

(2007) 05 PAT CK 0110

In the Patna High Court

Case No : C.W.J.C. Nos. 12348 of 1996 and 3397 of 1998

Prakash Ranjan Kumar and Others and Ajit Kumar Saha

APPELLANT

Vs

The State of Bihar and Others

RESPONDENT

Date of Decision : 31-05-2007

Acts Referred:

Citation : (2007) 05 PAT CK 0110

Final Decision : Dismissed

Judgement

Barin Ghosh, J.—Whereas in CWJC No. 12348/1996, the principal challenge was adjustment of persons, working with the Adult Education Department, in the Bihar Education Service, who secured a permanent job in the Government, after being recommended by the Bihar Public Service Commission on conclusion of the 30th Combined Competitive Examination; the principal challenge in CWJC No. 3397/1998 was granting of seniority to them above the persons who joined the Bihar Education Service on being recommended by the Bihar Public Service Commission after the 31st Combined Competitive Examination.

2. Both the Writ Petitions are by persons who joined the Bihar Education Service on being recommended by the Bihar Public Service Commission after conclusion of the 31st Combined Competitive Examination.

3. On the basis of success in the 30th Combined Competitive Examination, whereas six posts in the Bihar Education Service were to be filled in; 203 posts of Block Employment Officers, amongst other posts, were also to be filled in. Admittedly the posts of Block Employment Officers were abolished after the said examination was held. As a result, there were apprehensions amongst the candidates of the said examination that those who have given first option for the posts of Block Employment Officers, despite doing better than others in the said examination, may not be appointed. One of those apprehensive candidates, namely, Hasan Waris approached this Court (Ranchi Bench) by filing CWJC No. 1283/1984 expressing his such apprehension. This writ petition was disposed of on 24th May, 1985 when this Court recorded the statement made by the

Standing Counsel that the Government has decided in principle to appoint all candidates from General category, who have secured 584 marks and above. It was also recorded that since Hasan Waris has secured 593 marks, he will be appointed. The said writ petition was thus disposed of.

4. From a letter dated 5th September, 1985, written by the Personnel & Administrative Reforms Department to the Education Department dated 15th September, 1985, it appears that the Government had decided that the persons recommended for being appointed to the posts of Block Employment Officers on the basis of the 30th Combined Competitive Examination shall be appointed to the vacant posts available in other Departments of the Government keeping in view rules, merits and reservation policy. Accordingly, by the said letter, three persons including Hasan Waris were directed to be appointed in the Bihar Education Service. Those three persons were then appointed in the Bihar Education Service on 15th November, 1985.

5. From the notes prepared by the Personnel & Administrative Reforms Department of the Government dated 11th December, 1985 for consideration of the Cabinet, it appears that after conclusion of the 30th Combined Competitive Examination, 201 candidates were recommended for appointment to the abolished posts of Block Employment Officers, but the Government decided that the candidates who were recommended shall also be appointed against vacant posts, who secured minimum marks upto which candidates of different categories have been appointed in other services on the basis of the said examination. In the said note it was mentioned that the Cabinet at its meeting held on 4th September, 1985 decided to appoint 59 candidates out of 201 recommendees on different posts available in different services. Of the said 59 candidates, as aforesaid, three were appointed in the Bihar Education Service. In the said note it was stated that the Education Department (Adult Education) was requested to send vacancies for appointment of the remaining candidates and the said Department has sent 40 vacancies for appointment to the posts of Project Officers. It was stated that out of those 40 vacancies, 20 shall be appointed from the General category and the rest from the reserved category but inasmuch as a policy decision has been taken that all such recommended candidates shall be appointed having minimum marks, as above, shall also be appointed to the vacant posts. It was recommended that out of 24 candidates, 4 belonging to General category, 2 belonging to Backward Class, 2 belonging to Weaker Female Class, 10 belonging to Scheduled Caste and 6 belonging to Scheduled Tribe be appointed to the posts of Project Officers under Education Department (Adult Education) on deputation basis. It was stated that though there was no arrangement for making regular appointments, but the proposal was to make regular appointments on those posts, with a caution that termination of the appointees from service shall not be possible. It was held out that those appointees shall have to be adjusted under Education Department or to other posts in the equivalent pay scale even after the Adult Education Scheme comes to an end. The note stated that the Hon'ble Chief Minister has approved

the proposal and accordingly approval of the Cabinet was solicited.

6. The Cabinet considered those proposals on 24th December, 1985, when it sanctioned the same. It then added that steps should be taken to produce the proposal for due appointment of the remaining candidates within 15 days after receiving information in respect of available vacancies.

7. From the notes prepared on 10th January, 1985 for consideration by the Cabinet, it appears that a proposal was mooted thereby to appoint the remaining 118 recommended candidates as Project Officers in the Directorate of Adult Education or to the posts of equivalent pay scale. It was mentioned in the notes that the joining date of the said 118 recommended candidates shall be 1st March, 1986 and they shall be posted after one month's training, i.e. upto 31st March, 1986, and at the same time 118 Officers working on deputation as Project Officers in the Directorate of Adult Education shall be returned to their parent Departments. It was stated that approval of the Hon"ble Chief Minister to the said proposal has been received and accordingly the proposal is being placed before the Cabinet for its approval.

8. On 18th January, 1996, the Special Secretary to the Government of Bihar wrote a letter to the Secretary, Department of Education communicating thereby the aforementioned proposal dated 10th January, 1986. It was stated that the seniority of 24 of such recommendees, who have joined as Project Officers on the basis of the earlier decision, and the remaining 118, who would join later on, will be determined as per their merits decided by the Bihar Public Service Commission. On 21st March, 1986, the Cabinet accepted in to the proposal dated 10th January, 1986.

9. There is no dispute that on the basis of such Cabinet decision, 142 of the 201 recommendees for the posts of Block Employment Officers joined as permanent employees of the State of Bihar on permanent basis but in temporary posts of Project Officers, as were then available under Adult Education Scheme.

10. In the year 1992, the Adult Education Scheme came to an end or was about to come to an end. At that stage some of those 142 permanently appointed government employees then discharging their duties as Project Officers under the said scheme approached this Court by filing CWJC No. 5616/1992. They sought in the said writ petition their encadrement. The said writ petition was disposed of on 4th January, 1993 by the Division Bench of this Court, when upon considering the counter affidavit filed, the Division Bench found that the Government is seriously considering the matter of absorption of those persons on equivalent posts in any department, but the same may take some time for complying with procedural formalities. In view of such stand of the Government, the writ petition was disposed of with a direction to do the needful in regard to the claim of such persons preferably within three months from the date of receipt of a copy of that order by the Chief Secretary of the State.

11. By yet another order dated 19th April, 1993, time to comply with the said

order was extended till 7th July, 1993. By another order dated 23rd September, 1993, the Division Bench refused to extend the time any further.

12. In the meantime after coming to end the Adult Education Scheme, another scheme known as Formal/Adult Education Scheme was launched, where also non cadre posts of Project Officers were created. In those posts these persons were then shifted.

13. It appears that on 9th January, 1996, two of those 142 persons were adjusted as Child Development Project Officers in the Department of Welfare from the date of their joining.

14. In the meantime a contempt application was filed in 1994 registered as MJC No. 50/1994 alleging non-compliance of the directions contained in the order of this Court dated 4th January, 1993. This contempt application was filed by those persons, who were, adjusted as Child Development Project Officers and accordingly by an order dated 29th March, 1996, the said contempt application was dropped.

15. Subsequent thereto the private respondents in these writ petitions also filed a contempt application registered as MJC No. 1043/1996 seeking implementation of the order of this Court dated 4th January, 1993. Having noted the fact that the petitioners in the earlier contempt application have promptly obtained their adjustment, the Court directed putting up the second contempt application on 8th August, 1996. On 8th August, 1996, an adjournment was sought for hearing of the contempt application and the same was granted upon payment of costs of Rs. 5000/-. Thereafter one of the applicants in the said contempt application, namely, Maya Rani Pal was adjusted to Bihar Education Service from the date of her joining by an order dated 2nd September, 1996. The second contempt application was then taken up for hearing by this Court on 11th September, 1996 when the Court recorded its dissatisfaction with regard to the action taken by the State Government in the matter of implementation of the order of this Court dated 4th January, 1993. The Court observed that while encadrement has been directed of a few of those persons, who may be lower in the merit list, and accordingly there may be violation of Articles 14 & 16 of the Constitution of India, the Court felt that all such persons should therefore be appointed to a cadre meaning thereby a duly constituted service. The Court further observed that they must also be deemed to have been appointed to that service with effect from the date on which the other candidates were appointed on the basis of the 30th Combined Competitive Examination. The Court felt that the State has not understood the true impact and meaning of the judgment and order of this Court dated 4th January, 1993. On the prayer of the State, a further one week's time was granted to comply with the Court's order without imposing costs.

16. Thereupon on 8th January, 1996 the remaining applicants in the said contempt application, being the other private respondents to the present writ petitions, were adjusted to the Class II posts of Bihar Education Service from the

date of their joining.

17. It appears that on 17th October, 1996, Finance Department prepared a note, wherefrom it appears that those 142 persons were still drawing their salary in the initial scale of basic grade and, as aforesaid, some of them had been adjusted in the Welfare Department, i.e., as C.D.P.Os. and a few others in the Education Department, namely, the respondents in these writ petitions. The note took into consideration the orders passed by this Court on the aforementioned second contempt application on 8th August, 1996 and 11th September, 1996 as well as the request of the Government Advocate for an early decision. It was mentioned in the note that the problem should be solved permanently and the stop gap arrangement should not be permitted to continue any further. It was recorded that the proposal of adjusting those persons in Bihar Education Service was strongly resisted by the Bihar Education service Association, but according to the said note, adjustment of the said persons in Bihar Education Service would be better than in any other service. It was indicated that the Bihar Education Service Association is apprehensive that the line of promotion of candidates appointed in the service after the 30th Combined Competitive Examination would be adversely affected, but it was pointed out that such apprehension has no basis because no regular promotion in the Bihar Education Service had been given in the last 13-14 years and there would be no difficulty for adjusting promotions after adding 142 posts. It was stated that there are number of available vacancies in the Bihar Education Service and adjustment can be made even against them or, in the alternative, the issue can be considered by fixing the strength of the cadre of Bihar Education Service after increasing its strength. It was also indicated that no other Department would be desirous of taking those persons and the Education Department should ultimately accept them instead of discarding them.

18. It appears from the said note that many such persons did not pursue their career as was accorded to them. Ultimately apart from the private respondents in these writ petitions, 82 others continued as such and they filed intervention application in the contempt application. The note proposed to declare those 82 officers as permanent and proposed that they should be posted on any equivalent post along with the benefits of seniority, promotion, fixation of pay and other post retirement benefits from the date of their appointment and they should not be removed from services. It was recorded that despite adjustments accorded to the applicants the contempt application has not been brought to an end and accordingly all the 89 candidates should be adjusted in the permanent cadre and by merely adjusting 7 candidates, the contempt proceedings will not be dropped.

19. Then comes, on 19th November, 1996, a notification whereby it was declared that 82 of such persons are permanent and they shall be posted on other equivalent gazetted posts by the Personnel & Administrative Reforms Department and, if the posts of Project Officer, Non-formal Education/Assistant Director, Non-

formal Education/District Public Education Officer in the Directorate of Mass Education cease to exist, they shall not be removed from their services due to coming to end of the scheme. It was declared that their services shall be calculated for their seniority, promotion, pay fixation and all other post retirement benefits from the date of their appointments.

20. In the meantime the Association of the said persons filed a writ petition registered as CWJC No. 12037/1995. In that writ petition, they sought revised scale of pay of Rs. 2,200-4,000/- instead of Rs. 2,000-3,800/-. Their claim was resisted on the ground that they were not part of the 14 services of different departments, where the revised scale was, as was claimed by them, was applicable. This Court disposed of the said writ petition vide judgment and order dated 9th April, 1997. The Court as a fact found that there are 14 statutory services and in addition to that there are non-statutory services too. The Court found as a fact and which is not in dispute in these writ petitions that those persons are not members of the Bihar Education Service but certainly they are members of the service. The Court found as a fact that at least in 39 services, most of whom were not statutory services, pay was revised entitling the members of such services to obtain revision to the extent claimed by those persons in the said writ petition. The Court, therefore, allowed the writ petition and directed grant of such revised scale which had been claimed by the said Association to the members of the said Association, namely, those person, who had thus been appointed.

21. An appeal preferred against the said judgment and order dated 9th April, 1997 was dismissed on 3rd February, 1998 and the matter was pursued without any success for the SLP was dismissed.

22. Subsequent thereto on 17th April, 1997, an order was issued whereby it was held out that seniority of the private respondents in these writ petitions shall be counted after the last Officer appointed on the basis of the 30th Combined Competitive Examination and just above the 1st Officer appointed on the basis of the 31st Combined Competitive Examination as per the date of their joining.

23. Thereupon, on 21st April, 1997 the hearing of the second contempt application was adjourned. In the meantime in the said contempt application the writ petitioners, who were appointed in the Bihar Education Service on being selected on the basis of the 31st Combined Competitive Examination, intervened. In the said contempt application, it was contended by the intervenors, namely, the remaining 82 persons, who had not been adjusted in the Bihar Education Service, that the order of this Court dated 4th January, 1993 has not yet been complied with. The petitioners before this Court informed the Court that they have already filed CWJC No. 12348/1996 and the said writ petition is pending in this Court. It was indicated that the said writ petition has been filed challenging absorption of the respondents against the posts meant for promotees and other recruits of the Bihar Education Service. The Court felt that it is high time to conclude the matter finally. The Court noted that the stand of the State is to

absorb those persons in cadre posts with their seniority from the date of their appointments. The Court noted that the scheme in which 82 of those persons were then working would come to an end within six months and accordingly recorded the submissions of the State that within six months" time those persons will be posted in an appropriate cadre. The Court expressed no opinion as regards the contentions raised by the petitioners in these writ petitions as intervenors in the said contempt application and granted liberty to them to urge all their contentions in these writ petitions. The Court, however, directed that those 82 persons will be fully paid their pay and allowances and their pay and allowances shall be fully protected and that they shall not be put to any hardship. Thus the contempt application was disposed of.

24. It appears from a letter dated 14th May, 1997 issued from the Department of Secondary, Primary; and Adult Education to the Board of Revenue that the State Government has decided that before confirming the services and providing first time bound promotion to all those 87 persons, it is necessary for them to pass departmental examination. By that letter, they were asked to appear at the departmental examination to be held in June and July, 1997. It appears from yet another letter dated 5th June, 1997 issued from the Bihar Education Service Association to the Board of Revenue that some of those 87 persons appeared at the departmental examination fixed for the Officers of Bihar Education Service.

25. On 9th August, 1997, by a notification the respondents in these writ petitions were transferred to the posts mentioned in the said notification. It was stated in the said notification that those respondents were then working in Non-formal Education Department and are being transferred to posts in the Bihar Education Service.

26. Yet another writ petition was filed in 1996 by the Association of those persons for implementation of their adjustment. While the Court by its order dated 3rd August, 1998 granted further time to implement the decision to adjust those persons, a decision was taken by the Chief Secretary, the Finance Secretary, the Development Commissioner cum Secretary and the Secretary of the Department, of Administrative & Personnel Reforms on 23rd December, 1998. It was stated in the said decision that to comply with the order of this Court. 87 posts in the Bihar Education Service have been created by merging 50 posts of Mass Education Officers working under the Directorate of Mass Education created under the Adult Education Programme and 37 posts of Assistant Director created in the Non-formal Education Department.

27. It appears that subsequent thereto a Memorandum for Council of Ministers was prepared on 30th December, 1998. In that while the background of the case of those remaining 82 persons was furnished, it was proposed that they be adjusted in Bihar Education Service and their seniority be determined in accordance with their rank obtained in the merit list of the 30th Combined Competitive Examination. It was also proposed that 50 posts of District Mass Education Officers created under the plan head of Adult Education and 37 posts

of Assistant Directors created under the programme for Non-formal Education be unified in Bihar Education Service which unification will not create any additional financial burden to the State Government. It was also proposed that by such unification while 87 posts will be increased in Bihar Education Service, those 87 persons, namely, 5 private respondents and the remaining 82 persons can be accommodated.

28. It appears that the Council of Ministers at their meeting held on 7th January, 1999 accepted the said proposal. The Cabinet, however, used the word "merger". Subsequent thereto on 13th January, 1999, a notification was issued whereby it was held out that for permanent solution, by merger the cadre has been expanded after creating 87 posts in the Bihar Education Service where the remaining 82 of such persons shall be accommodated and their seniority shall be decided on the basis of their names mentioned in the merit list of the 30th Combined Competitive Examination.

29. It appears that the notification dated 13th January, 1999 was stayed by this Court by an interim order passed on these writ petitions and ultimately the matter went before the Hon"ble Supreme Court when the Hon"ble Supreme Court modified the interim order of the High Court to the extent that all those Officers, who were successful in the 30th Combined Competitive Examination and have already been absorbed in the regular cadre prior to 13th June, 1999, must be treated to be senior than those who had come in the cadre pursuant to the 31st Combined Competitive Examination and, so far as others are concerned, status quo as existing on the date of the said order of the Hon"ble Supreme Court shall be maintained until the writ petitions are disposed of finally one way or the other. The Hon"ble Supreme Court made it clear that it would be open for all parties to raise their respective contentions before the High Court where the writ petitions are pending. The Hon"ble Supreme Court also made it clear that whatever has been said by the Hon"ble Supreme Court in its order dated 21st February, 2000 will not in any way bind the High Court while deciding the writ petitions finally.

30. From what has been stated above following undisputed facts emerge:

1. Bihar Public Service Commission recommended 201 candidates for being appointed as Block Employment Officers. However, the posts of Block Employment Officers were abolished and accordingly none of those recommendees could be appointed in the posts where they were recommended for being appointed.

2. Some of these recommendees did better than many recommendees, who had been recommended for being appointed to other posts. The Government initially decided that 59 of the persons recommended for appointment to the posts of Block Employment Officers should be adjusted in other services.

3. The Government then decided to give permanent employment to the remaining 142 of such recommendees. Some of them admittedly got marks

equivalent to marks obtained by persons, who had been recommended for being appointed to other posts. At that stage, the Government could not locate suitable vacant posts available in different services in order to accommodate all the said 142 recommendees.

4. At that stage it transpired that temporary posts have been created for implementing the obligations of the Government under Adult Education Scheme and those posts have been filled up by deputationists from various services including Bihar Education Service. In order to accommodate those 142 recommendees, who were decided to be permanently appointed, the Government decided to return the deputationists holding the temporary posts created to implement the obligations of the Government under the Adult Education Scheme and to appoint the said 142 persons in those temporary posts.

5. As a result, those 142 recommendees though obtained permanent employment, but did not get permanent posting in any permanent service of the Government. They continued as such. As a result many of those 142 persons did not pursue their career as such and left the government employment. Two of them subsequently succeeded in the subsequent combined competitive examination and were appointed in the Bihar Education Service.

6. When the Adult Education Scheme was about to come to an end, the remaining persons appointed to the posts created to implement the said scheme approached this Court and sought encadrement. On the basis of the concession of the State, the Court directed their encadrement. At that stage, efforts were made to locate vacant posts in different services. Two of them having been located, two of those persons were posted as C.D.P.Os. in the Department of Welfare. But their adjustment took place from the date of their joining as C.D.P.Os.

7. Subsequent thereto though on the threat of contempt, the private respondents in these writ petitions were adjusted in the Bihar Education Service, in its Secondary, Primary and Mass Education Department, they were, in fact, subsequently transferred from the posts held by them in Non-formal Education to the posts available in the Bihar Education Service.

8. Later on, it transpired that altogether 87 persons including the private respondents in these writ petitions are required to be adjusted and for such adjustment posts are required to be created and accordingly 87 posts were created in the Bihar Education Service and in those posts, those 87 persons including the private respondents in these writ petitions were adjusted. At that stage, it was decided that 87 persons shall carry with them their seniority in the manner they are entitled to carry the same, i.e., on the basis of their ranks in the 30th Combined Competitive Examination and accordingly they shall be posted before the 1st candidate who joined Bihar Education Service upon being selected at the 31st Combined Competitive Examination.

9. Although notifications pertaining to such adjustments had been published but

before the 82 of such persons could be transferred to posts so created in the Bihar Education Service, as the private respondents in these writ petitions got on being transferred, an order of status quo was passed by the Hon'ble Supreme Court and in consequence thereof the private, respondents, who are junior to many of the remaining 82 persons, while enjoyed to the full extent the benefits of their adjustments, the remaining 82 did not get the same.

31. Although in the counter affidavits filed by the respondents in these writ petitions as also by the remaining 52 such persons, they have in no uncertain terms contended that there was no merger, the word "merger" has been used in some of the documents, referred to above, including in a decision of the Cabinet. It is the case of those persons that they were adjusted.

32. A cadre may be merged with another cadre. A non-statutory cadre may be merged with a statutory cadre but vice versa is not permissible. A cadre, whether statutory or non-statutory, must be recognized as such. Those 87 persons were never treated as belonging to a non-statutory cadre. Though they were appointed as permanent employees of the Government, they were appointed to temporary posts. In order to appoint them for the first time in permanent posts, the temporary posts then held by them were made permanent posts in the Bihar Education Service and they were then shifted to the same. The matter did not stop there. The shifting though was adjustment but five of them were assigned duties attached to the posts in the Bihar Education Service by transferring them to those posts. The question is whether non-cadre temporary posts can be thus amalgamated in a cadre and, that too, in a statutory cadre. If that is permissible then in view of the law settled, they get into the service with their status they earned upto the date of entrance and accordingly their seniority must be counted from the date they were made permanent employees.

33. Those 89 people and others, who were then similarly situate to that of those 89 people, approached this Court seeking their encadrement. Therefore, the obligation of the Government in terms of the order of this Court was to encadre those 89 people. This was sought to be done by adjustment and accordingly two of those people were adjusted in the posts of C.D.P.O. in the Welfare Department and five of the remaining were then adjusted in Bihar Education Services and later on the remaining 82 persons were adjusted in Bihar Education Service. In order to adjust, those 87 people, the Government created 87 posts in Bihar Education Service. As a result, the cadre strength of Bihar Education Service increased. Even after adjusting five of the private respondents in these writ petitions in Bihar Education Service, the Government had to issue an order transferring them to the posts available in the Bihar Education Service. Before, however, any such transfer order could be passed as regards the remaining 82 persons, an order of status quo was passed by the Hon'ble Supreme Court in connection with the present writ petitions.

34. There cannot be any dispute that from the day one, the Government held out to those 87 people and other similarly situate to that of them that they are being

appointed permanently in the Government. Each of those persons, therefore, obtained a permanent employment having a permanent tenure. They were posted in non-cadre posts but not in cadre posts. Admittedly in some of these non-cadre posts, members of Bihar Education Service had been deputed. They and others deputed from other departments were taken back for the purpose of paving the way of posting of those persons in those non-cadre posts.

35. The writ petitioners contended that Bihar Education Service being a statutory service, in order to become a part of the said service, one must enter the service in accordance with the provisions laid down in the statute and by no other means. It was contended that the statute, which has not yet been altered, does not permit adjustment of those persons in Bihar Education Service. It was next contended by the writ petitioners that while two of those persons were adjusted in the posts of C.D.P.O in the Welfare Department, their adjustments having been directed with prospective effect, those adjustees got their seniority from the date of their adjustment in the cadre to which they had been adjusted but while adjusting the remaining 87 people, that was not adopted and accordingly all on a sudden 87 people have been sought to be put above the first person, who entered the Bihar Education Service by dint of his merit in the 31st Combined Competitive Examination. It was stated that the same is not permissible.

36. It was submitted that under Rule 3 of the Bihar Education Service (Class I) and Bihar Education Service (Class II) Recruitment Rules, 1973 made under the proviso to Article 309 of the Constitution of India there are four means of entry into the said service, namely, (A) by direct recruitment through Combined Competitive Examination in accordance with rules in Part II, and or (B) by open advertisement in accordance with rules in Part III, and or (C) by promotion in accordance with rules in Part IV, and or (D) by direct recruitment (Special Recruitment) in accordance with the rules in Part V. It was stated that though those persons are recommendees of the Combined Competitive Examination, but they were not recommended for appointment in the said service and at no stage it was even proposed to recruit them in the said service on the basis of their success in the said examination. It was stated that those persons were not recruited in the said service by open advertisement in accordance with the rules in Part III and they were not promoted also in accordance with the rules in Part IV. It was contended that Part IV of the said rules which deals with special recruitment also directs Bihar Public Service Commission to invite applications from candidates eligible for appointment under the Rules made in the said Part. It was stated that the Bihar Public Service Commission in relation to special recruitment also was required to hold examination. It was contended that the procedures specified for special recruitment having not been followed, those 89 persons could not be recruited in the said service.

37. It was next contended that in terms of the said rules, every Officer appointed in the said service is required to remain on probation for two years. On the other hand those 89 persons had no period of probation; they were only trained for

one month. It was stated that in terms of the said rules, confirmation can be granted to a recruited at the end of the period of his probation, if he has passed the prescribed departmental examination. It was stated that the seniority in accordance with the said rules was to be determined on the date of substantive appointment which will be the date on which an appointment on probation is made. It was, therefore, stated that having regard to the admitted facts those 87 persons could not be recruited in the said service and alternatively it was contended that those 87 officers can at the best have their seniority counted for the said service from the date of their adjustment therein.

38. I have not been able to appreciate those two directly opposite submissions. If by reason of the said rules those 87 persons cannot come in the said service, question of counting their seniority from the date of their coming in the said service would not arise.

39. A number of judgments were cited at the Bar but I think the most important judgment which has a bearing in this matter rendered by the Hon''ble Supreme court was not cited. One of the judgments cited at the Bar is the judgment of the Hon''ble Supreme Court rendered in the case of K. Madhavan and Anr. v. Union of India and Ors. reported in 1987 SC 2291. In that case what fell for consideration was - what was the meaning of 8 years'' service in the grade? The Hon''ble Supreme Court answered the same by saying that, the same would mean 8 years'' service, in the grade of Dy. S.P. The Hon''ble Supreme Court pointed out that the applicable rules do not provide that the period of 8 years should be counted from the date of deputation to the C.B.I. as Dy. S.P. This case, therefore, does not help either of the parties.

40. In the case of New Bank of India Employees Union and another Vs. Union of India and Others, , the Hon''ble Supreme Court found as a fact that under the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1980, the New Bank of India which incurred heavy losses was taken over and then amalgamated with the Punjab National Bank. In terms of the scheme under which such amalgamation took place, the workmen and Officers of New Bank of India became entitled to count two years service rendered in the services of the said Bank as equivalent to one year''s service in the Punjab National Bank for the purpose of computation of seniority, promotion, etc. The Court dealt with the scheme and upheld the same.

41. In S.I. Rooplal and Another Vs. Lt. Governor Through Chief Secretary, Delhi and Others, , it was held that absorbed deputationists are entitled to count services rendered by them in their parent department for the purpose of computation of seniority. Inasmuch as it is nobody''s case that those 87 persons were deputed to Bihar Education Service, this judgment has no direct bearing in the case at hand.

42. In Bishundeo Chaudhary and Ors. v. Bihar State Non-Formal Education Non Gazetted Employees Union and Ors. reported in (1995) 2 BLJ 139, this Court was

considering whether appointments given in two different situations brought in equality of status in between those appointees and accordingly whether the principle of equal pay for equal work can be applied. The Court found as a fact that the Government did not grant status of Class II government employee to some of those persons and accordingly did not treat them as equal to those who had been granted such status. This judgment is not applicable to the present case inasmuch as from the day one the Government accepted the status of those 87 persons as permanent government employees having status as that of Class II Government Officers; whereas in the said case, the status as was granted to one of the groups of persons was not a permanent status.

43. In *V.K. Dubey and Others Vs. Union of India (UOI) and Others*, , erstwhile Engine Drivers redeployed as Electrical Engine Drivers, upon giving them some training, were held not entitle to reckon their past services as such Diesel Engine Drivers for the purpose of counting seniority as Electrical Engine Drivers on the ground that if, they were not so redeployed, those Diesel Engine Drivers would have lost their services by retrenchment. This case was decided on that principle. In this case, there is no question of redeployment for the purpose of avoiding retrenchment.

44. It was held in *R.N. Nanjundappa Vs. T. Thimmiah and Another*, , that regularization of appointment by stating that notwithstanding any rules the appointment is regularized strikes at the root of the Rules and, if the effect of the regularization is to nullify the operation and effectiveness of the Rules, the Rules themselves are open to criticism on the ground that it is in violation of the Rules. In those circumstances, it was stated that it is impermissible to keep the Rules intact but to bend the same for the purpose of violating the provisions contained therein. There cannot be any dispute with the proposition so enunciated. In the instant case, to my mind, no attempt has been made to bend any Rules to violate the provisions contained therein.

45. In *Union of India (UOI) through Chandigarh Administration (U.T.), Chandigarh and Another Vs. Sh. S.K. Sharma, Professor of Civil Engineering Punjab Engineering College, Chandigarh*, , it has been held that the seniority can be reckoned from the date of regular appointment and not from the date of officiation. It is nobody's case in the instant case that any of those 87 persons at any point of time officiated in any post available in the Bihar Education Service.

46. In *H.L. Randev and Ors. v. High Court of Punjab & Haryana and Ors.* reported in 1991 Supp (1) SCC 47, promotees were appointed to temporary posts outside their quota while direct recruits were appointed to their cadre posts within their quota. The rules were amended and the temporary posts which were treated as outside the cadre thus formed part of the cadre and seniority also was determined on the basis of length of continuous service on the post from the date of amendment. On a challenge thrown to such action, the Hon'ble Supreme Court held that the seniority of the holders of such temporary posts will count from the date they became part of the cadre. Therefore, if incumbents holding

posts outside the cadre become part of the cadre by reason of amendment of the cadre rules, of course, they shall be entitled to count their seniority from the date of their encadrement by reason of such rules. The Bihar Education Service is a statutory service. The rules governing the said service have not been altered as yet. By executive fiat, statutory rules cannot be altered. Therefore, by reason of change in the rules those 87 persons have not become part of the Bihar Education Service. In such view of the matter, I do not think that the said judgment has any application in the instant case.

47. In *Dr Ram Raj Ram Vs. State of Bihar and Others*, , the Bihar Animal Husbandry Service Class I (Special) was established in the Department of Animal Husbandry of the Government of Bihar and a solitary post in that service was created while a regular service already existed in the Department in consonance with rules, i.e., the Bihar & Orissa Veterinary Service Class I Recruitment Rules, 1935. The same on facts was found to be mala fide. It was held that special service could not be treated as basic grade conferring on the incumbent in the said service superiority over a member of the regular service in the matter of seniority for the purpose of further promotion. This judgment, I do not think, is at all relevant on the facts of this case.

48. In *Dr M.A. Haque and Others Vs. Union of India (UOI) and Others*, , certain persons were regularized on special procedure laid down by the Hon''ble Supreme Court. The Hon''ble Supreme Court held that officiating service of the persons so regularized cannot be counted for the purpose of seniority. In the instant case, as aforesaid, it is nobody''s case that those 89 persons ever officiated in any post.

49. In *Yogendra Ram and Others Vs. The State of Bihar and Others* , this Court held that appointment by regularization in the absence of statutory provision to that effect is not permissible. There cannot be quarrel with that proposition. However, in the instant case, there is no question of regularization.

50. In *Kulwant Kr. Sood v. State of Himachal Pradesh and Anr.* reported in (2005) 10 SCC 670, the appellant was recruited as a Clerk in the pay scale of Rs. 110-250. In response to an advertisement which authorised departmental candidates to opt for the post of Assistant in the pay scale of Rs. 225-250, the appellant was offered to serve as a temporary Assistant. While the appellant was so working, an integration of the office took place and by reason thereof he was regularized. The appellant then contended that his seniority should be counted from the date he was offered the post of temporary Assistant. This claim was rejected by the Hon''ble Supreme Court. The facts of this case amply demonstrate that the same have no application in so far as the case at hand is concerned. In the instant case, all those 87 persons were accorded status of permanent employees of the State of Bihar.

51. The case of *Jai Jaiyendra Kumar Singh and Ors. v. The Bihar State Electricity Board and Ors.* reported in 1994 (1) PLJR 406, was a case of absorption contrary

to the rules. I do not think that this case has any bearing in so far as the case at hand is concerned.

52. In the case of *Katyani Dayal and Ors. v. Union of India and Ors.* reported in : [1980]3SCR139 , it was held that the Temporary Assistant Engineers recruited on the recommendation of Union Public Service Commission, may be for doing the same work as that of holders of Indian Railway Service of Engineers Class I, were, not similarly placed as that of the holders of the said service. The Court at the same time held that once they are absorbed in the Indian Railway Service of Engineers, they would be entitled not to be treated differently thereafter and their seniority would be reckoned from the date of their absorption. Again this being a case of absorption of a dissimilar person, the same has no application to this case.

53. In *Nirmal Kumar Choudhary and Ors. v. State of Bihar and Ors.* reported in : (1988)ILLJ540SC , the Court was dealing with seniority of candidates belonging to two different cadres which stood merged subsequently. The Court upheld the seniority from the date of joining one of the two merged cadres.

54. In the case of *Ramesh K. Sharma and Another Vs. Rajasthan Civil Services and Others*, , it was held that in absence of statutory rules operating in the field, surplus employees appointed substantively to a permanent post, appointed prior to the direct recruits would be senior to the direct recruits. I think this judgment declares that unless barred by a statutory law permanent employees, though surplus, would carry with them the status earned by them upon being so appointed.

55. As has been held in *Madhvan's case* (supra), so has been held by the Allahabad High Court in *Abdul Quayum v. Chief Justice, Allahabad High Court*, reported in 1970 SLR 425, approved by the Hon"ble Supreme Court in *Vijaya Kumar Shrotriya Vs. State of U.P. and Others*, that benefit of the service rendered in the erstwhile department can be granted in case a person is transferred from one department to another.

56. The case which is relevant to the instant case and which has not been cited at the Bar is the case of *Tej Narain Tiwary Vs. State of Bihar and Others*, . In that case Tej Narain Tiwari had been appointed by the Bihar School Examination Board as Special Officer in 1969. The said post was abolished with effect from 18th April, 1971. He then filed a suit and obtained an injunction against abolition of the post and termination of his service. In course of litigation, a compromise had been arrived at between the Board and Tej Narain Tiwari, whereby he was appointed as Sectional Head Officer and his pay as Special Officer was also protected. In view of such compromise, the Board passed an order on 20th March, 1972 appointing Tej Narain Tiwari as Sectional Head Officer in the general cadre. In the seniority list of Sectional Head Officer prepared by the Board, Tej Narain Tiwari had been shown above Respondent No. 5 before the Hon"ble Supreme Court and he had been granted promotion to the post of Assistant

Secretary. The Respondent No. 5 thereupon filed a writ petition challenging the seniority list. This Court came to the conclusion that the post of Special Officer occupied by Tej Narain Tiwari not being a cadre post, services rendered by him as Special officer cannot be taken into account for calculating his seniority in the cadre of Sectional Head Officer. The Hon"ble Supreme Court reversed the judgment of this Court and held that the compromise entered between the parties and the order dated 20th March, 1972 is capable of being interpreted as an order of amalgamation of the ex cadre post of Special Officer with the cadre of Sectional Head Officers and consequentially Tej Narain Tiwari could get his seniority from the date of his appointment as Special Officer.

57. Therefore, it is permissible to amalgamate non-cadre posts with cadre posts and, as aforesaid, amalgamation of non-statutory cadre posts with statutory cadre posts is permissible. When such an amalgamation takes place, the holder of the transferor post carries with him the status earned by him upto the date of amalgamation into the transferred posts. The same principle applies when a person is transferred from one post to another. While it is permissible to amalgamate a non-cadre post with cadre post, it goes without saying that transfer from a non-cadre post to cadre post is also permissible.

58. It is well settled in law that when a field is not covered by Legislation, the same may be covered by the Executive fiat. Transfer is no recruitment. Similarly amalgamation is also no recruitment. When the statutory rules are silent as regards transfer and amalgamation, the same could be supplied by the Executive in the manner the same was supplied in the instant case.

59. In the instant case, the effort had been althroughout to adjust those 87 persons. This adjustment has been effected, to my mind, by combining amalgamation and transfer. The amalgamation has been effected by transferring the temporary posts held by those 87 persons to the Bihar Education Service as permanent posts and thereupon by transferring the five private respondents in these writ petitions to such permanent posts. As aforesaid, in view of the status quo order, no further step could be taken to transfer the remaining 82 persons to those permanent posts, though those posts were amalgamated and those 82 persons were accorded permission to hold the same prior to passing of the said status quo order.

60. In the circumstances, the conclusion would be that the challenge thrown to such adjustment or transfer by the writ petitioners is of no avail. They have not alleged mala fide. Inasmuch as, admittedly, each of those 87 persons was appointed to permanent posts in the Government prior to the date of appointment of the first appointee of the 31st. Combined Competitive Examination, it goes without saying that all those 87 persons will have their seniority above that person in accordance with their merit positions inter se them in the 30th Combined Competitive Examination, for the statute does not bar the same.

61. For the reasons, as aforesaid, I would advise myself to dismiss these writ petitions and, accordingly, I do hereby dismiss both the writ petitions but, however, without any order as to costs.