

(1983) 09 PAT CK 0037
In the Patna High Court
Case No : C.W.J.C. No. 2980 of 1981

Kapildeo Bhagat and Others	Vs	APPELLANT
State of Bihar and Others		RESPONDENT

Date of Decision : 14-09-1983

Acts Referred:

Citation : (1984) 32 BLJR 272

Hon'ble Judges : M.P. Varma, J; L.M. Sharma, J

Bench : Division Bench

Final Decision : Allowed

Judgement

Lalit Mohan Sharma, J.—The petitioners and respondent No. 4 are engineers employed in the Public Works Department of the Government of Bihar. The petitioners claim to be senior to the respondent No. 4 and have by the present writ application challenged the orders passed to the contrary.

2. The petitioners were appointed in the years 1954 to 1963 in the Bihar Engineering Service Class II, the details whereof are mentioned in para 4 of the writ application. They were confirmed indifferent years which will be mentioned later. The respondent No. 4 was also appointed in B.E.S. Class II by the Order in Annexure 1 dated 13.11.64 and joined on 1.10.64. Although this appointment was for six months only but he continued in service without interruption and fresh order was passed on 16.10.65 as in Annexure 2 appointing him as temporary Assistant Engineer with effect from the date of joining.

3. After the Chinese aggression in 1962 and attack by Pakistan in 1965, many doctors and engineers serving under the State offered their services to the defence of the country by joining the Army. It was considered expedient to make it obligatory for them to join the military if so required and, accordingly, the rules applicable to Bihar Engineering Class II were amended on 26.3.65 by insertion of a new clause to Rule 11 as mentioned in the notification annexed to Annexure 2. The respondent No. 4 joined the military service in September, 1966. According

to the petitioners" case, he had to do sounder the compulsory military scheme introduced by amendment of the rule. The respondents deny this. The respondent No. 4 returned back in September, 1970 after rendering four years of military service.

4. In 1967, a decision as contained in Annexure 3 was taken by the State Government to bestow certain benefits on the doctors and the engineers who had joined the military service before the introduction of the compulsory scheme. The respondent No. 4 could not claim any benefit thereunder. He and several other engineers, however, pleaded their case for similar benefits by filing a representation, Annexure D/4 dated 19.11.70. The request was turned down by Annexure 7 dated 29.5.71. On 24.4.72 the benefits allowed by Annexure 3 were extended to other engineers and doctors by a decision in Annexure 3/1. The respondent No. 4 made a fresh application as contained in Annexure E/4 dated 23.12.75 claiming under Annexure 3/1 the right of confirmation in B.E.S. Class II with effect from the date on which he was relieved to join the military service, and other benefits. The petitioners have attached a copy of the order rejecting the claim as Annexure h dated 11.7.77. On the very next date, that is, 12.7.77 the respondent reiterated his claim by filing another application, Annexure F/4. By the order Annexure 9 dated 18.8.79 the benefit was granted to him and he was confirmed retrospectively with effect from 18.9.66 and was declared entitled to the other benefits in this regard. Accordingly, by order in Annexure 10 dated 11.4.80, the seniority of the respondent No. 4 was fixed. In the meantime, some of the engineers including some of the petitioners who were affected by this decision, filed a writ application in this Court which was registered as C.W.J.C. 2647 of 1979 and was admitted on 11.9.79. When the case was placed for hearing (before a Bench of which I was a member) it was mentioned that the gradation list in Annexure 11 had been withdrawn by a later order dated 17.4.80 Annexure 10/1. The learned Additional Advocate General who was representing the State stated that the entire controversy was being re-examined and a fresh final decision would be taken by the Government. The High Court in these circumstances declined to consider and decide the dispute and observed that it was expected that the State would take a decision expeditiously. C.W.J.C. 2647 of 1978 was "accordingly disposed of on 24.7.80 (vide Annexure H/4). Ultimately the State Government issued an order as contained in Annexure U dated 14.8.81 accepting the claim of the respondent No. 4.

5. The present writ application has been filed for quashing the orders in Annexures 9 and 11. The petitioners claim that the decision bestowing upon the respondent No. 4 and recognising his seniority is illegal.

6. The circular orders in Annexures 3 and 3/1 have also been challenged as arbitrary and invalid in law in the writ application, but during the hearing of the case, Dr. Chitale appearing on behalf of the petitioners did not advance any argument in support of this view.

7. Dr. Chitale contended that,

(i) respondent No. 4 is not entitled to the benefits granted by Annexure 3/1 as the same is not applicable to him;

(ii) even conceding that the respondent No. 4 was rightly confirmed in service with effect from 18.9.66, he could not claim seniority over the petitioners who were in continuous regular service from before. In other words, inter se seniority could not be decided with reference to the dates of confirmation in service; and

(iii) besides, the petitioners 2 and 3 were confirmed in 1964 and in any view of the question, they could not be held to be junior to the respondent no.

8. In support of his argument that the circular order (Annexure 3/1) was not applicable to the petitioners at all, it was strenuously contended that for a person claiming benefit thereunder, it was essential that he should have joined the military service voluntarily and not under any compulsion. The respondent No. 4 had to join the army under the compulsory scheme and, therefore, could not claim any benefit. It was further urged that Annexure 3/1 applied only to such engineers and doctors who had entered the State's service before 8.1.65. The petitioners want to ignore for this purpose the service of the respondent No. 4 under Annexure 1. The suggestion is that he should be treated to have entered the State's service on 16.10.65 under Annexure 2 and not earlier. In their counter affidavits, the State as well as the respondent No. 4 have averred that the respondent No. 4 had voluntarily joined the military service.

9. For deciding the question as to whether the respondent No. 4 was appointed in the State Service before 8.1.65 so as to entitle him to the benefits under Annexure 3/1, the scope and effect of the said order and the appointment orders as contained in Annexures 1 and 2 have to be considered. Reliance on behalf of the respondent has been placed on the language of Annexure 1 under which the respondent No. 4 was initially appointed as a temporary Assistant Engineer "in B.E.S. Class II in Public Works Department". Although the order indicated that the appointment was for six months only, it is the admitted position that the respondent and other engineers mentioned in Annexure 1 continued in uninterrupted service until the order in Annexure 2 dated 16.10.65 was passed.

10. It is not suggested by any body that the benefit granted under Annexure 3 could be claimed by the petitioners and it is therefore, not necessary to go into its contents in great detail. But for appreciating the background in which the latter order Annexure 3/1 was passed, it may be useful to mention that Annexure 3 was passed with a view to bestow certain benefits on doctors and engineers who had joined the Emergency or Short Service Commission before the compulsory military scheme was introduced in January, 1965. It was, inter alia, provided that such Government servants would on their return from the military service be appointed substantively against permanent posts with retrospective effect from the dates they had relinquished charge of their temporary civil posts under the State. It expressly excluded those Government servants who had joined the military service after 8.1.65. The decision in Annexure 3/1 to extend

the benefits to others was taken on considering the representations made by the j officers. The original order is in Hindi, but the learned Counsel for the petitioners advanced his argument by reference to an English translation filed by him at the hearing of the case. The English version appears to be a faithful rendering of the original and no objection was taken by the respondents against the same. It states that some officers had filed representations that they had been deprived of the benefits in lieu of their military service only on the ground that they had joined the military service after 8.1.65. It proceeds to state.

On careful considerations of their representations it was found that the compulsory liability scheme is not applicable to those persons who were appointed in State Services before 8.1.1965 and where this compulsory liability scheme is not applicable on such persons, they cannot be deprived of the facility of permanency like other serving doctors. Therefore, the State Government has decided that those doctors and engineers on whom the compulsory liability scheme was not applicable (i.e., those who were appointed in State's Services before 8.1.65) still, if they had joined the Military Service at their option, they would be entitled to all those facilities as contained in the Government order No. 9653 dated 12.7.1967 which are admissible to other serving doctors and engineers even though they might have joined the Military Service after 8.1.1965.

11. The view expressed above that the compulsory liability scheme was not applicable to any person who was appointed before 8.1.65 appears to be based on the amendment of Rule 11 mentioned earlier whereby Clause (c) was added to Rule 11 in the following terms (only the relevant portion is quoted below):

Any person appointed to the Bihar Engineering Service Class II on or after 1st April, 1965 shall, if so required be liable to service in any Defence Service or post connected with the defence of India, for a period of not less than four years including the period spent on training, if any.

12. Since Annexure 3/1 extended the benefits to those who were appointed in State's service before 8.1.65, the point whether the petitioners joined the Engineering service under the State of Bihar before that date becomes important.

13. Mr. Chitale strongly contended that since the appointment by Annexure "1" was for a period of six months only, the same must be treated as an ad hoc appointment and should be ignored. So far as Annexure "2" is concerned, the expression "from the date of joining" mentioned therein has been interpreted as referring to the date on which the appointees joined their posts under Annexure "2". In the writ application, some vague allegations of favoritism were also made and denied in the counter affidavit, but during the course of the argument, the learned Counsel for the petitioners did not rely on them. Mr. Shreenath Singh, appearing on behalf of the respondent No. 4 relied on the counter affidavit sworn by the Under Secretary (P.W.D.) to the Government of Bihar filed on behalf of the State. It is stated therein that the State felt in 1964 the necessity of urgently appointing 150 Assistant Engineers in the Bihar Engineering Service Class II and

as the process of consultation with the Bihar Public Service Commission would have taken considerable time, it was decided to appoint at least 80 such engineers on the recommendation of a Selection Committee constituted by the Government for this purpose. Accordingly, the Government issued an advertisement on 3.4.1964 "for appointment of temporary Assistant Engineers in Bihar Engineering Service Class II". The Development Commissioner, Bihar was the Chairman of the Committee and the Secretary, P.W.D. and two Chief Engineers were members. A request was made to the Bihar Public Service Commission also to make suitable recommendations for filling up vacancies in the Service and it was made clear that the services of those candidates who were selected by the Selection Committee, but were not recommended by the Public Service Commission for appointment as Assistant Engineers, would be terminated after six months. The respondent No. 4 besides others was thus appointed initially by Annexure 1 and later on the recommendation of the Commission by Annexure 2. The respondent No. 4 accordingly joined his post on 1.12.64 and he continued in service without break. Mr. Shreenath Singh is right in his contention that in these circumstances and in view of the express language both in Annexure 1 and 2 that the respondent No. 4 was appointed in B.E.S. Class II, it is futile to suggest that he was not in State Service before 8.1.65. There was no question of the respondent No. 4 joining or rejoining his post after Annexure 2 was issued, he was already in service and he merely continued. The words to this effect mentioned in Annexure 2 must be held to refer to the initial date of joining, that is, 1.12.65.

14 The learned Counsel for the petitioners referred to paragraph 3 of Annexure 2 which is in the following terms, which described the appointment of 46 Assistant Engineers including the respondent No. 4 as having been made on ad hoc basis for six months:

That 46 Assistant Engineers as per Annexure "B8" appointed on ad hoc basis for six months will continue in their respective posts until further orders.

The expression "ad hoc" has clearly been used in a loose and not in the technical sense and not as meaning to be an appointment outside the Service, as that would be contradicting the express language of the opening sentence in Annexure 2 as well as that of Annexure 1. The description in Paragraph 3 was made casually, as will appear from its context. The latter part of the said paragraph quoted above supports the view that there was no second date of joining for the respondent No. 4 under Annexure 2. He had to continue in his post which he had joined in November 1964. The fact that the appointment in Annexure 2 was also temporary and, therefore, liable to be terminated cannot lead to the conclusion that the respondent No. 4 was not in service, it is significant to note that the endorsement made in Annexure 2 after the signature of the Deputy Secretary mentions that appointees were holding "the sanctioned posts of Assistant Engineers".

15 The object of the order in Annexure 3/1 was to extend the benefits to "those

who were appointed in State Service before 8.1.65". There is no reason to give a narrow and restricted meaning to the expression "State Services" The order is remedial in nature and should receive a beneficial construction This approach to interpretation has been judicially recognised in England "for several centuries and has been followed in this country, Referring to the judgment in Heydon's case (1584) 3 Rep. 7 b it is stated in Maxwell's book on Interpretation of Statutes that it is the duty of the Judge who makes such a construction as shall suppress the mischief and advance the remedy. Even where the usual meaning of the language falls short of the object, a more extended meaning may be attributed to the words if they are fairly susceptible to it. In the present case, the language in Annexures 1, 2 and 3/1 plainly suggests a construction in favour of the case of the Respondent No. 4.

16 In the course of final reply of the petitioners, Mr. B.P. Pandey, learned Counsel, relied on the judgment of this Court dated 3.5.82 in C.W.J.C. 1493 and 1829 of 1981 in support of his argument that the temporary service of the respondent No. 4 in pursuance of Annexure 1 should be ignored Mr. Shreenath Singh indicated that he also relied on the said judgment in support of his argument on the second point mentioned in Paragraph 7 above. The case is clearly distinguishable and I propose to deal with it again later on.

17. It was urged on behalf of the petitioners that the military service rendered by the respondent No. 4 cannot be treated to be voluntarily and he therefore should not be allowed benefits of Annexure 3/1. Reference was made to Paragraph 2 of Annexure 2 which stated that the Assistant Engineers, if so required, will be liable to serve in any defence service or posts connected with the defence of India, as per amended Rule 11(c) of the Rules, referred to above. It has to be remembered that a large number of Engineers were appointed by Annexure 2 and the number of Engineers coming in service from before like the respondent No. 4 was only 46. Paragraph 2 was making a general reference to the Assistant Engineers. The third paragraph considered and discussed above is an independent paragraph separately dealing with them. The second paragraph while mentioning the liability to compulsory military service expressly pointed to the amended Rule 11(c) in this regard. The conclusion is that the liability mentioned therein was subject to the provision of Rule 11(c) and Rule 11(c) quoted above in Paragraph 11, in unambiguous terms placed the liability in this regard only on those persons who were appointed on or after 1965. This was reiterated in Annexure 3/1. It must, therefore, be held that the respondent No. 4 was not covered by the Compulsory Military Scheme and therefore, entitled to the advantages allowed by Annexure 3/1. Dr Chitale referred to the statement in the respondent No. 4's representation filed in 1970 (i.e. before Annexure 3/1), Annexure D/4 claiming the benefits under Annexure 3 by saying that he had joined the military service under Compulsory Service Liability Scheme. Mr. Singh replied that the respondent No 4 had joined many other Engineers who were covered by the Compulsory Scheme, in filing that representation and did not care to distinguish his case on this aspect. He pointed out that in his

representation, Annexure E/4 filed individually in 1975, he asserted the voluntary nature of this service and this fact was reiterated again and again. The State Government has also strongly supported his case by filing an affidavit and explaining the situation. In the circumstances, I am satisfied by the explanation offered by the respondent No. 4 in regard to the statements made by him in Annexure D/4.

18. For the reasons mentioned above, I reject the first point urged on behalf of the petitioners and hold that the respondent No. 4 was in State Service since before 8.1.65 and had joined the military service not under Compulsory Military Scheme and was, therefore, entitled to the benefits under Annexure 3/1 read with Annexure 3.

19. Dr. Chitaley next contended that since all the petitioners were appointed to the B.E.S. Class II before 1964, that is, before the initial appointment of the respondent No. 4 under Annexure I and continued in service without any interruption till they were confirmed, they are entitled to be treated as senior to the respondent No. 4. The seniority is a matter of continuous service and it is the length of that service alone which is determinative of seniority. The confirmation or substantive appointment has been described by the petitioners as irrelevant to consideration of seniority. In the further affidavit, the petitioners after giving the years of their appointment have stated that they and the respondent No. 4 have been functioning in more or less identical capacities and discharged identical duties and responsibilities in posts which were interchangeable, that is, the posts in which one person could be transferred from one post to another. They have all been in the Engineering "Service" of the State of Bihar and during the course of many years, the respondent No. 4 served as an Assistant Engineer under some of the petitioners who were then working as Executive Engineers. The post of Executive Engineer is one step higher in rank than that of an Assistant Engineer and some of the petitioners were promoted earlier. Although the respondent No. 4 still continues to be an Assistant Engineer, all the petitioners have at least officiated for considerable periods as Executive Engineers and some of them are occupying still the higher posts of Superintending Engineer. In one of the affidavits, the respondent No. 4 has stated that the averments made by the petitioners are not correct, but the denial is vague and half hearted and during the course of the argument, neither the Additional Advocate General nor Mr. Shreenath Singh advanced any reason for not accepting the averments made by the petitioners. The appointments of the petitioners were made after consultation with the Public Service Commission and, later, they were duly confirmed. In these circumstances a question arises as to whether the seniority will be decided on the basis of the initial appointment of the petitioners and the respondent No. 4 or by reference to the dates of their confirmation.

20. Admittedly, the rules applicable to the Class II Service are silent on this aspect. Rule 27 applicable to Class 1 Service directs that the seniority be determined in accordance with the dates of substantive appointments. Mr.

Additional Advocate General urged that the same principle should be applied to Class II Service also. I am afraid, this would be wholly illegal. The fact that the rule framing authority omitted to provide a similar rule for Class II Service emphasises the distinction between Class I and Class II Services in regard to this question. It is, therefore, not permissible to apply this rule in favour of the respondent No. 4. Dr. Chitaley alternatively contended that the aforesaid Rule 27 is illegal and ultra vires in view of the decision in *S.B. Patwardhan and Another Vs. State of Maharashtra and Others*, . Dealing with a similar rule, the Supreme Court held that instead of adopting an intelligible differentia, the rule impugned in that case left the seniority to be determined on the sole touchstone of confirmation which was indefensible. In the present case, it was urged that there was no intelligible ground bearing the nexus in efficiency in public services which might have sustained the rule. I do not consider it necessary to deal with the legality of Rule 27 in view of my finding that the same is not applicable in the present case. The reported decision, however, does support the petitioners' plea that the claim of seniority of the respondent No. 4 on the basis of his retrospective confirmation has no merit.

21. The decision in *Baleshwar Dass and Others Vs. State of Uttar Pradesh and Others*, has been strongly relied on by the petitioners. *Patwardhan's* case and *Chauhan's* case AIR 1977 S.C. were analysed and explained and the final view of the Supreme Court has been expressed in more categorical terms in *Baleshwar Das*. Then observation that confirmation is one of the inglorious uncertainties of Government servants depending neither on efficiency of the incumbent nor on the availability of substantive vacancy is fully applicable to the services under the State of Bihar. Innumerable instances can be collected from different services here. The present case also can be cited as an illustrative one, though in the circumstances which are not usual. The respondent No. 4 was admittedly junior to the petitioners in service until Annexure 3/1 was issued in 1972. The claim of seniority of the respondent No. 4 was not recognised before August, 1979. As late as July, 1977, the respondent No 4's representation was rejected and he worked as junior and sometimes directly under some of the petitioners. A decision in his favour was taken in 1979 which was worked out by preparation of a gradation list in 1980. Within a week, the same was cancelled and ultimately the impugned order was passed in August, 1981. The position has thus remained in a confused state. Even ignoring the developments after 1972, the admitted junior position of the respondent No. 4 for about 8 years cannot be lost sight of. The ratio of the Supreme Court decision must, therefore, be applied to the present case, Dr. Chitaley placed the judgment in *Baleshwar Das's* case at length emphasising the important observations and I do not consider it necessary to repeat them here.

22. Mr. Shreenath Singh attempted to distinguish the cases on the ground that the Full Bench decision of this Court in *Bishundeo Mahlo v. State* (5) has in Paragraph 13 of the judgment, held that *Patwardhan's* case is applicable only to such cases where confirmation is based on fortuitous circumstances and not the

test of merits of eligible candidates. I am afraid, the respondent No. 4 cannot take advantage of this observation inasmuch as the respondent No. 4 was not chosen for retrospective confirmation on the basis of merits and the petitioners at no stage were refused confirmation for their inefficiency or lack of suitability.

23. Mr. Singh also relied on the decision in C.W.J.C. Nos. 1493 and 1829 of 1981 cited by Mr. Pandey. It was held there that ad hoc appointment cannot be treated at par with the appointment of temporary or permanent character made on substantive basis. In Para 12, it was found that the relevant appointments in the case were "not in the service". The decision was based on that finding and is, therefore, inapplicable to the present case where the petitioners were appointed in Class II Service. Similar was the position of the respondent No. 4 in 1964 and, therefore, the said decision is of no help to the petitioners either on the first point decided against them earlier.

24. Mr. Singh argued that Annexure 3/1 will be rendered completely ineffective on the view which I am taking. This again is not right. Annexure 3/i bestows the benefits which were mentioned in Annexure 3 and they are numerous relating to pay scale, leave etc. Earlier confirmation allows to an officer the advantage in pension, gratuity etc. and it is, therefore, not right to suggest that the order of confirmation is of no use, if it cannot clothe the officer with seniority.

25. Mr. Additional Advocate General faintly advanced another argument based on Annexures 12 series. He referred to the earlier writ application filed in 1969 being C.W.J.C. 290/69 by one Rajiv Ranjan Pathak, not a party to the present case against certain other Engineers who are also strangers to the present writ petition. Their inter se seniority was in controversy which was decided in that case and a gradation list was accordingly issued. The correctness of the decision in C.W.J.C. 290/69 was doubted in later cases being C.W.J.C. 1880/70 and C.W.J.C. 534/72 and were referred to Full Bench and were disposed of by the judgment reported in 1982 B.B.C.J., 45 relied upon by Mr. Singh and discussed in Paragraph 22 above. It was suggested that the final gradation list issued in pursuance of the decision in Rajiv Ranjan Pathak's case was prepared on the basis of the confirmation and since that remained unchallenged, the petitioners cannot now be allowed to suggest otherwise in the present writ case on the ground that the seniority should be reckoned by reference to the dates of initial appointments in service. There are several answers to this point. In Rajiv Ranjan Pathak's case, the competition was between Engineers appointed at the same time. A separate Rule in this regard issued under the State instruction and known as the 1934 Rules covered the case and that decision rested on their interpretation. It has nothing to do with the present question. So far as the gradation list referred to by Mr. Additional Advocate General is concerned the same did not show the respondent No. 4 as senior to the petitioners. Therefore there was no question for the petitioners who were not interested in the dispute between the parties to that case to have challenged that gradation list. The point which is being urged by them did not arise there, nor can it be held that the

gradation list constructively decided a rule in regard to seniority which may be binding in the present case. I, therefore, cannot see any relevance to Annexure 12 series except with regard to the dates of confirmation of petitioners 2 and 3 for which purpose they have been filed in this case. Since there does not appear to be any merit in this argument, the respondent No. 4 was right in not advancing such an argument and I do not find any substance in the same which is rejected.

26. Mr. Additional Advocate General also referred to the statement made in the supplementary counter affidavit of the State filed on 9.8.83 to the effect that the practice followed in the department has been to fix the seniority with reference to the date of confirmation. A chart in this regard giving the relevant dates with reference to 13 engineers has been annexed. In reply, it was contended on behalf of the petitioners that it is not correct to say that a uniform practice was followed in the department in this regard and even assuming that there was such a practice, the same cannot be respected in face of the decision in Patwardhan's case where a formal rule to that effect was struck down. I do not find myself in a position to accept the statement in the counter affidavit about a consistent practice. The chart in the annexure does not give full facts and is not helpful at all. It does not indicate that the question of inter se seniority was decided on the basis of the pleaded practice. The columns in the chart merely give the dates when they were appointed Executive Engineers and later Superintending Engineers. It cannot be assumed in absence of an assertion to that effect supported by materials that the appointments to higher posts were made solely on the basis of the seniority dependant on the dates of confirmation. The argument addressed on behalf of the Additional Advocate General has been based on assumption. Further, the chart gives the dates in regard to a small number of Engineers as compared to a large number appointed and promoted during the period covered by the chart. It cannot, therefore, be interpreted to establish any fixed practice. It is significant to note that no document has been produced from any of the innumerable files maintained by the department mentioning this practice. In fact, a very large number of writ applications have been filed by engineers of the Public Works Department in this Court during the last 15 years involving disputes relating to seniority and this Court had to observe on several occasions that it was desirable to have a clear rule which could have saved the officers' time and unnecessary expenses. If the State was serious about this plea, it was expected that a statement recorded sometime in the past by a high officer in the department mentioning the practice would have been available. In the circumstances, I do not accept that a practice as mentioned in the counter affidavit has been uniformly followed in the department. I also agree with Dr. Chitale that even if there were such a practice, it would have to be rejected as illegal.

27. For the reasons mentioned above, I hold that the petitioners are senior to the respondent No. 4.

28. In view of the finding on the second point, the petitioners have to succeed and it may not be necessary to decide the third point. However, since arguments were addressed on the question as to whether the petitioners 2 and 3 were confirmed before the respondent No. 4, I may briefly deal with this aspect also. The date of confirmation of the petitioners 2 and 3 has been stated in Paragraph 15 of the petitioner's reply (Page 225) as 13.2.64. It is conceded that the confirmation of the respondent No. 4 has been wrongly mentioned there. He was confirmed on 29.12.1966, that is, later than the petitioners. The averments on behalf of the petitioners 2 and 3 are denied by the respondents. The petitioners have relied on Annexure 12, the letter dated 28.3.66 of the Chief Engineer addressed to the Public Service Commission and the letter by the Deputy Secretary dated 17.2.69 (Annexure 12/1) to the Accountant General. A reference has been made also to the letter of the Deputy Secretary, Government of Bihar dated 28.10.70 (Annexure 12/2) sent to the accountant General which superseded Annexure 12/1. It is urged that those documents support the case of the petitioners 2 and 3 about the date of their confirmation. The reply of the respondent No. 4 is that the petitioners have failed to produce any order of their confirmation with effect from 1964. The only order in this case, according to the respondent, is that in Annexure J/4 (Page 244 dated 2.11.67 placing the petitioners 2 and 3 on probation for a period of one year. It is therefore said that they could not have been confirmed with effect from any date earlier than 2.11.67. It is true that the petitioners have not produced the orders of their confirmation and Annexure 12 series which are merely letters by certain officers, cannot determine this question in face of the denial. In Paragraph 7 of the State's supplementary counter affidavit, filed on 9.8.83 (Page 324) the State has also stated that the petitioners 2, 3 and 4 were put on probation for a period of one year by Annexure J/4. On a consideration of the materials produced before this Court, I hold that the petitioners 2 and 3 have failed to prove that they were confirmed earlier than the respondent No. 4.

29. Mr. Shreenath Singh lastly urged that since the respondent No. 4 rendered great service to the nation by joining the Army, the discretion of this Court should be exercised in refusing to interfere with the impugned orders. I am afraid, the respondent No. 4 having already obtained several benefits under Annexure 3/1 cannot be entitled to a further advantage, as suggested. It will not be a sound exercise of discretion to reject the application on this point.

30. As a result of my finding on the second points, the petitioners must be held to be senior to the respondent No. 4 and the orders as contained in Annexure 11 and the decision mentioned in Para 3 of Annexure 9 are quashed. The orders in Annexures 5/1 and 9 will be confined to bestowing on respondent No. 4 the benefits mentioned therein and in Annexure 3 except his claim of seniority based on his retrospective confirmation.

31. The writ application is accordingly allowed, but in the circumstances without costs.

M.P. VERMA, J.

I agree.