

(1994) 11 SHI CK 0010

In the High Court Of Himachal Pradesh

Case No : C.W.P. No's. 1184 of 1993 and 168 of 1994

Janeshwar Goyal and Others

APPELLANT

Vs

High Court of H.P. and Others

RESPONDENT

Date of Decision : 17-11-1994

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 11
Constitution of India, 1950 — Article 14, 15(4), 16(4), 226, 233(1)
Demobilized Indian Armed Forces (Reservation of vacancies in the Himachal Pradesh
Judicial Service) Rules, 1975 — Rule 2
Himachal Pradesh Higher Judicial Service Rules, 1973 — Rule 4, 5(1), 5(9), 7, 9

Citation : (1995) 1 ILR HP 9

Hon'ble Judges : Gulab C. Gupta, C.J;S.N. Phukan, J

Bench : Division Bench

**Advocate : A.K. Goel, for the Appellant; Rajiv Sharma, for Respondent No. 1,
Inder Singh, General for Respondent No. 2 and K.D. Sood, for the Respondent**

Judgement

Gulab C. Gupta, C.J.—This judgment shall also govern--disposal of CWP No. 168/94, J.N. Barowalia and Ors. v. High Court of Himachal Pradesh and Ors., as the question of facts and law in both the writ petitions are identical. Petitioners in both the writ petitions are Additional District and Sessions Judges, Chief Judicial Magistrates and Senior Sub Judges, belonging to Himachal Pradesh Judicial Service and challenge benefits of Military Service being given to Respondent No. 3, having the effect of introducing disparity in their pay and making Respondent No. 3 senior to all of them. They therefore claim appropriate writ from this Court for quashing the revised gradation list as well as orders, in favour of Respondent No. 3 (Annexures PH and PJ).

2. Respondent No. 3, Shri A.C. Thalwal, had joined the Indian Air Force on 11-11-1965 and released for the said force on 1-12-1980. He worked as a Cashier in the Punjab National Bank New Delhi from February 1981 to January 1984. It appears that he was simply a matriculate at the time of joining the Air Force but graduated in 1971, passed M.A. in 1973 and LL B., in 1976. He

appeared in Himachal Pradesh Judicial Service examination held in August/September, 1983, against the vacancy reserved for Released Indian Armed Forces Personnel and was selected. Consequent upon his selection as aforesaid, he joined the said service as a Sub Judge-cum-Judicial Magistrate on 1-2-84. After the said Respondent joined the judicial Service, he made a representation to Respondent High Court seeking benefits of his approved military service under the Demobilized Indian Armed Forces (Reservation of Vacancies in the Himachal Pradesh Judicial Service) Rules, 1975. His representation was accepted by an order dated 31st August, 1989 by granting him eleven increments having regard to his eleven years approved military service. As far as his seniority was concerned, his representation was accepted by Respondent High Court in part by an order dated 19/ 20th November 1991, by granting him seniority in the service at the bottom of the batch of 1974. Prior to acceptance of this representation, Respondent No. 3 was shown at serial No. 43 of the seniority-list issued in December, 1990 but as a result of acceptance of the said representation, he became entitled to be placed at serial No. 13, in the said list. This has affected the seniority of the Petitioners and has made them juniors. The purpose of present writ petition is to challenge the constitutional validity of the Rules granting the aforesaid benefit as also the legal validity of the order disturbing their seniority.

3. Admittedly, the Petitioners as well as Respondent No. 3 are governed by the Himachal Pradesh Judicial Service Rules, 1973 (Annexure PA), which have been made in exercise of powers under Article 234 read with proviso of Article 309 of the Constitution of India. Constitutional validity of these Rules is not under challenge in these writ petitions. Part-V of this Rule dealt with the seniority and require the High Court to prepare a list of members of Judicial service arranged in order of seniority as determined in the manner specified in this Rule. As far as Sub Judges/Judicial Magistrates are concerned, the Rule provides that it shall be determined by the order in which the appointment are made to the service provided that persons recruited on the results of the competitive examination in any year shall be ranked inter se in the order of merit in which they are placed at the competitive, examination on the result of which they are recruited. Further it provides that those recruited on the basis of an earlier examination being ranked senior to those recruited on the basis of the later examination. It is a common ground that these Rules are still in force and valid for all purpose. It must be mentioned that these Rules do not specifically provide for reservation for Ex-servicemen. However, Rule 9 of these Rules which deals result/selection of the examination, permits reservation of vacancies for Scheduled Castes, Scheduled Tribes, other backward classes and Antyodaya Families and requires the Public Service Commission to arrange the names of selected candidates, in the order of merit interse against the vacancies reserved for them and in the manner prescribed by the Government from time to time. The words "other backward classes" have been interpreted by this Court in *Mohinder Kumar Sood v. H.P. Public Service Commission and Ors.* (AIR 1982 H.P. 76), as including "Ex-

servicemen". Under the circumstances, it is possible to hold that some of the vacancies could be reserved for Ex-servicemen as well as candidates applying against the said vacancies and competing successfully for appointment against them were entitled to get their names placed in the order of merit interse. There is no provision in these Rules to give any benefit to Ex-serviceman of their past military service either in the matter of pay fixation or in the matter of seniroyty.

4. It appears that the Government of Himachal Pradesh in consultation with the High Court and the Himachal Pradesh Public Service Commission framed Rules known as "Demobilized Indian Armed, Forces (Reservation of Vacancies in the Himachal Pradesh Judicial Service) Rules, 1975 and published the same in the official Gazette in accordance with law. Rule 2 of these Rules provides that they shall remaining force for a period of five years. Admittedly, these Rules expired in April, 1980. Under these Rules 20 % of the vacancies in the Himachal Pradesh Judicial Service to be filled up through direct recruitment were kept reserved for being filled by the released Indian Armed Force Personnel who joined military service or were commissioned on or alter 1-11-1962. It appears that the State Government was keen to extend the life of these Rules, and therefore, made a " reference to the Respondent High Court on 29th November, 1980, seeking approval of the High Court to the extension of the aforesaid Rules. The proposal of the Respondent-State Government was considered in the Full Court meeting of the High Court held on 6th March, 1981, wherein following decision was taken:

After giving serious consideration to the proposal the Full Court was of the opinion that it would not be in, the interest of Judiciary to agree to any further reservation.

Inspite of the aforesaid resolution the High Court the State Government published on 1-8-1981 the Ex-Serviceman (Reservation of Vacancies in the Himachal Pradesh Judicial Service) Rules, 1981; (Annexure PD), (hereinafter referred to as 1981 Rules), purporting to be in exercise of powers conferred by the proviso to Article 309 read with Article 234 the Constitution. Though the preamble to these Rules mentions" that these Rules were made in Court with the High Court of Himachal Pradesh, the Rules were neither sent to the High Court nor the High Court had otherwise known about the intention of the "Government to promulgate those Rule Earlier in the letter dated 29th November, 1980, the State Government had only sought approval of the High Court for extending 1975 Rules and nothing more.

5. The Publication of these Rules on 1-8-1981 caused concern in the High Court which again met on 28-8-1981 and passed the following resolution:

The Full Court views with grave concern the fact that whereas the Government sought "approval of the High Court" to the proposed amendment vide its letter No. 7-5/70-DP. (Apptt. II), dated 29th November, 1980 and though the Court vide its resolution dated 6th March, 1981 did not agree to the proposed amendment, still the Government has enforced the proposed amendment;

The Registry is directed to convey the same to the Government.

6. Nothing seems to have happened and the Respondent Government continued to make reservation for Ex-servicemen under these Rules.

7. These 1981 Rules not only made provisions of reservation of vacancies but Rule 5(1) further provided that; "the period of approved military service rendered after attaining the minimum age prescribed for appointment to the Himachal Pradesh Judicial Service by the candidates appointed against reserved vacancies under Rule 3 above, shall count towards fixation of pay and seniority in that service". Respondent No. 3, has sought the benefit of this Rule and has been granted the same as a result of which he though recruited and confirmed much after the Petitioners, has become senior to them.

8. It may be mentioned that One George who had appeared in the competitive examination for the Himachal Pradesh Judicial Service in the year 1981 alongwith Respondent No. 3 and was above him in the seniority list had challenged the legal validity of the aforesaid benefit being given to Respondent No. 3 by filing a writ petition in this High Court under Article 226 of the Constitution and the same was CWP No. 693 of 91. This High Court by its order dated 10th June, 1992, held that the constitutional validity of the 1981 Rules remain decided by the Full Bench of this Court in Mohinder Kumar Sood Vs. H.P. Public Service Commission and Others, and hence held that reservation in favour of Ex-servicemen and the grant of benefit of approved military-service for the purpose of pay fixation and seniority was constitutionally" valid. (Annexure-R 3/5). It however appears that Shri George filed a SLP before the Supreme Court where it was the subject matter of SLP No. 8258 of 92. The said petition was however dismissed in limine on 26-11-1992 (Annexure-R 3/6). The Petitioners, admittedly were not the parties to the aforesaid writ petition and claim that the said judgment does not bind them nor the said judgment decide their grievance as submitted for consideration of this Court in these writ petitions.

9. Since George's judgment accepts that the constitutional validity of 1981 Rules has been decided by the Full Bench of this Court in Mohinder Kumar Sood's case (supra), the said judgment may also be noticed. The said case concerned advertisement for recruitment, to the H.P. Judicial Service issued in October, 1980 wherein eight seats were shown as reserved for Scheduled Castes, Scheduled Tribes and Ex-Servicemen. The examination for selection was proposed to be held on 22-12-1980. One Ravinder Singh Dhaulta challenged the reservation by filing a writ petition which was subject matter of CWP No. 202 of 80. The State of Himachal Pradesh in reply to the said writ petition, conceded that there was a mistake in making reservation for Ex-servicemen, since there was no provision for such reservation. On the aforesaid statement, the examination was countermanded by order dated 4-12-1980. In spite of it an advertisement was issued. in August 1981 showing two each vacancies reserved for Scheduled Castes and Scheduled Tribes and one for Ex-servicemen. One Shri Mohinder Kumar Sood who was one of the candidates filed the writ petition

challenging reservation as aforesaid. Constitutional validity of 1981 Rules was challenged on the ground that they were promulgated without any consultation with the High Court as required under Article 234 of the Constitution. "The High Court noticed events leading to promulgation of 1981 Rules in paras 4 and 5 and found that the Rules were framed neither in consultation with the High Court nor the H.P. Public Service Commission. The stand of the State Government before the Court as appearing from para 7 of the judgment was that since the High Court had already conveyed its disagreement to the Government's proposal to extend the Demobilized Indian Armed Forces (Reservation, of Vacancies in the H.P. Judicial Service) "Rules, 1975, the High Court was not again consulted when the Ex-servicemen (Reservation of Vacancies in the H.P. Judicial Service) Rules, 1981, were notified as both these sets of rules had the same intention, namely, the intention to provide reservation for ex-servicemen in the H.P. Judicial Service and the views of the High Court on this matter had already been solicited. The High Court, therefore, held that there was no consultation." Relying on the decision of Chandramouleshwar Prasad Vs. The Patna High Court and Others, the Court further held that "the consultation is not a mere formality of asking the opinion of another but there has to be full and effective consultation by each party making their respective points of view known to each other and then discussing and examining their relative merits of the view.

10. It, however, appears that the Advocate General submitted before the Full Bench that no consultation was necessary. It was submitted that the Government has the power to make the reservation under the Constitution without consulting the High Court under Articles 14, 15(4) and 16(4). The Full Bench, however, did not test this contention in view of its agreement with the submission that reservations made, were also referable to proviso (ii) of Sub-rule (9) of Rule 5 of H.P. Judicial Service Rules, 1973. (hereinafter referred to as 1973 Rules) these rules were admittedly made after consultation with the High Court and, therefore, the Full Court held as under:

The proviso leaves no doubt that vacancies for Scheduled Castes, Scheduled Tribes, and Other backward Classes can be reserved. The manner of reservation has, however, been left to the Government. It can be prescribed from time to time.

Argument that the aforesaid provision amounts to abdication of the powers of the High Court in favour of the Government, was not accepted by the Full Bench up-held as under:

The High Court had been consulted and it had agreed that there should be reservation for Scheduled Castes, Scheduled Tribes and other backward classes. This decision was in accordance with the principles enshrined in the Constitution for the upliftment of these classes. The only discretion left to the Government was about the extent of reservation. This extent was likely to vary from time to time in view of the economic development of various communities with the passage of time. It is the State which has the means of finding out the extents of

handicap suffered by various classes and, therefore, is in a position to fairly conclude the extent of reservation which may be required by each class. In this view of the matter it cannot be said that the High Court had abdicated its powers or functions.

Thereafter, the Court went on to examine the question whether Ex-Servicemen can be included in the other category under Article 14 as well as Article 29(2) of the Constitution and held that the word "would" include such persons also. There is nothing in this judgment to indicate that the Full Bench had upheld the Constitutional validity of 1981 Rules. Indeed, the Full Bench in para 6 of the judgment had held that the Rules of 1981 were not amendment to the previous Rules of 1975 and were a new set of Rules. The Full Bench has also clearly and specifically held that 1981 Rules were not made in consultation with the High Court. It has not examined its constitutional validity as the reservation for Scheduled Castes, Scheduled Tribes and Ex-servicemen could also be made under Rule 9 of 1973 Rules which had been admittedly made after consultation with the High Court and in accordance with law. "Under the circumstances, it is not correct to hold that the Full Bench in Mohinder Kumar Sood's case has upheld the constitutional validity of 1981 Rules. The assumption of the Division Bench in George's case that the Rules have been held constitutionally valid by the Full Bench, is therefore, patently erroneous. Respondent No. 2, the State of Himachal Pradesh has not filed its own reply to the writ petition but has adopted the reply filed by the Respondent High Court. The High Court has, however, in its reply to paras 18 to 21, submitted that the High Court was "duly consulted" before framing 1981 Rules. It also appears to be the contention of the High Court that the constitutional validity of 1981 Rules has been specifically upheld by the Full Bench of this High Court in Mohinder Kumar Sood's case (supra). The High Court therefore, submits that the Petitioners cannot re-agitate the issue of constitutional validity of these Rules again in this Writ Petition. This reply of the High Court must be regretted as it is neither honest nor otherwise correct. There is a specific averment in para 18 of the writ petition that the High Court had conveyed its "disagreement to the Respondent State Government to the extension of 1975 Rules to the Himachal Pradesh judicial Service, and in spite of it, 1981 Rules were made without any consultation with the High Court. The Petitioners had also filed a copy of the affidavit of the Registrar of the High Court in CWP No. 338 of 81 as Annexure PE which clearly and specifically supported the case of the Petitioners that the 1981 Rules were made without even informing the High Court about it. It is surprising that the officer of the High Court, particularly, Shri B.D. Chaudhary, Deputy Registrar (Admn.) has chosen to contradict the erstwhile Registrar of the High Court, Shri R.L. Khuranna, who had filed the affidavit in the aforesaid case. This only shows that the High Court has now taken a somersault and is trying to somehow justify its order which would not be justified on the basis of its earlier stand. Such an inconsistent stand by the High Court hardly adds to its prestige and must be regretted. In spite of it, we have no hesitation in holding that the reply filed by the Respondent High Court

in this Writ Petition is not correct and cannot be accepted as it amounts to not only disregarding the earlier affidavit Annexure PE but also the facts stated in the Full Bench judgment in Mohipder Kumar Sood's case. It is, therefore, the considered view of this Court that 1981 Rules were not framed in consultation with the High Court.

11. It is not the submission of the Respondents that these rules could have been made without consulting the High Court. Indeed the preamble of these Rules clearly states that these Rules have been made in conformity with the provisions of Article 234 of the Constitution and were made in consultation with the High Court. The statement of facts in the preamble to these Rules being false, the Rules, as framed, must be held to be un-constitutional and invalid. Article 234 deals With the appointment of persons other than District Judges to the judicial service of a State and requires them to be made by the Government of the State in accordance with the Rules made by him in that behalf after consultation with the State Public Service Commission and the High Court exercising jurisdiction in relation to that State. The consultation is required in the making of the Rules. Since in the instant case, not even a formal reference of the intention of the State Government to make 1981 Rules has been communicated to the High Court, there has not been even a formal consultation about it. Clearly, therefore, 1981 Rules are violative of Article 234 of the Constitution. In this connection recent decision of the Supreme Court in Supreme Court. Supreme Court Advocates-on-Record Association and another Vs. Union of India, may be referred to wherein the Supreme Court while dealing with the requirement of Article 233(1) has held that the obligation to consult the High Court is so integrated with the exercise of the powers by the Governor that the power must be exercised in the manner provided by that Article or not at all. (Paras 281, 286 and 289). Under the circumstances, it must be held that the exercise of power by the Governor of making 1981 Rules was not available to him" except in Consultation with the High Court. The Rules are accordingly held to be constitutionally invalid and declared non-est.

12. The submission of the learned Counsel for the Respondent, however, is that the consultation under Article 234 of the Constitution is required only for making Rules for appointment of a person to judicial service but the same does not include seniority. Determination of seniority is for the purpose of further promotion which is a matter of control of the High Court under Article 235 of the Constitution. In this Connection the decisions of the Supreme Court in Chief Justice of Andhra Pradesh and Others Vs. L.V.A. Dixitulu and Others, , State of Assam and Another Vs. Kuseswar Saikia and Others, and Hari Datt Kainthla and Another Vs. State of Himachal Pradesh and Others, may be referred to. The power to determine interse seniority of the judicial officers appointed is also within the exclusive jurisdiction of the High Court, as would be clear from the judgment. The State of Assam and Another Vs. S.N. Sen and Another, and State of Bihar v. Madan Mohan Prasad and Ors. (AIR 1976 404). Under the circumstances, determination of Seniority is outside the authority of the

Governor and could not have been exercised by him. This, however, does not mean that the Governor by exercising his Rule Making powers under Article 309 of the Constitution can nullify the control of the High Court under Article 235 of the Constitution. Rules Contemplated under Article 234 need not necessarily be rule for appointment of the person only. The said Article only provides making of appointment by the Governor of the State in accordance with the Rules which have to be made in consultation with the High Court. This however, does not mean that the Rules required to be made in consultation with the High Court should be Rules relating to appointment only and not other matters connected with the appointment. Indeed the manner and mode of appointment including the conditions of appointment would form necessary part of those Rules and hence Rules governing the conditions of appointment of Judicial Officers other than the Distrit Judges will require to be made in consultation with the High Court Article 234 and 235 and 309 of the Constitution have now to be understood and appreciated in the context of the constitutional scheme which aims at promoting an independent Judiciary consisting of Judges capable of delivering justice without fear or favour. Independence of Judiciary will be destroyed if the Governor by making Rules under Article 309 could destory the control of the High Court over the subordinate judiciary. In this connection the recent decision of the Supreme Court in Advocates-on-Recofd Association (1993) 4 SCC 411 (supra) deserves special mention wherein it has been emphasised that: IT IS THE CARDINAL PRINCIPLE OF THE CONSTITUTION THAT AN INDEPENDENT JUDICIARY IS MOST ESSENTIAL CHARAC TRISTIC OF'A FREE SOCIETY LIKE US. The interpretation of the Ld. Counsel for the Respondent would with out doubt destroy this independence of judiciary and for that reason cannot be accepted.

13. Then in the context of peculiar facts and circumstances of the case the matter really is connected with the appointment of Respondent No. 3. Respondent No. 3 was actually appointed in the year 1981 but has been treated as having been appointed in 1974 when he was actually not appointed. Under the circumstances giving benefit of military service to Respondent No. 3 is nothing sort of treating him as fictionally serving as a judicial officer while actually he was serving in the Indian Air Force. The matter in our opinion squarely falls within Article 234 of the Constitution and therefore, 1981 Rules can not be served as they are constitutionally invalid.

14. It was thereafter submitted" that since 1981 Rules have been subsequently amended atleast thrice the invalidity if my should be deemed to have been cured. There is no provision in the Constitution curing the invalidity as aforesaid. Then Rules made in violation of Article 234 are void as held in The State of West Bengal Vs. Nripendra Nath Bagchi, . The distinction between "void" and "voidable" is well established and hence there should be no difficulty in holding that the Rules did not exist in the eye of law and hence could not be restored in law. The arguments therefore must be rejected.

15. Learned Counsel for the Respondents, have however, vehemently submitted that the judgment of this Court in George's case (Annexure R3/5) has finally decided that seniority of the Respondent No. 3 has fixed by the High Court by giving him the credit for his military service is legal and valid and since the said judgment has also been approved by the Supreme Court by refusing Special Leave against the same, it cannot be up set by this Court and hence these writ petitions should be dismissed. The submission of the learned Counsel for the Petitioners is that they were not the parties to the aforesaid case and had, therefore; no opportunity of presenting their point of view for consideration of the Court. It is, therefore, submitted that the said judgment cannot decide their claim. It is not the Respondents case that the judgment in George case operates res judicata against the Petitioners and, therefore, the petition should be dismissed. Indeed no such submission could legitimately be made. It is well settled that the principle of res judicata is not applied in cases where parties in subsequent case are different. In this connection the decision of the Supreme Court in K. Srinivasa Iyengar v. K. Srinivasan and Anr., (1973) 2 SCC 327, State of Punjab (Now Haryana) and Others Vs. Amar Singh and Another, may be referred to. It is not in dispute that principle governing res judicata u/s 11 of the CPC are also applied in writ petitions and hence it was rightly not argued that the aforesaid judgment would operate as res judicata against and to the Petitioners. Then the said judgment proceeds on assumption that the Full Bench of this Court in Mohinder Kumar Sood's case has up-held the constitutional validity of 1981 Rules, which assumption is factually incorrect. The Division Bench deciding George's case has itself not considered and decided the constitutional validity of these Rules which is the main submission requiring the consideration of this Court in these Writ petitions. Under the circumstances neither the George's case nor Mohinder Kumar Sood's case decide the constitutional validity of 1981 Rules. In this view of the matter, It is the obligation of this Court to decide the question submitted for its consideration.

16. Once 1981 Rules have been declared to be constitutional (sic) invalid, no action based on the aforesaid Rules would be constitutionally valid. Benefit of approved military service rendered by Respondent No. 3 for the purpose of seniority has been given to him under Rule 5(1) of the aforesaid Rules. There is no corresponding provision either in 1973 Rules or elsewhere so as to provide a legal base to the grant of said benefit to Respondent No. 3. The submission of Respondent No. 3 however, is that the Supreme Court in Narendra Nath Pandey and Others Vs. State of U.P. and Others, has granted similar benefits to Ex-Armed Personnel and hence grant of benefit to him is fully justified. As far as Narendra Nath Pandey's case is concerned, the Supreme Court was interpreting Rule 6 of U.P. Non-technical (Class-II) Services (Reservation of vacancies for Demobilised officers) Rules (1973) and in that context up-held reservation and computation of seniority. The said judgment cannot be read without the aforesaid Rules. The said judgment also cannot be read laying down the law that even without any valid Rule in that behalf in the absence of any Rule, the benefit of

past military service can be given. This decision was considered in *S.B. Dogra Vs. State of Himachal Pradesh and Others*, and the aforesaid aspect of the matter clarified. In Dogra's case also the Supreme Court was considering the question in the context of the Demobilised Armed Forces Personnel (Reservation of Vacancies in the Himachal Pradesh State Non-Technical Service) Rules, 1972 and not otherwise. Under the circumstances these decisions cannot support the submission that even in the absence of Rules granting benefit of approved janitary service for the purpose of seniority, ah Ex-Armed Force Personnel would be entitled to the said benefit. Indeed in the absence of any rule in this behalf, the matter would be governed by Part v. of Rule 7 of 1973 Rules and seniority of all judicial officers will require determination in terms thereof. 1973 Rules being constitutionally valid would operate in the absence of any other law to the contrary. Under the circumstances, it is not possible to accept the submission that Respondent No. 3 would be entitled to the benefit of military service even in the absence of any Rule in that behalf.

17. The upshort of the aforesaid discussion is that Respondent No. 3 cannot be given the benefit of authorised military . service while determining his seniority vis-a-vis the Petitioners and others in judicial service. The seniority of the judicial officers including the Respondent No. 3 will have to be determined in accordance with Rule 7 of 1973 Rules.

18. The Petitioners also submit that even otherwise the impugned orders are arbitrary and violative of Articles 14 and v. 16 of the Constitution of India. It. is particularly submitted that the impugned orders have the effect of making Respondent No. 3 a Judicial Officer from 1974 when he was not even qualified to hold the said post. As has been noticed earlier, Respondent No. 3 was only a matriculate when he joined the Indian Air Force in November 1965. He passed his B.A. in 1971 and LL.B., in 1976. Rule 4 of 1973 Rules and provide that no person shall be appointed to be a subordinate judge who is not a Law Graduate or has not possessed or an equivalent examination. Clearly, therefore, Respondent No. 3 was not eligible to be appointed as a Subordinate Judge before 1976. It is, therefore, a case where he has been treated as having been appointed before he was eligible to be so appointed. The rule, if any, made in this behalf and having the aforesaid effect would require consideration in the context of Articles 14 and 16 of the Constitution. It has, however, been held that there has been no such Rule in existence and hence the consideration of said question would not arise. Since the impugned orders are supported dehors the rules, it is necessary to consider whether they are arbitrary as alleged. Assuming that Respondent No. 3 being the Ex-Armed Personnel would fall in a distinct and separate category at the time of his entering the service and hence reservation of post will be constitutionally valid, the same distinction would disappear after his induction into the service. Thereafter it will not be possible to grant the said Respondent any such benefit and the said grant would be prima facie arbitrary. It is well settled that persons though recruited from various source as members of the service, are treated as having become part of the said service after their

appointment and thereafter no distinction between them can be made. In this view of the matter, Respondent No. 3 could not be given the said benefit. The said benefit would be violating Rule 4 of 1973 Rules and cannot be justified in any manner. 1973 Rules have statutory force and cannot be permitted to be violated. Then conferring benefits on the Respondent No. 3 from a date when he was not even eligible for appointment would, in our opinion, be wholly arbitrary and un-justified.

19. In view of the aforesaid, the orders of the High Court dated November 19/20, 1991 (Annexure PH) and dated 5th August 1993 (Annexure PJ) amending the gradation list are hereby quashed. While so doing, we consider it necessary to clarify that we are not giving any direction regarding the benefit of pay-fixation nor we are finding any fault with the reservation made in favour of Ex-Army Personnel. Under the circumstances, this judgment would not be interpreted as affecting the validity of appointment or grant of increments to Respondent No. 3. No costs.

Petitions accepted.