forestry conducted by Government of India, he again topped and was awarded Gold Medal. This later course was for eligibility to the Bihar Forest Service as ACF. It is, thereafter, he was appointed and posted as ACF on 31.3.1986 but later because the retrospectivity of the Rule 3(aa) was taken away by this Court his date of substantive appointment was changed to 26.12.1989. He has wrongly been shown as promotee because Rule 3(aa) treats him as a direct recruit. He has, thus, to be treated correctly as such.

56. Thus, I find that the challenge in this regard is misconceived. The State has considered this aspect of the matter in correct perspective with correct positioning in the final gradation list.

57. Now, coming to the controversy with regard to the seniority as between the promotees who were shown to be promoted with effect from 30.3.1990 and the direct recruits appointed in the cadre on 30.3.1990. As noted above, Shri Rajendra Narayan, learned Senior Counsel appearing for the promotees in the case of Digambar Thakur submitted that the direct recruits that is the group of Awadhesh Kumar Ojha and others were wrongly appointed. There was no vacancy for them and that being so, they have to be pushed down in the seniority list in the cadre below the promotees. Alternatively, he submitted that the promotees and the direct recruits having been appointed in the same transaction with effect from 30.3.1990, by virtue of Rule 35(ii), the promotees would rank senior. To the contrary and contesting, Shri Binod Kanth, learned Senior Counsel appearing for the direct recruits submitted that the final gradation list was correct having put the promotees below the direct recruits. He

submitted that the direct recruits were appointed pursuant to vacancy notified in terms of Rule 4 and pursuant to competitive examination for the notified vacancies conducted by BPSC pursuant to Part II of the Rules. They were selected and substantively appointed and were substantively posted as ACF. It could, thus, not be said that they were wrongly borne in the cadre. He would further submit that assuming that there was no vacancy for the direct recruits then so was the case with regard to the promotees and, thus, they were both in the same boat. This factual position could not be contested by Shri Narayan, learned Senior Counsel for the promotees. In any event, for both, these direct recruits and the promotees supernumerary posts were simultaneously created. Reference may be made to D.K. Reddy and Another Vs. Union of India (UOI) and Others, and, in particular, paragraph 17 thereof:--

17. As a result of such an exercise, if need arose Appellant 1 could be treated to have been holding supernumerary post in Junior Time Scale Grade of Group "A" posts and in all other promotional cadres. He cannot be treated to be outside the sanctioned strength of posts in Junior Time Scale Grade of Group "A" or other promotional posts as contended by the learned counsel for the respondents. Otherwise, the very creation of supernumerary posts would become otiose and meaningless.....

58. Shri Kanth, learned Senior Counsel then submitted that it is wrong to say that the promotees and the direct recruits were appointed in the same transaction. On their own showing, the matter in relation to appointment of promotees was initiated for the first time in 1989 whereas the appointment process of the direct recruits started with the requisition by the State and advertisement in 1987 itself. It cannot be said that the two processes were in the same transaction.

59. Having considered the matter, in my view, contentions, as advanced by Shri Kanth, must succeed. Mr. Kanth for the direct appointees aforesaid is right in his submission when he submits that so far as their appointment is concerned, it was pursuant to the vacancies notified by the Governor. Those vacancies were then advertised by BPSC and pursuant to competitive examinations, they were selected and recommended for appointment by BPSC. Upon recommendations being received, State, accepting the recommendation, appointed them on substantive post of ACF in proper pay scales. They were, thus, duly borne in the cadre on the date of appointment which is 30.3.1990. Thus, their service tenure has to be calculated in the cadre with effect from the said date. Further, in view of the fact that if the cadre strength is taken to be 133 then both these direct recruits and the promotees were all beyond their quota and both beyond the quota are in the same boat and, thus, giving precedence to one over the other, the question will not arise. Normally, rule of continuous officiation would apply.

60. Again, in relation to appointment in same transaction, I am afraid factually it is incorrect. The connotation "same transaction" denotes that where appointments are made from two different sources on different dates but must

be pursuant to a singular decision taken in point of time. This is what has been held by a Full Bench of this Court in the case of Bishundeo Mahto and Others Vs. State of Bihar and Others, The reason is simple. The recruitment decision having been taken from both the sources, there are different formalities for the two sources and, as such, the time for completion whereof ending in appointment may differ. There is no fault on part of either of the two sets of appointees. They would, thus, be deemed to be appointed on the same day and, accordingly, as a general principle, which is also enshrined in proviso (ii) to Rule 35 of the Rules. It may be mentioned that the expression "same transaction" and "at the same time" as used in the said proviso are synonymous. Here, the facts are undisputed. So far as the direct recruits are concerned, State, upon quantifying the vacancy, sent a requisition to the BPSC on 12.6.1987 whereafter in December 1987, BPSC issued the advertisement. Examinations were held in 1988 but for some inexplicable reason, the appointments were only made on 30.3.1990. So far as promotees are concerned, their entire case is that the decision to initiate the process for their appointment started on 9.7.1989 wherein it was noticed that so far as direct appointees are concerned, the process had already started in 1987. Thus, on these facts itself, it cannot be said that the decision for appointment from two sources were taken simultaneously or at one point of time. They were two years apart and distinctively so. Thus, it would be a misnomer to say that they were appointed in the same transaction. If I examine the facts further, I find that while there was still consideration being done with regard to necessity of appointment of promotees to the cadre, the direct recruits had already been appointed on 30.3.1990. It was because of this that it was decided that as and when the promotees are appointed, they would be shown to be appointed with effect from 30.3.1990. I bet this was only to give the promotees advantage in terms of Rule 35(ii) in matter of seniority. It is further to be found that so far as promotees are concerned, the first phase of 10 after Departmental Promotion Committee (DPC) were recommended for promotion by BPSC only on 4.6.1990. Their appointment was notified on 17.8.1990 but with retrospective effect from 30.3.1990. Further, pursuant to DPC held in 1991, BPSC recommended 16 more promotees for appointment on 6.3.1991 pursuant to which their appointments were notified on 18.7.1991 but with effect from 30.3.1990. Similarly, pursuant to DPC held in the year 1992, 6 more promotees were appointed by BPSC on 8.4.1992 but they were notified for appointment in the cadre on 2.9.1992 but with retrospective effect of 30.3.1990. It would, thus, be seen that even the DPC considered the cases of the promotees after the appointment of direct recruits had already been notified. The promotees appointment were also notified long after the direct recruits appointment but all the promotees were given retrospective promotion from the date of appointment of direct recruits. This cannot be permitted.

61. It is well settled law in relation to service jurisprudence that no person can be given a place in a cadre from a time before he is borne in the cadre. This proposition is borne out by the judgment of the Apex Court going from this State

itself in the case of State of Bihar and others Vs. Sri Akhouri Sachindra Nath and others, Reference may also be made to a recent decision of the Apex Court in the case of Pawan Pratap Singh and Others Vs. Reevan Singh and Others,

62. The promotees were borne in the cadre on various dates when their appointments to the cadre were notified but their date of promotion in the cadre was made retrospective to match that of the direct recruits. That could not be done especially when the decision to promote and appoint the Range Officer of Forest was itself taken separately almost two years after the decision to appoint the direct recruits.

63. There is yet another well established rule of law that promotion and/or appointment with retrospective effect cannot be given so as to adversely affect the seniority of others, Akhouri Sachindra Nath (*supra*). On both these principles, the promotees cannot claim seniority over these direct recruits.

64. In my view, a reference may also be made to the minutes of the Committee which considered the objections to the provisional gradation list as was published on 31.3.2010. The Committee, which considered the objection, made its recommendations to the Government on 29.6.2010. In its recommendation, it has accepted the objection as made by these direct recruits and rightly so and it is upon their recommendations that these promotees were held not to be entitled to the concept of "same transaction" or the seniority over the direct recruits in terms of proviso (ii) to Rule 35.

65. Thus, in my view, the final gradation list vis-a-vis the direct recruits on 30.9.1990 and promotees shown to be promoted with effect from 30.9.1990 has been correctly determined in the final gradation list and it requires no interference.

66. Now, the only question that remains is with regard to the fate of the 18 (10+8) direct recruits of the second and the third phase of 1985 advertisement. They claim their seniority from the date of their appointment being 13.4.1988 and 10.8.1989 respectively for the two phases and contend that they have been wrongly pushed down below everybody treating them to be appointees from the date of their confirmation with effect from 3.10.2005. All parties have vehemently opposed this stand contending that the Government, while publishing the final gradation list dated 2nd July, 2010 took the right decision in the right perspective on the correct facts. The State Government, it was submitted, could not be precluded from taking cognizance of rank illegality and not mere irregularity in the appointment of these 18 direct recruits of the 1985 advertisement in the second and third phase and they would be effectively deemed to be in the service only after they were deemed to be regularized/confirmed with effect from 3.10.2005 and the service rendered by them prior to that by virtue of their rank illegality in appointment has been rightly not taken into account by the Government while finalizing gradation list.

67. It is the fifth, sixth and the seventh writ petitions which have been filed by

the direct recruits pursuant to 1985 advertisement who were appointed in the second and the third phase challenging the final gradation list in which they have been pushed down treating them to be in service with effect from 3.10.2005, the day when decision was taken by the Governor to treat them as regularized instead of dismissing them because of their rank illegal appointment. Shri Abhay Singh and Shri Jeetendra Singh, learned Senior Counsel appearing for these petitioners, as noted above, have made many fold submissions. It was firstly submitted that it is wrong to say that they were illegally appointed. Their case would be that the Government had the power to make the appointments far in excess of the advertised posts. Appointment having been made, they were legal and binding. It was then submitted that pursuant to the judgment dated 3.4.1996 passed in CWJC No. 8306 of 1989 (Binay Kumar Pal and Others vs. State of Bihar and Others), State had issued a notification fixing the date of initial appointment as the relevant date in respect of these persons which notification having not been rescinded or challenged in any manner by any party, that must be taken to be final. It would further be submitted that some of the direct recruits, who were appointed on 30.3.1990 and were in Jharkhand, now after the bifurcation of the State with effect from 15.11.2000, had challenged the seniority, being given to these petitioners in the provisional gradation list on basis of their appointment, by filing writ petition being WP(S) No. 6629 of 2005 (Arvind Kumar and Others vs. State of Jharkhand and Others) wherein learned Single Judge of the Jharkhand High Court, by order dated 14.7.2006, refused to entertain the writ petition on ground of inordinate delay in challenge. Those writ petitioners then preferred Letters Patent Appeal in the Jharkhand High Court being LPA No. 597 of 2006 (Niranjan Prasad Deo and Others vs. State of Jharkhand and Others) which was dismissed by judgment dated 8th June, 2011. Thus, the direct recruits of 30.3.1990 are precluded from challenging the validity of appointment of these petitioners at Patna High Court who were appointed in the second and third phase pursuant to advertisement of 1985. The State of Bihar was a party in that writ petition before the Jharkhand High Court. It would then be submitted that seniority of longstanding settled should not be unsettled at a later stage. There must be security of service tenure. On the other hand, Shri Binod Kanth, Shri Rajendra Narayan, Shri Tej Bahadur Singh, learned Senior Counsel and Shri Gopal Rai, learned counsel for the contesting parties would submit that once the final gradation list was published on 2.7.2010, they do not seek to challenge the appointment of the petitioners who were appointed in the second and third phase pursuant to 1985 advertisement because this fact was taken note of by the State Government and because of that reason, the State Government has pushed them down in the final gradation list instead of dismissing them from service. They only seek to support the State action in this regard. State finalized the gradation list, which was long overdue, as the earlier final gradation list of the year 1989 had already been quashed by the Apex Court. State rightly acted in the manner in taking note of the facts. Those petitioners deserve no equitable or sympathetic consideration because they themselves were responsible for their predicament. They had wrongly canvassed

for their wrongful appointment. It was a misadventure on their part. They cannot complain. Having got into the service wrongly, in fact their appointment being rank illegality, their deemed regularization itself in the year, 2005 was not proper but having been done more on humanitarian considerations rather than legal, they are lucky to be in service instead of being dismissed.

68. Let me now examine the first line of submission made on behalf of the direct recruits of 1985 advertisement in the second and third phase. On their behalf, as noted above, it was submitted that it is wrong to contend that their appointment was illegal. For this, reliance was placed on the judgments of the Apex Court in the cases of State of Bihar and Others Vs. Secretariat Assistant Successful Examinees Union 1986 and Others, Prem Singh and Others Vs. Haryana State Electricity Board and Others, , Suvidya Yadav vs. State of Haryana, (2002) 10 SCC 269 Sandeep v. State of Haryana, 2001 (1) ALD (CrI.) 620 (SC), , The Direct Recruit Class-II Engineering Officers" Association and others Vs. State of Maharashtra and others,

69. In opposition to this stand, it was submitted that their appointments were not mere irregularity but rank illegality for which reliance was placed on the observations made in the above cases itself and also the law, as laid down by the Apex Court in this regard in the cases of State of Bihar and another Vs. Madan Mohan Singh and others, Surinder Singh and Others Vs. State of Punjab and Another, Rakhi Ray and Others Vs. The High Court of Delhi and Others, , Public Service Commission, Uttaranchal Vs. Mamta Bisht and Others, which decisions have clearly laid down the law that any appointment made in excess of vacancy advertised in absence of any such clause in the advertisement or rule authorizing such action would be illegal rendering the appointment invalid.

70. Before advertizing to the various case laws, I deem it essential to note the salient facts in this regard which are undisputed. In terms of Rules 4 and 5 of the Service Rules, pursuant to request of the State Government, BPSC, on 24.7.1985, issued an advertisement for filling up of 40 posts of ACF by open competitive examination. While this selection process was started and was pending finalization, on 12.6.1987, again State requisitioned BPSC for 40 more direct recruits as ACF. Pursuant to the second requisition for 40 more posts of ACF, BPSC issued second advertisement on 19.12.1987. It appears that while the matter of final selection pursuant to the first advertisement of 24.7.1985 was virtually finalized, persons, who could not make it to the merit list for appointment like Mihir Kumar Jha and others being petitioners of the fifth, sixth and the seventh writ petitions, filed a petition before the Minister concerned on 21.8.1987 and on 6.11.1987 before the Secretary of the Department concerned pointing out that there were still more vacancies for the post of direct recruit ACF and they should be selected and appointed. Normally, it was expected that the State would not have taken note of such applications because by then, State had already requisitioned BPSC for further 40 posts for which BPSC also had issued advertisement on 19.12.1987 but for some curious reason, ignoring this, State

entertained those applications. In the meantime, pursuant to the first advertisement for 40 posts issued on 24.7.1985, on 14.12.1987 pursuant to the list sent by BPSC after selection, 40 appointments were made on 14.12.1987, one of whom later resigned. Notwithstanding the aforesaid that the post, as advertised at the first instance, had already been filled up, State was persuaded to entertain the applications by the unsuccessful candidates and on persuasion of the State, BPSC sent 10 more names from the merit list of the candidates who had failed to get appointment. They were appointed on 13.4.1988 and have been referred in this order as appointees in the second phase pursuant to 1985 advertisement. BPSC was again perused to send more names and on 26.5.1988, BPSC protested that it was not permissible but gave in at the end. It recommended further 8 names of unsuccessful candidates who were then appointed on 10.8.1989 and have been referred to as direct appointees in the third phase pursuant to the 1985 advertisement. It may also be noted here that pursuant to the second advertisement, pursuant to the requisition by the State Government on 12.6.1987, the advertisement for which 40 posts BPSC issued on 19.12.1987, 35 appointments were then made after due selection and recommendation on 30.3.1990.

71. From the facts aforesaid, it would be seen that BPSC, pursuant to request of the State, had issued advertisement, conducted examination and made recommendation for 40 posts only. They were all filled up and the entire process was exhausted. Yet, without waiting for the selection process pursuant to the second advertisement which was already on way, from the exhausted list at the persuasion of the candidates who had failed to get appointment, they were picked up and appointed without any further fresh advertisement. It is not in dispute that the advertisement issued by BPSC did not indicate any other vacancy or any variation in the number to be recruited. It is also not in dispute that there are no rules permitting the State Government to change the number of vacancies to be filled up after the selection process was over. It is in the facts aforesaid that I have to see whether the appointments were rank illegality or a mere condonable irregularity or they were valid and binding appointments.

72. In support of validity of appointment, the first decision relied is the judgment of the Apex Court in the case of Secretariat Assistant Successful Examinees Union 1986 and Others (supra). A reference to the said judgment, in my view, was more against the submission rather than in support. Reference may be made to paragraphs 8, 9 and 10 of the said judgment wherein the Apex Court has clearly held that empanelment does not amount to selection and does not create any vested right. The Apex Court held that the direction given by the High Court for appointment of empanelled candidates according to their position in the merit list against the vacancies till 1991 was not proper and could not be sustained since the examination had been held in 1987 for a particular number of vacancy and the vacancies arose long thereafter. The Court then directed that the vacancies, which occurred after the advertisement could not be so directed to be filled up. The Court held that persons, who had become eligible to compete for

appointment, were denied opportunity and the directions of the High Court would prejudicially affect them for no fault of theirs. These are clear observations against the cause on which the case has been relied.

73. The next case is Prem Singh and Others (supra). Here again, in paragraph 26, the Apex Court has itself noticed that, strictly speaking, the Haryana State Electricity Board was not justified in making more than 62 appointments pursuant to the advertisement published in 1991 but, as noticed on the facts that there existed emergent situation where there was over 147 vacant posts which was urgently required to be filled up and it is in those peculiar facts that the Court refused to interfere. This decision, in my view, again goes against the proposition as canvassed. It was on the peculiar facts that the Court did not interfere.

74. Then I may refer to the case of Suvidya Yadav and Others (supra) and Sandeep Singh (supra). In both these cases, the Apex Court found that in the advertisement itself, there was a variation clause wherein it was clearly stipulated that the number of vacancies filled up may vary and, accordingly, filling up of more posts than advertised was not interfered with. In the case of Direct Recruits Class-II Engineering Officers Association (supra), it was not a case where there was rank illegality in initial appointment. The question was of irregularity in appointment permitting an employee to continue on the post for substantial period which was later regularized within the powers available to the State. It is in that respect that the Apex Court, inter alia, held that upon regularization, the entire period of officiating service will be counted for seniority and further that it was not in the interest of justice to unsettle a settled position. In the present, as would be seen, it is not a case of mere irregularity in appointment which could be regularized by the State. It is a rank illegality and, as such, the judgment is clearly distinguishable.

75. Now, I may refer to decisions of the Apex Court as cited to show that the appointments were rank illegality. The case of Madan Mohan Singh and Others (supra) is again from this State. In that case, pursuant to advertisement issued, 32 names were recommended to the State Government for appointment to judicial service. They were appointed. The Apex Court held that the advertisement was to fill up 32 vacancies and once that was done, there was no basis whatsoever for keeping the list subsisting for filling up other vacancies. The advertisement did not mention that the panel would be valid for one year. Even the Full Court of the High Court, which accepted that the vacancies have been filled up but resolved to fill up future vacancies from the merit list, it could not do so. Once appointments were made on 32 vacancies, the panel got exhausted and came to an end. If the list was kept subsisting, that would naturally amount to deprivation of rights of other candidates who would have become eligible subsequent to the said advertisement and selection process. The Apex Court quashed the request of the High Court and consequently the State Government to send more names from the panel for appointment.

76. I may then refer to the case of Surinder Singh and Others (supra). In this case, the Apex Court clearly held that normally it is not permissible for appointment to be made in excess of advertised vacancy. It is only in rare and exceptional circumstances and in emergent situation, this can be done. This decision clearly is an authority for the general proposition that more than advertised vacancy cannot be filled up.

77. Then I may refer to a recent decision in the case of Rakhi Ray and Others (supra). In this decision, the Apex Court clearly held that the appointments made beyond the number of vacancies advertised is without jurisdiction being violative of Articles 14 and 16(1) of the Constitution. It has held that the selection process comes to an end with filling up of notified vacancies and the waiting list cannot be used as a reservoir to fill up vacancies. This principle can be deviated only in exceptional and rare circumstances and in an emergent situation, and that too, after taking a policy decision based on rational grounds. This decision is again an authority that filling up vacancies, beyond advertised, would be without jurisdiction and ultra vires. This same position has been reiterated in the case of Public Service Commission, Uttaranchal (supra).

78. In the facts of the present case, I have not been shown that there was any exceptional or an emergent situation necessitating the Government to make appointments from an exhausted panel. To the contrary what has been brought on record is that it was these appointees themselves who were instrumental in persuading the Government to wrongly appoint them. The Government suddenly became oblivious of the fact that they had already requisitioned and the BPSC had already advertised to fill up the other vacancies of direct recruits in the cadre which process had already started. Thus, clearly the situation of this rank illegality in the appointment was brought about by these persons by their own conduct. No rule nor policy decision of the State permitting any exception has been brought on record.

79. I am further of the view that it is a settled position that if the illegality in appointment is a rank illegality then State cannot be precluded at any point of time from taking suitable action in this regard which could be of termination of their service as well. Their appointments were violative of Articles 14 and 16 of the Constitution. Further, the State is obliged to select the best people. The best 40 having been selected by going 18 positions further down, only merit could be compromised. At the Bar, it was submitted that some of these petitioners has sat for the examinations pursuant to the 1987 second advertisement but could not qualify in the written test to make it to the selection.

80. Thus, on the aforesaid basis, I hold that the appointment of the second and third phase direct recruits pursuant to 1985 advertisement after the advertised posts had been filled up, was a rank illegality and cannot be termed as an irregularity or a minor deviation from the Rules. It was a misadventure from the very beginning on which those petitioners had embarked. They cannot invoke equity in their favour. The law does not support them.

81. On behalf of these direct recruits of the second and the third phase pursuant to 1985 advertisement, it was then submitted that pursuant to the judgment of this Court in the case of Binay Kumar Pal and Others (supra), State issued notifications in respect of this group specifying their entry into cadre with effect from the date of their initial appointments being 13.4.1988 and 10.8.1989 for the two phases respectively. The matter of seniority of these two groups was, accordingly, decided which cannot now be upset.

82. In order to appreciate the contention, it would be necessary to examine the said judgment and what it decided. That was a case filed by the direct recruits in the first phase pursuant to 1985 advertisement and were belonging to the reserved category. Their contention was that as their recruitment process was started in 1985 whereas private respondents No. 4 to 46, though appointed earlier in time upon promotion from Rangers, they could not be held to be senior because of the aforesaid fact. This was rejected by the Court on the simple ground that the promotees had entered the cadre before the appointment of the petitioners which issue had also been decided by this Court in CWJC No. 8305 of 1989. Here, it may be noticed that this case that is CWJC No. 8305 of 1989 is the case of Sanjay K. Sinha-II and Others (supra) which was earlier decided and then remanded for fresh decision to the High Court which decision is since reported in Sanjay Kumar Sinha-II and Others Vs. The State of Bihar and Others, and which decision has since been overruled by the Apex Court in Sanjay K. Sinha-II and Others (supra) wherein these promotees have been pushed down below the writ petitioners of that writ petition. The second contention of the petitioner in the writ petition of Binay Kumar Pal (supra) is with regard to the direct recruits of the 1985 advertisement in the second phase. Petitioners claimed seniority over them. That was allowed and it was held that respondents No. 47 to 56 could not claim seniority over the writ petitioners. The gradation list as then was existing being the final gradation list of the year, 1989 was then ordered to be corrected. It is pursuant to this that the date of appointment of the petitioners of the second phase pursuant to 1985 advertisement was notified as their actual dates of entry into that cadre.

83. Thus seen, the parties to the said writ petition were the direct recruits pursuant to the first and second phase of 1985 advertisement and the promotees of the year, 1987. At that time, neither the direct recruits, who were appointed on 30.3.1990 or for that matter, the promotees with effect from 30.3.1990, were not even borne in the cadre much less parties to the said proceedings. There was no issue with regard to the legality or otherwise of the appointment of the direct recruit of the second and third phase pursuant to 1985 advertisement. Surely, on these facts, the said judgment nor the notification issued pursuant thereto can estop these direct recruits and promotees of the year, 1990 from challenging the appointment or their position in the merit list. Further, it may be noticed that the question of legality of the appointments had been taken up by the State. There was strong recommendation for their dismissal but instead of doing that, as noted earlier during President's Rule, the Governor took a humanitarian

approach and deem them to be regularized. It is pursuant to this that State issued notification on 4.10.2010 taking 3.10.2005 as their date of confirmation in service when they were deemed to be regularized instead of being dismissed and while finalizing the gradation list, this date is taken to be their legitimate date of entry in the cadre for till that date, their entry in the cadre was rank illegality. Thus, this contention does not hold any water and cannot be accepted.

84. On this issue, it was rightly submitted on behalf of the opposing set that the State has rightly calculated seniority of these petitioners from the date of their confirmation in service when they were regularized and reference was rightly made to various judgments including the case of A.K. Bhatnagar and Others Vs. Union of India (UOI) and Others, The reason is that prior to their confirmation and/or regularization, they had no due entry in the cadre. They were legitimately borne in the cadre only upon their confirmation/regularization order being passed by the Governor on 3.10.2005 instead of their dismissal.

85. Then, on behalf of these direct recruits of the second and third phase pursuant to 1985 advertisement, it is submitted that some of the direct recruits, who were appointed on 30.3.1990, had challenged the legality of appointment of these direct recruits of the second and third phase before the Jharkhand High Court by filing writ petition which was not entertained by the learned single Judge in the case of Arvind Kumar and Others (supra). The writ petition was dismissed in limine on ground of delayed challenge without further adjudication on merit. Those writ petitioners then preferred Letters Patent Appeal which has recently been dismissed in the case of Niranjana Prasad Deo and Others (supra) again not interfering with the order of the learned Single Judge. Thus, it was not open to these direct recruits of 30.3.1992 to raise this issue before the Patna High Court. There should be comity and amity of Court orders even though the decision of the Jharkhand High Court does not bind this Court.

86. To the contrary, Shri Binod Kanth and Shri Rajendra Narayan, learned Senior Counsel vehemently opposed these stands and, in my view, rightly so. They rightly first pointed out that at this juncture, the final gradation list having been published on 2.7.2010 wherein the State had pushed down these petitioners, they were only required to support the State action. They were not exercising their independent cause of action. State had rightly considered the precarious nature of their appointment and rightly took note of the Governor's action. It was pointed out that after the bifurcation of the State with effect from 15.11.2000, State of Jharkhand notified its own cadre of this service. They notified their own gradation list in respect of the ACFs there in that State. It is those ACFs, who were now in the Jharkhand cadre who had in fact challenged the position of those ACFs who remained there. That cadre became a separate cadre from the Bihar cadre and it has its own seniority list.

87. Independent of this, it was submitted that the learned Single Judge did not decide the matter on merit and rejected the challenge on grounds of delay. When the matter was taken up by the LPA Court in intra Court appeal at Jharkhand

High Court, it was brought to the notice that the final gradation list had been published on the 2nd of July, 2010 which was brought on record there. This is what the Division Bench of Jharkhand High Court had to say in that regard in paragraphs 10 and 13 of the judgment:--

10. So far initial grievance of the appellants that State Government was sitting over the finalization of the seniority list in spite of the representation submitted by the petitioners is concerned, for that now the final seniority list has been declared, as admitted by the appellant-writ petitioners in the supplementary affidavit dated 7th June, 2011, and petitioners-appellants admitted that Government of Bihar accepted the recommendation dated 29.6.2010 of the High Level Committee and accordingly published the final gradation list on 2nd July, 2010 and copy of which has already been brought on record by the State of Bihar as Annexure-E annexed with the supplementary counter affidavit. According to the appellants, by this seniority list dated 2nd July, 2010 the appellants have been given relief, as prayed for in paras-B & E, however, it is also submitted by the learned counsel for the parties that several writ petitions and counter writ petitions have been filed to challenge this final seniority list dated 2nd July, 2010 and those writ petitions are pending. Therefore, also the writ petitioners-appellants' relief, for direction to the State Government, to consider and publish final gradation list has already stand fulfilled and if, appellants are aggrieved against the said list, as a whole or in part, then that is a separate and independent cause of action and the scope of this litigation cannot be enlarged to adjudicate upon the seniority/final gradation list dated 2nd July, 2010 and, therefore, the present Letters Patent Appeal has become infructuous.

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13. In sum and substance, in our opinion, the petitioners' challenge to the appointment was rightly rejected by the learned Single Judge because of the reasons mentioned above by us. The appellants cannot succeed in Letters Patent and further so far their request for consideration of their representation and publication of final seniority list is concerned, that has already given and if, appellants are aggrieved against the new final seniority list on any count, including on the count of list published by the State of Bihar which is not treated as binding upon the State of Jharkhand, then that is a separate and independent cause of action for which in this Letters Patent Appeal as well as in original writ, no relief can be granted to the writ petitioners-appellants. Hence, the Letters Patent Appeal preferred by the appellants is dismissed, for the reasons mentioned above.

88. Thus seen, even though it was brought to the notice of the Jharkhand High Court the final gradation list, it chose not to adjudicate upon it and held the Letters Patent Appeal infructuous leaving it to those petitioners/appellants to agitate the matter afresh, if they so desired.

89. In my view, it is well settled that a judgment is an authority for what it

decides and not for all that logically flows from it in spite of the generality of the expression used therein. There being no adjudication about the correctness or otherwise of the final gradation list dated 2.7.2010, it is open for this Court to decide the said issue especially when the petitioners themselves have put the said gradation list to issue.

90. It is then submitted that seniority of longstanding and settled should not be unsettled at a later stage. Continuity and security of service tenure must be respected. In opposition to this line of submission, it is pointed out that the question of seniority being of longstanding settled issue is itself begging the question at all times. Whenever the question of inter se seniority came up before the State, the direct appointees of 1990 and the promotees with effect from 1990 challenged the seniority given to the petitioners being direct recruits of the second and third phase of 1985 advertisement. Objections were always filed before the Government but they were not finally decided nor disposed of in any manner till this final gradation list was published on 2.7.2010. In my view, it was rightly submitted that the seniority was not settled nor longstanding without challenge. State settled the issue for the first time by publication of the final gradation list only on 2.7.2010.

91. In this connection, I may note that Shri Abhay Singh placed strong reliance on the case of Roshan Lal and Others Vs. International Airport Authority of India and Others, which has been cited with approval in the case of Amarjeet Singh and Others Vs. Devi Ratan and Others, for the proposition that the challenge to the appointment orders could not be entertained because of inordinate delay and in absence of the same, validity of consequential seniority could not be examined. In such a case, a party is under a legal obligation to challenge the basic order and only if the same is found to be wrong, consequential order of seniority may be examined. In my view, the said proposition does not apply to the facts and circumstances of the present case. Here, as noted earlier, the direct recruits and the promotees of 1990 do not seek to challenge the validity of appointment of these direct recruits of the second and third phase pursuant to 1985 advertisement. Pursuant to the final gradation list being published, their writ applications in that regard had become infructuous. They had no cause of action left because the State had already accepted their contentions. Now they were only supporting the State action to be in the right perspective. They were not seeking the dismissal of these petitioners. It would have been another matter if they had independently challenged the validity of appointment in their own right but on the facts noted above, there is no need for that. Thus, even this ground is not available.

92. At the end, Shri Abhay Singh, learned Senior Counsel relied on the judgments of the Apex Court in the cases of Rabindranath Bose and Others Vs. The Union of India (UOI) and Others, The State of Gujarat Vs. Patil Raghav Natha and Others, and M.S. Mudhol and Another Vs. S.D. Halegkar and Others, to submit that even at this late stage, State can very well be precluded from taking

note of the illegality in their appointment and taking action in this regard. Thus, in view of his submission, State is precluded from taking cognizance of the illegality for relegating these petitioners to virtually bottom of the seniority list. In other words, State must take any action within a reasonable time and not having done so, it cannot take the action at all even if otherwise permitted.

93. Having given my anxious consideration, in my view, the proposition is too broadly stated in the facts of this case to be accepted. It is not that the State was not taking any cognizance of the rank illegality in appointment. As noted above, almost a decade back, the departmental Minister had recommended the dismissal of these petitioners. It was only on 3.10.2005 that the position was salvaged for them by the Governor during President's Rule when instead of dismissing them, taking a humanitarian view, he directed them to be considered as regularized. This action of the Governor itself clearly showed that State had not held their appointments to be valid. On the other hand, the need of such a declaration arose only because the invalidity of the appointment. After earlier gradation list was set aside, it is for the first time this gradation list is being finalized in the year, 2010 and, thus, this was the occasion to consider the effect of illegal appointment and confirmation in service pursuant to regularization with effect from 3.10.2005. Thus, the reliance on the cases aforesaid is clearly distinguishable and misconceived. If Shri Abhay Singh, learned Senior Counsel is understood to be submitting that whatever illegality in initial appointment be there, now it cannot be looked into at all for any purpose, again, it runs counter to the settled decisions that it is only irregularity in appointment that can be condoned or ignored but not rank illegality in appointment because a person illegally appointed does not get any right much less a vested right to continue as such. In that view of the matter, even this line of argument cannot be accepted.

94. No other issue was either raised or argued calling upon this Court to adjudicate by any party.

95. Before parting with this order, I would wish to observe that this whole mess and controversy is because of governmental action, both on count of miscalculations and misadventure. In order to obviate further complications, it is desirable that before any further recruitment or promotion to the cadre is done by taking proper steps in the matter, regular cadre strength should be notified consisting of duly notified sanctioned posts which is all the more necessary as the consequence of bifurcation of the State. Once that is done then recruitment and promotions must be made in consonance to the quota rule by balancing the recruitment for promotion process. Once the balance is restored then on superannuation of a promotee, the vacancy should be filled up by the promotee and vice versa for the direct recruit. The State is bound to act in a non-arbitrary and non-discriminatory manner and set its house in order. In the result, all the writ petitions are disposed of in accordance with the observations and directions, as contained above and the State would act accordingly.