

(2009) 02 GAU CK 0086

In the Gauhati High Court

Case No : Writ Appeal No's. 370 of 2005 and 29 (A) of 2007

S. Sumnyan and Others

APPELLANT

Vs

Limi Niri and Others

RESPONDENT

Date of Decision : 19-02-2009

Acts Referred:

Arunachal Pradesh Administration (Public Works Department) Group B Posts
Recruitment Rules, 1983 — Rule 13, 14, 19, 22, 6
Assistant Engineer (Civil) (Group B) Recruitment Rules, 1991 — Rule 5
Constitution of India, 1950 — Article 14, 16, 162, 226, 309

Citation : (2006) 1 GLT 116

Hon'ble Judges : P.K. Musahary, J; I.A. Ansari, J

Bench : Division Bench

Advocate : R.P. Sharma and K. Jini, for the Appellant; K. Ete and R.H. Nabam,
for the Respondent

Final Decision : Dismissed

Judgement

I.A. Ansari, J.—Whether conditions of recruitment can be relaxed? If so, when and to what extent? Whether appointment of a person to a post without following any selection process whatsoever can be sustained if his appointment is challenged on the ground that though no selection process was followed, while making the appointment, the appointee was, otherwise, eligible to receive such appointment ? Whether the Constitutional scheme of public employment can sustain in making of appointment of a person, who may be eligible for a post, but has not come to be appointed by adhering to any selection process whatsoever? Whether an appointee, whose appointment has been made in conformity with the scheme of a given recruitment rules, can be treated as senior, in service, to an appointee, who had the requisite qualification, but whose appointment was without following any selection process?

These are some of the questions, which have arisen for consideration, in this appeal, which has been preferred against the judgment and order, dated 29.04.2005, passed, in WP (C) No. 746 (AP)/2001, whereby a learned Single

Judge of this Court has allowed the writ petition of the Respondent No. 1 herein and directed the State Respondents to make necessary corrections, in the impugned final seniority list, in terms of the directions given in the said writ petition.

2. The material facts, which have given rise to this appeal, may, in brief, be set out as under:

(i) The writ Petitioner, who is Respondent No. 1 in this appeal, was appointed as an Assistant Engineer, on ad hoc basis, in the year 1988, in the Public Works Department, Government of Arunachal Pradesh, his appointment having been made without following any selection process. The writ Petitioner-Respondent No. 1 herein was, thus, appointed, on the basis of the policy of pick and choose, as an Assistant Engineer (ad hoc). The Appellants herein (who were private Respondents in the said writ petition), has also been appointed, on ad hoc basis, during the period from 04.02.1986 to 21.03.1988, in the same manner as the writ Petitioner-Respondent No. 1 herein inasmuch as the initial appointments of both--the writ Petitioner-Respondent No. 1 as well the Appellants herein--were made, on ad hoc basis, without resorting to any acknowledged selection process. These ad hoc appointments on pick and choose basis, had been made prior to the coming into existence of the APPSC, for, the APPSC came to be formed, on 01.04.1988, under the Arunachal Pradesh Public Service Commission Regulations, 1988. During the period, when these ad hoc appointments were made, the Arunachal Pradesh Administration (Public Works Department) Group B Posts Recruitment Rules, 1983, governed the recruitment to the posts of Assistant Engineer in the Public Works Department. Government of Arunachal Pradesh.

(ii) While the writ Petitioner and the present Appellants had been working, on ad hoc basis, as Assistant Engineers, the writ Petitioner-Respondent No. 1 herein applied, in response to an advertisement, dated 13.05.1988, published by Arunachal Public Service Commission (in short, "the APPSC), inviting applications for filling up some posts of Assistant Engineer in the Public Works Department. The present Appellants, except one, however, chose not to apply in response to the said advertisement. Pursuant to the application, so made, the Petitioner participated in the selection process and, in the merit list, which came to be published on 23.03.1989, the Petitioner was placed at serial No. 6. In consequence of his selection, the Petitioner was appointed, vide order, dated 19.04.1989, as Assistant Engineer, on regular basis, subject to the condition that he shall be, for a period of two years, on probation, and his appointment shall not commence before 02.05.1989. The Petitioner accordingly joined, as a regular Assistant Engineer, on 02.05.1989.

(iii) After the writ Petitioner-Respondent No. 1's regular appointment to the post of Assistant Engineer, as mentioned hereinabove, was made, a Departmental Promotion Committee, headed by the Chairman. APPSC, recommended, on 22.06.1989, regularization of the services of the present Appellants (who were

private Respondents in the said writ petition) as Assistant Engineers, on the basis of their respective service records, and not by holding any such selection process, which may be said to be consistent with the principles of public appointments. Following the recommendation for regularization, so made by the APPSC, the State Government issued order, dated 20.07.1989, appointing the present Appellants as Assistant Engineers (Civil), in the Public Works Department, Government of Arunachal Pradesh, against the quota of direct recruitment. Following the regularization of the services of the present Appellants, in terms of the order, dated 20.07.1989, aforementioned, another order was published, on 13.05.1994, by the Department concerned, whereby it was declared that the Governor of Arunachal Pradesh had granted one time relaxation to those Assistant Engineers, who had been appointed, on ad hoc basis, prior to the constitution of the APPSC, and, thereby, their ad hoc appointments were regularized with effect from their respective dates of initial ad hoc appointments. By this order, dated 13.05.1994, it was also made clear that even the ad hoc promotions of such appointees, whose initial appointments too were adhoc, shall also stand regularized with effect from their respective dates of ad hoc promotion. Thus, by virtue of the order, dated 13.05.1994, aforementioned, not only the initial ad hoc appointments of the present Appellants, but also their subsequent ad hoc promotions were regularized, such regularization being, with retrospective effect, in the manner as mentioned hereinbefore.

(iv) In course of time, when the seniority list of the Assistant Engineers (Civil) in the Public Works Department, was finalized, on 01.03.1999, the writ Petitioner (i.e., the Respondent No. 1 herein), sought for a copy of the said seniority list, and a copy of the seniority list was made available to him on 16.11.2000. Since the present Appellants were placed above the writ Petitioner (i.e., the Respondent No. 1 herein) in the seniority list, the writ Petitioner (i.e., the Respondent No. 1 herein) filed the said writ petition putting to challenge the legality of the action of the State Government in treating the Appellants herein as senior to the writ Petitioner, the ground of challenge being, inter alia, mat the regularization of the ad hoc initial appointments of the present Appellants as well as the regularization of their subsequent ad hoc promotions were wholly illegal inasmuch as the intial appointments of the Appellants were without following any selection process and de hors the relevant recruitment rules. The writ Petitioner-Respondent No. 1 accordingly prayed for treating him as senior to the present Appellants. Since the learned Single Judge has, as indicated above, allowed the writ petition, the private Respondents, in the writ petition, have, now, preferred this appeal.

3. We have heard Mr. R.P. Sarma, learned Senior counsel appearing on behalf of the Appellants-private Respondents in the writ petition, and Mr. K. Ete, learned Counsel for the writ Petitioner-Respondent No. 1 herein. We have also heard Mr. R.H. Nabam, learned Senior Government Advocate, Arunachal Pradesh.

4. Appearing on behalf of the Appellants, Mr. Sarma has pointed out that the learned Single Judge has incorrectly concluded, in the impugned judgment and order, that the regularization of the Appellants' service was with prospective effect and not with retrospective effect. This apart, the learned Single Judge has, according to Mr. Sarma, incorrectly held that the initial appointments of the Appellants were de hors the relevant recruitment Rules and, hence, their initial appointments being illegal, their services could not have been regularized with retrospective effect.

5. Drawing attention of this Court to the provisions of the Arunachal Pradesh Administration (Public Works Department) Group "B" Posts Recruitment Rules, 1983 (in short, "the 1983 Rules"), Mr. Sarma has submitted that according to the 1983 Rules, consultation with the Union Public Service Commission (in short, "the UPSC") was not necessary for the purpose of making even direct recruitment to the post of Assistant Engineer and, hence, the initial appointment of the Appellants, on ad hoc basis, was not de hors the 1983 Rules. It has also been pointed out by Mr. Sarma that the process of selection of the Assistant Engineers, in the Public Works Department, Government of Arunachal Pradesh, came to be vested, in the APPSC, by virtue of the Assistant Engineer (Civil) (Group "B") Recruitment Rules, 1991 (in short, "the 1991" Rules). In such circumstances, according to Mr. Sarma, the regularization of the services of the present Appellants, with retrospective effect from the date of their respective initial ad hoc appointments, cannot be treated to be illegal and ought not to have been interfered with by the learned Single Judge by way of denying the benefit of regularization of their service with retrospective effect.

6. It is contended by Mr. Sarma that since the writ Petitioner had not challenged the order of regularization of ad hoc initial appointments as well as the regularization of the subsequent ad hoc promotions of the present Appellants, the writ petition ought not to have been allowed. It is further contended by Mr. Sarma that the settled seniority position of the persons concerned ought not to have been interfered with by the learned Single Judge after the Appellants had already been promoted and the final seniority list had been published settling, once and for all, the question of seniority between the writ Petitioner-Respondent No. 1, on the one hand, and the present Appellants, on the other.

7. Referring to the decision, in the The Direct Recruit Class-II Engineering Officers' Association and others Vs. State of Maharashtra and others, (hereinafter referred to as Maharashtra Engineers' case), Mr. R.P. Sarma has submitted that even if the initial appointments of the present Appellants are conceded to have had been made without following the relevant recruitment rules, yet, when the Appellants had continued, in their respective posts, uninterruptedly, till regularization of their services, the period, which they had spent, in the service, on the basis of their ad hoc appointments, could have been counted towards their seniority, and has been correctly so counted, while determining their seniority, with effect from their respective dates of initial

appointment.

8. As far as the learned Senior Government Advocate is concerned, his submission is that the regularization of the service of the present Appellants was wholly legal and, hence, the same may be upheld.

9. Responding to the submissions, made on behalf of the Appellants, Mr. K. Ete, learned Counsel for the writ Petitioner-Respondent No. 1 herein, has submitted that when the APPSC had published the advertisement, on 13.05.1989, inviting applications for making regular appointments in the posts of Assistant Engineer, in the Public Works Department, Government of Arunachal Pradesh, the writ Petitioner as well as the present Appellants stood on the same footing inasmuch as both these groups were holding ad hoc appointments in the posts of Assistant Engineer, their adhoc appointments having been made without following any recruitment process and, hence, while the writ Petitioner applied and appeared in the interview, majority of the present Appellants chose not to face the interview and/or participate in the selection process, which had actually opened the doors to all the ad hoc appointees, such as, the writ Petitioner as well as the Appellants, to receive regular appointments.

10. It has also been pointed out by Mr. K. Ete that pursuant to the advertisement, dated 13.05.1989, one of the present Appellants had also applied for appointment to the post of Assistant Engineer and though he got selected, yet, when his ad hoc appointment was regularized, along with the other Appellants, by the order, dated 20.07.1989, aforementioned, he resigned from the regular appointment and rejoined the service on the strength of the said order of regularization. Thus, the Appellants, according to Mr. K. Ete, very well knew, at the time, when the advertisement, dated 13.05.1988, had been published, that their initial appointments were illegal and, if they wished to be regular appointees, then, they would have to apply for regular appointment, but they chose not to participate in the competitive process of direct recruitment and they have, thus, with regularization of their ad hoc services, entered into the cadre of Assistant Engineer through back door. Such an approach to public appointments may not be approved; so pleads Mr. Ete. It has also been submitted by Mr. Ete that even the initial appointments of the Appellants were de hors the Rules inasmuch as even the 1983 Rules required a due selection process to be conducted by the UPSC and that consultation with the UPSC was not required only in the case of departmental promotion, for, the Departmental Promotion Committee, in terms of the 1983 Rules, was to be constituted with some departmental officers and it was to be headed by the Chief Secretary as the Chairman.

11. Before entering into the merit of this appeal, it is apposite that the position of law which would govern the outcome of this appeal, be, at first, outlined so that the parameters of the powers of the State in making public appointments and/or appointments to the posts of Assistant Engineers in the Public Works Department, Government of Arunachal Pradesh, can be clearly appreciated. We

start with the submission made by Mr. R.P. Sarma, learned Senior Counsel, that according to the decision, Maharashtra Engineers" case (supra), even when a person's initial appointment is not made by following the procedure laid down by the relevant rules of recruitment, yet, when the appointee continued in his post, uninterruptedly, till regularization of his service, in accordance with law, the period of his officiating service shall be counted for the purpose of fixing his seniority. The relevant portion of paragraph 47 of Maharashtra Engineer's case (supra), which Mr. Sarma has relied upon, read as under:

47. To sum up, we hold that:

(A) Once an incumbent is appointed to a post according to rule, his seniority has to be counted from the date of his appointment and not according to the date of his confirmation.

The corollary of the above rule is that where the initial appointment is only ad hoc and not according to rules and made as a stop-gap arrangement, the officiation in such post cannot be taken into account for considering the seniority.

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

12. On a hurried reading of Clauses "A" and "B" of paragraph 47 of Maharashtra Engineers" case (supra), Clauses "A" and "B" may appear to be irreconcilable with each other inasmuch as while Clause "A" states that where the initial appointment is only ad hoc and not according to the relevant rules, the period of officiation, in such a post, cannot be taken into account for considering seniority, Clause "B" states that if the initial appointment is not made following the procedures laid down by the relevant recruitment rules, but the appointee continues in the post uninterruptedly till the regularization of his service in accordance with the rules, the period of his officiating service will be counted. The subsequent decisions of the Supreme Court, on this aspect of the case, have made it clear that there is no conflict in the principles embodied in Clause "A" vis-a-vis Clause "B". How the principles, embodied in Clauses "A" and "B" can be reconciled may, now, be noted.

13. In State of W.B. and Others Vs. Aghore Nath Dey and Others, , the Apex Court found that prior to the regularization of the services of the writ Petitioners, the writ Petitioners were not regularly appointed Assistant Engineers and that this fact alone was sufficient to turn down their claim of seniority. However, reliance was placed, in Agshore Nath Dey (supra), on behalf of the writ Petitioners, on the contents of Clause "B" of paragraph 47, in Maharashtra Engineers" case (supra), to contend that Clause "B" shows that even if the initial appointment of a person was not made according to the relevant recruitment rules, when the appointee continues, on the basis of such appointment, till regularization of his service according to the rules, the period of officiating

service rendered by him should be counted for the purpose of fixing his seniority. We may pause here to point here that Mr. Sarma, learned Senior counsel, too has advanced the same argument, which was advanced by the writ Petitioners in *Aghore Nath Dey* (supra).

14. Reacting to the argument, advanced in *Aghore Nath Dey* (supra), that even when the initial appointment of a person is not in accordance with the rules, yet when such an appointee is allowed to continue uninterruptedly till regularization of his service, his period of officiation, in the post of regularization, shall be counted towards his seniority, the Apex Court clarified that Clause "B" would cover only those cases, where the initial appointments were made according to the relevant recruitment rules, though, while adopting the procedure for recruitment, there might have been some procedural error, which do not go to the root of the appointment. The Apex Court further clarified, in *Aghore Nath Dey* (supra), that Clause "B" would not cover those cases, where the initial appointments were made without following the relevant recruitment rules or where the appointments were *de hors* the relevant recruitment rules. The Apex Court, while clarifying that Clause "B" would not cover those cases, where the appointments are illegal or *de hors* the relevant recruitment rules, observed and laid down as follows:

22. There can be no doubt that these two conclusions have to be read harmoniously, and conclusion (B) cannot cover cases which are expressly excluded by conclusion (A). We may, therefore, first refer to conclusion (A). It is clear from conclusion (A) that to enable seniority to be counted from the date of initial appointment and not according to the date of confirmation, the incumbent of the post has to be initially appointed "according to rules". The corollary set out in conclusion (A), then is that where the initial appointment is only *ad hoc* and not according to rules and made as a stopgap arrangement, the officiation in such posts cannot be taken into account for considering the seniority". Thus, the corollary in conclusion (A) expressly excludes the category of cases where the initial appointment is only *ad hoc* and not according to rules, being made only as a stopgap arrangement. The case of the writ Petitioners squarely falls within this corollary in conclusion (A), which says that the officiation in such posts cannot be taken into account for counting the seniority.

23. This being the obvious inference from conclusion (A), the question is whether the present case also fall within conclusion (B) which deals with cases in which period of officiating service will be counted for seniority. We have no doubt that conclusion (B) cannot include, within its ambit, those cases which are expressly covered by the corollary in conclusion (A), since the two conclusions cannot be read in conflict with each other.

24. The question, therefore, is of the category which would "be covered by conclusion (B) excluding therefrom the cases covered by the corollary in conclusion (A).

25. In our opinion, the conclusion (B) was added to cover a different kind of situation, wherein the appointments are otherwise regular, except for the deficiency of certain procedural requirements laid down by the rules. This is clear from the opening words of the conclusion (B), namely, if the initial appointment is not made by following the procedure laid down by the "rules" and the latter expression "till the regularisation of his service in accordance with the rules". We read conclusion (B), and it must be so read to reconcile with conclusion (A), to cover the cases where the initial appointment is made against an existing vacancy, not limited to a fixed period of time or purpose by the appointment order itself, and is made subject to the deficiency in the procedural requirements prescribed by the rules for adjudging suitability of the appointee for the post being cured at the time of regularisation, the appointee being eligible and qualified in every manner for a regular appointment on the date of initial appointment in such cases. Decision about the nature of the appointment, for determining whether it falls in this category, has to be made on the basis of the terms of the initial appointment itself and the provisions in the rules. In such cases, the deficiency in the procedural requirements laid down by the rules has to be cured at the first available opportunity, without any default of the employee, and the appointee must continue in the post uninterruptedly till the regularisation of his service, in accordance with the rules. In such cases, the appointee is not to blame for the deficiency in the procedural requirements under the rules at the time of his initial appointment, and the appointment not being limited to a fixed period of time is intended to be a regular appointment, subject to the remaining procedural requirements of the rules being fulfilled at the earliest. In such cases also, if there be any delay in curing the defects on account of any fault of the appointee, the appointee would not get the full benefit of the earlier period on account of his default, the benefit being confined only to the period for which he is not to blame. This category of cases is different from those covered by the corollary in conclusion (A) which relates to appointment only on adhoc basis as a stopgap arrangement and not according to rules. It is, therefore, not correct to say, that the present cases can fall within the ambit of conclusion (B), even though they are squarely covered by the corollary in conclusion (A).

(Emphasis is added)

15. From what have been observed and laid down in *Aghore Nath Dey* (supra), it becomes clear that where the initial appointment is only ad hoc and not according to rules, such appointees, on regularization of their services, cannot claim that the period of service, which they had spent, on the strength of such illegal appointments, shall be counted towards their seniority. However, when an initial appointment is regular except for some deficiency in die procedural requirement, such an appointee would, on regularization of his service, receive the benefit of the period of service, which he might have rendered on the strength of such irregular appointment.

16. In *State of Maharashtra and Ors. v. Sanjay Thakre and Ors.* reported in (1995) 2 SCC 407, the Apex Court, at paragraph 6, having referred to *Aghore Nath Dey's* case (supra), held, in no uncertain words, that "a perusal of *Aghore Nath's* case shows that benefit of ad hoc service would not be admissible if appointment be in violation of Rules".

17. Even a Division Bench of this Court, in *A.T. Gayakwad v. Union of India and Ors.* reported in (2003) 3 GLT 10, has held that the proposition of law., as mentioned in Clause "A" aforementioned, would apply to cases, wherein the incumbent had not been appointed according to relevant recruitment rules, and that the proposition mentioned in Clause "B" aforementioned would cover only those cases, where the appointments have been made following the procedure prescribed by the rules. Consequently, proposition "B" would not apply to the cases of appointees, whose appointments were de hors the Rules. Taken to its logical conclusion, proposition "B" would mean that if the initial appointment has been made de hors the relevant recruitment rules, the appointee will not, on regularization of his service, receive the benefit of the period, which he spent on the post on the basis of his illegal appointment.

18. Coupled with the above, what needs to be pointed out is that the Constitution Bench, in *Secretary State of Karnataka and Ors. v. Umadevi and Ors.* reported in (2006) 4 SCC 4, has made it clear that Article 14, 16 and 309 form part of the basic structure of the Constitution inasmuch as these Constitutional provisions aim at ensuring that every public employment is made only in a fair and equitable manner by giving all those, who are eligible, an opportunity to seek employment. Thus, adherence to the rule of equality of opportunity in public employment forms the basic feature of the Constitution. The relevant observations made, in this regard, in *Uma Devi* (supra), read as under:

Any public employment has to be in terms of the constitutional scheme.

It is not the role envisaged for the High Courts in the scheme of things and their wide powers under Article 226 of the Constitution are not intended to be used for the purpose of perpetuating illegalities, irregularities or improprieties or for scuttling the whole scheme of public employment.

The Constitution does not envisage any employment outside this constitutional scheme and without following the requirements set down therein.

When rules framed under Article 309 of the Constitution are in force, no regularisation is permissible in exercise of the executive powers of the Government under Article 162 of the Constitution in contravention of the rules.

Though the High Court is entitled to exercise its judicial discretion in deciding writ petition or civil revision applications coming before it. the discretion had to be confined in declining to entertain such petitions and refusing to grant reliefs asked for.

Adherence to rule of equality in public employment is a basic feature of the Constitution.

High Court acting under Article 226 of the Constitution, should not ordinarily issue direction for absorption, unless the recruitment itself was made regularly and in terms of the Constitutional scheme.

When the Court is approached for relief by way of a writ, the Court has necessarily to ask itself whether the person before it had any legal right to be enforced.

Constitution as one of its basic features, has included Articles 14, 16 and 309 so as to ensure that public employment is given only in a fair and equitable manner by giving all those who are qualified, an opportunity to seek employment.

Those decisions which run counter to the principle settled in this decision, or in which directions running counter to what we have held herein, will stand denuded of their status as precedents.

19. From what have been observed and held by the Constitution Bench, in *Umadevi* (supra), it becomes, now, transparent that Articles 14, 16 and 309 form basic structure of the Constitution inasmuch as these constitutional provisions aim at ensuring that public employment is made only, in a fair and equitable manner, by giving all those, who are eligible, an opportunity to seek employment. Adherence to the rule of equality of opportunity in public employment is, thus, a basic feature of the Constitution. When rules framed under Article 309 are in force, no regularization of service is permissible in exercise of the State's executive powers under Article 162, particularly, when the exercise of such executive power by the State contravenes the rules framed under Article 309. Even when no rules have been framed under Article 309, the public employment must be made following a fair and equitable selection process in terms of Articles 14 and 16 so as to enable every eligible person the liberty to seek employment. Our Constitution does not permit, in the light of the decision of the Constitution Bench, in *Uma Devi* (supra), making of public employment outside the Constitutional scheme and without following the requirements set forth hereinbefore.

20. In the present case, when the Appellants were, admittedly, appointed without following any selection process and without giving any opportunity to the people, similarly situated, as the Appellants were, to participate in any selection process, such arbitrary appointments of the Appellants could not have been treated, and ought not be treated, as valid and regular irrespective of the fact as to whether the 1983 Rules envisaged any role for the UPSC or not.

21. Let me, now, turn to the 1983 Rules. The relevant portion of the Schedule, relating to the appointment of Assistant Engineer (Civil), PWD, by way of promotion and direct recruitment, are delineated below:

1 6 7 8 9 11 12 13 Name Age for Educatio- Whether Period In case of rectt. by

If a DPC Circum- of post Direct nal & other age& of promotion/deput- exists what is stances Recruits qualificat- educat- prob- ation transfer gra- its composi- in which ions requ- ional ation des from which tion UPSC ired for qualific- if any promotion/depu- is to direct ations tation transfer to consul- recruits prescri- be made ted in bed for making direct re- rectt. cuitme- nts will apply in the case of prom- ottees

Asstt. 30 yrs. Degree in No 2 yrs. Promotion Group B" Not Engineei (Relaxable Civil Jr. Engineer (Civil) Departmental applic- (Civil) for Govt. Engineer- of AP, PWD havi- Promotion able. AP, Servants ing ng 5/10 yrs regular Committee PWD upto 5 yrs. service in the grade consisting of: in accord- for degree/diploma 1. Chief Sec- ance with holder respectively retary, Arun- the instru- in civil engineering achal Pradesh- ctions or Transfer on deput- Chairman, orders ation (including 2. An officer issued by short-term contract) not below the the Central Officers of Central rank of Dy. Govt. Govt. State Govt./ Secy, of Min- SemiGovt./ autono- istryof Home mous statutory Affairs-Mem organizations/Public ber. Undertakings: 3. Head of Holding analgous Deptt. Concer- posts or holding a ned- Member, post in the scale of 4. A Senior Rs. 425-700/-with officer of Un- 5/10 yrs service for ion Territory degree/diploma Admn. holders in civil engi- belonging to neering (priod of AP Tribe not deputation includ- below the ing short-term con- rank of Secy tract including the to the Admn- period of deputator Member in another ex-cadre post held immediately preceding this apptt. in the department sail ordinarily not exceed 3 yrs).

22. From a careful reading of the above Schedule, it becomes clear that Column 12 prescribes the constitution of Departmental Promotion Committee; hence, this Committee is not meant for making direct recruitment. This apart, when the ad hoc appointments of the present Appellants had been made without following the principles, which are required to be adhered to, in the realm of making public employment, such appointments, in the light of the pronouncement of the decision in Uma Devi (supra), were nothing, but arbitrary and wholly illegal, such appointments cannot be treated as mere irregular appointments irrespective of the fact as to whether UPSC had any role to play in making appointment under the 1983 Rules. It needs to be noted that till 27.02.1987, Arunachal Pradesh remained as a Union Territory inasmuch as it acquired Statehood only on 28.02.1987. Prior to the point of time, when Arunachal Pradesh became a State, the direct recruitments, in respect of the posts (such as, the present one, which we are concerned with), in Arunachal Pradesh, being a Union Territory, stood vested in the UPSC and, it was after the Union Territory of Arunachal Pradesh had acquired Statehood that APPSC was constituted under the Arunachal Pradesh Public Service Commission Regulations, 1988. The procedure for selection, in terms of the Schedule given under the 1991 Rules are as under:

23. It is, thus, the APPSC, which replaced the UPSC. When the appointments cannot, now, be made without a selection process having been conducted by the APPSC in terms of the 1991 Rules, the question of holding the appointments,

which were made under the 1983 Rules, without following any selection procedure whatsoever, to be valid, does not arise at all.

24. The impression that the State Government, the APPSC as well as the present Appellants knew that the initial appointments of the present Appellants, as ad hoc Assistant Engineers, were illegal, the same being de hors the relevant recruitment rules, and that their appointments were required to be regularized, is re-in forced by the fact that the initial appointments have, in fact, been regularized by the order, dated 20.07.1989, aforementioned. This regularization makes it more than abundantly clear that the Appellants' initial appointments were illegal. Even otherwise, in the light of the Constitution Bench decision, in Uma Devi (supra), the initial appointments of the Appellants having been made without following any selection process whatsoever and the same having been made in complete disregard of the principles governing public employments, these cannot but be treated as wholly illegal and arbitrary.

25. Coupled with the above, what also attracts the eyes, most prominently, is that the Appellants relied upon the order, dated 13.05.1994, aforementioned, to claim that their appointments have been regularized with effect from their initial dates of appointment. This order, dated 13.05.1994, however, clearly mentions that the Governor is pleased to grant one-time relaxation to the Appellants in the matter of relaxation of their ad hoc services. Thus, the appointees are beneficiaries of the provisions of relaxation, which exist in the 1991 Rules.

26. While dealing with the above aspect of the case, it may also be mentioned, if we may borrow the language used in Dr. Dr. M. Laitphlang and Others Vs. State of Meghalaya and Others, that the concept of appointment, absorption and promotion in service, in relaxation of the recruitment rules, has undergone a prominent development. The present view is that there can be no relaxation of the basic and fundamental rules of recruitment. Thus, the service jurisprudence, now, makes a distinction between conditions of recruitment and conditions of service. While condition of service may be relaxed, condition of recruitment cannot be relaxed. Subject, however, to the condition that if the recruitment rules, in themselves, provide for relaxation of the condition of recruitment, the condition of recruitment may be relaxed provided that such relaxation does not render the conditions of recruitment, as a whole, nugatory and/or non-est in its entirety. Reference, in this regard, may be made to Dr. M. Laiphlang (supra), wherein a Division Bench of this Court, relying upon a number of authorities, culled out the parameters of the law of relaxation in the following words:

25. While considering the above aspects of the matter, it needs to be pointed out, at the very outset, that the concept of appointment, absorption and/or promotion in service in relaxation of relevant recruitment rules has undergone a prominent development. The present view is that there can be no relaxation of the basic and fundamental rules of recruitment. Moreover, strict conformity with the recruitment rules is insisted both for direct recruits as well as promotees. (Ref. Suraj Parkash Gupta and Others Vs. State of Jammu & Kashmir Others,

Thus the service jurisprudence, now, clearly draws a distinction between the conditions of recruitment and conditions of service. In other words, in the realm of service jurisprudence, a distinction is, now, drawn between the conditions of recruitment and the conditions of service. While the conditions of service may be relaxed, conditions of recruitment cannot be relaxed. In other words, the provisions for relaxation in general contained in recruitment rules cannot be resorted to for relaxing the conditions of recruitment. The minimum period of qualifying service for promotion, which recruitment rules impose, is really a condition of recruitment and such a condition not being condition of service cannot generally be relaxed unless the Rules in themselves provide for otherwise. J.C. Yadav and others Vs. State of Haryana and others, . A Division Bench of this Court have set the matter at rest in the case of Ananda Ram Baruah v. State of Assam reported in 2003 (2) GLT 78, by observing and laying down as follows:

? The question, which call for determination by this Court is whether the power to relax the Rule would go to the extent of relaxing conditions of recruitment also or it can be only to the extent of relaxing the conditions of service? Can a direct recruit for recruitment to the post of LDA avoid competitive examination? Can the Government exercise power of relaxation of Rule of recruitment requiring a direct recruit to appear in the competitive examination and such relaxation of the recruitment Rules is permissible. In Aslam Babalal Desai Vs. State of Maharashtra, the Apex Court has emphasized the need of strict compliance of the recruitment Rules for both direct recruits and promotees. It is held that there cannot be any relaxation of the basic or fundamental Rules of recruitment. That was a case where the Rule permitting relaxation of conditions of service came for consideration and it was held by a three Judges Bench that the Rule did not permit relaxation of the recruitment Rules. In Krishna Ram and others Vs. State of Rajasthan, the Apex Court observed "The condition precedent, therefore is that there should be an appointment to the service in accordance with Rules and by operation of the Rules, undue hardship has been caused. It is already held that the condition of recruitment and conditions of service are distinct and the latter is preceded by an appointment according to Rules. The former cannot be relaxed. Thus, according to the Apex Court there is distinction between the conditions of recruitment and conditions of service. Appointment has to be made in accordance with the recruitment Rules and, thereafter, there may a relaxation in the service condition. Similarly, in State of Orissa and others Vs. Smt. Sukanti Mohapatra and others, it was held that though the power of relaxation stated in the Rule was in regard to "any of the provisions, of the Rules", this did not permit relaxation of the Rule, of direct recruitment without consulting the Commission and the entire, adhoc service of a direct recruit could not be treated as regular service. In Dr M.A. Haque and Others Vs. Union of India (UOI) and Others, and in J and K. Public Service Commission, etc. Vs. Dr. Narinder Mohan and others etc. etc., it has been emphatically laid. Down that the Rule relating to recruitment could not be relaxed. The judgment in the matter of Suraj Prakash Gupta (supra) has also reiterated the principle laid down by the Apex Court that

there cannot be any relaxation of the conditions of recruitment. The conditions of recruitment and conditions of service are distinct. The Government has the power to relax conditions of service, whereas the conditions of recruitment cannot be relaxed even though the Rule intends to do so.

26. We express our complete agreement with the position of law laid down in *Ananda Ram Baruah (supra)* subject to only one classification that if the recruitment rules, in themselves, provide for relaxation of conditions of recruitment, the conditions of recruitment may be relaxed, provided that such relaxation does not make the conditions of recruitment nugatory and that interpretation of such provisions of relaxation contained in the recruitment rules must not be liberal, but very strict.

(Emphasis is supplied)

27. For reaching the above conclusions, the Division Bench of this Court has relied upon, amongst others, the decisions in *J.C. Yadav and others Vs. State of Haryana and others*, *Keshav Chandra Joshi and others etc. Vs. Union of India and others*, *Syed Khalid Rizvi and Others and Ramesh Prasad Singh and Others Vs. Union of India (UOI) and Others*, *State of Orissa and others Vs. Smt. Sukanti Mohapatra and others*, *Dr M.A. Haque and Others Vs. Union of India (UOI) and Others*, *J and K. Public Service Commission, etc. Vs. Dr. Narinder Mohan and others etc. etc.*, and *Suraj Parkash Gupta and Others Vs. State of Jammu & Kashmir Others*,

28. In the case at hand, Rule 5 of the 1991 Rules embodies the provisions of relaxation. This Rule reads as under:

5. Power to relax : - Where the Governor of Arunachal Pradesh is of the opinion, that it is necessary or expedient so to do, he may, by order for reasons to be recorded in writing, and in consultation with the Arunachal Pradesh Selection Board/Public Service Commission, relax any of the provisions of these rules with respect to any class or category of person.

29. In tact, Rule 6 of the 1983 Rules, which embodied the provisions of relaxation, read:

Power to relax: - Where the Lt. Governor is of the opinion that it is necessary or expedient so to do, he may, by order, for reasons to be recorded in writing, relax any of the provisions of these rules with respect to any class or category of persons.

30. A bare reading of Rule 5 of the 1991 Rules and Rule 6 of the 1983 Rules clearly shows that the provisions, with regard to relaxation under both sets of recruitment rules, are same except the fact that while granting of such relaxation did not require, under the 1983 Rules, consultation with the UPSC or with any specific body, the 1991 Rules require consultation with the Arunachal Pradesh Selection Board or APPSC, as the case may be.

31. In the light of the law laid down in Dr. M. Laiphlang (supra), one can safely hold that even if, in the light of the language used in Rule 5, the conditions of recruitment, contained in 1991 Rules, may be relaxed, such relaxation cannot be to such an extent that it makes the whole provisions for recruitment imbecile, purposeless and nugatory as if the rules, as a whole, do not exist or as if the rules, in their entirety stand suspended. In short, Rule 5 does not conceive of recruitment dehors the 1991 Rules.

32. From what has been discussed above, it is abundantly clear that though Rule 5 provides for relaxation of any Rule and even if the word "any", occurring in Rule 5, is interpreted to include the rules of recruitment, relaxation cannot be to such an extent that the rules of recruitment are rendered facile. On this aspect of law, we may refer to State of Orissa and others Vs. Smt. Sukanti Mohapatra and others, wherein the Apex Court has, taking note of its earlier decision, in R.N. Nanjundappa Vs. T. Thimmiah and Another, clarified the law, on the subject, as follows:

8. The Rules were made under the proviso to Article 309 for regulating the method of recruitment to the posts of Lower Division Assistants in the offices of the Heads of Departments. *** Counsel for the regular recruits contend that what the Government has done in exercise of power under Rule 14 is set at naught the entire body of the Rules as if they never existed. The power of relaxation, contend counsel, cannot be so used as to render the Rules non-est. In support of this contention strong reliance was placed on the following observations in the of R.N. Nanjundappa v. T. Thimmiah : (SCC pp. 416-17, para 26)

?If the appointment itself is in infraction of the rules or if it is in violation of the provisions of the Constitution, illegality cannot be regularized. Ratification or regularization is possible of an act which is within the power and province of the authority but there has been some non-compliance with procedure or manner which does not go to the root of the appointment. Regularisation cannot be said to be a mode of recruitment. To accede to such a proposition would be to introduce a new head of appointment in defiance of rules or it may have the effect of setting at naught the rules.

In the present case also the appointments of the employees whose services are sought to be regularized were dehors the Rules. Rule 14 merely permits relaxation of any of the provisions of the Rules in public interest but not the total shelving of the rules. The orders do not say which rule or rules the Government considered necessary and expedient in public interest to relax. What has been done under the impugned orders is to regularise the illegal entry into service as if the Rules were not in existence. Besides the reason for so doing are not set out nor is it clear how such regularization can sub-serve public interest. Rule 14 has to be strictly construed and proper foundation must be laid for the exercise of power under that rule. The Rules have a limited role to play, namely, to regulate the method of recruitment, and Rule 14 enables the Government to relax any of

the requirements of the Rules pertaining to recruitment. The language of Rule 14 in the context of the objective of the Rules does not permit total suspension of the Rules and recruitment dehors the Rules. In the present case the recruitments had taken place years back in total disregard of the Rules and now what is sought to be done is to regularize the illegal entry in exercise of power under Rule 14. Rule 14, we are afraid, does not confer such a blanket power; its scope is limited to relaxing any rule, e.g. eligibility criteria, or the like, but it cannot be understood to empower Government to throw the Rules overboard. If the rule is so construed it may not stand the test of Article 14 of the Constitution. The proviso to Rule 13 can come into play in the matter of fixation of seniority between candidates who have successfully cleared the examination and a candidate who cleared the examination after availing of the benefit of relaxation. We are, therefore, of the opinion that the Tribunal committed no error in understanding the purport of Rule 14.

10. Now even though the Tribunal came to the conclusion that Rule 14 did not permit regularization made under the impugned orders of January 3, 1985 and February 14, 1985, it, having regard to the long service put in by the employees named in the same two orders and on compassionate considerations, has supported the regularization under Article 162 of the Constitution. It has moulded the relief on such considerations. Since that part of the order has not been assailed and since the Appellants cannot be worse off by appealing, we cannot interfere with that part of the order. It will, therefore, be worked out as directed by the Tribunal but we may clarify that it will not have the effect of disturbing the seniority of regular appointees who will rank senior to the irregular appointees under any interim orders contrary to the relief moulded by the Tribunal shall be adjusted and brought in tune with the said relief. The benefit of this relief, to the extent relevant, will be given to irregular appointees covered under both the impugned orders of January 3, 1985 and February 14, 1985.

33. Applying the law laid down in *Sukanti Mahapatra* (supra) to the factual matrix of the present case, one can unhesitatingly hold that the 1983 Rules were made, and the 1991 Rules have been made, under the proviso to Article 309 for regulating the method of recruitment to, amongst others, the post of Assistant Engineer in the Public Works Department, Government of Arunachal Pradesh, and Rule 6 of the 1983 Rules and Rule 5 of 1991 Rules provide for relaxation. Even if the power given, under Rule 5, to the Government can be interpreted to empower the Government to relax not only the conditions of service, but also the conditions of recruitment, the fact remains that what the Government has done, in the present case, in exercise of powers under Rule 5, is to virtually set at naught the entire body of the Rules as if the Rules never existed. The power of relaxation, as the decision in *R.N. Nanjundappa* (supra) reflects, does not empower appointments in defiance of the Rules. As held in *R.N. Nanjundappa* (supra), if the appointment itself is in infraction of the rules or if it is in violation

of the provisions of the Constitution, illegality cannot be regularized; ratification or regularization is possible of an act, which is within the power and province of the authority or where there has been some non-compliance with the procedure or the manner, which does not go to the root of the appointment; regularization cannot be said to be a mode of recruitment. To accede to such a proposition would be to introduce a new head of appointment in defiance of rules, for, it may have the effect of setting at naught the rules.

34. What emerges from the above discussion is that the recruitment of the Appellants was made by throwing into the wind the entire scheme of recruitment envisaged under the 1983 as well as 1991 Rules. This apart, the appointments of the Appellant are against the Constitutional scheme of public employment as spelt out in *Uma Devi* (supra). In a situation, as the present one, there can be no escape from the conclusion that the appointment of the Appellants was *de hors* the Rules and if the same is not to be interfered with by this Court, such non-interference will not be and cannot be on account of the fact that the relevant Rules of recruitment were relaxed, while recruiting them; rather, such non-interference would be and can be on sheer sympathetic consideration that the Appellants have put in service for a long period, though the period is not as long as the service, which the promotees in *Narender Chadha v. Union of India* AIR 1968 SC 638, had put in.

35. However, while considering the length of service, which the Appellants have put in, one has to bear in mind that even when the appointment to a promotional post is in violation of the relevant recruitment Rules, the Court should refuse to give benefit of the period during which the promotee has rendered service on the promotional post. See *M.K. Shanmugam and Another Vs. Union of India and Others*, , the Court observed:

There is difficulty in the way of the Appellants to fight out their case, for, seniority should be reckoned by reason of the length of the service whether *ad hoc* or otherwise inasmuch as they had not been recruited regularly.

36. The law laid down in *M.K. Shammugam* has been followed in *Md. Israils and Ors. v. State of West Bengal and Ors.* reported in (2003) 2 SCC 306, wherein the Court observed:

Para 9. In the case of *M.K. Shammugam v. Union of India* this Court came to hold that any *ad hoc* service does not count for seniority in the cadre and it can only count in those cases where the initial appointment, though *ad hoc* is made by the same process, as is applicable to the regular appointment and is not a stopgap appointment. In this case also the promotions had been made purely temporary and on *ad hoc* basis and for a limited period and it had been made clear in promotion order that the promotion is subject to the approval of the Public Service Commission and would not confer any seniority. In the case in hand also the order of promotion in favour of Respondents 6 to 30 categorically indicated that the promotion is purely on *ad hoc* basis and subject to the

approval of the Public Service Commission. Consequently the services rendered on such ad hoc basis till the approval of the Public Service Commission is obtained, will not count for reckoning the seniority in the cadre. The only other decision which requires consideration is the judgment of this Court in *Suraj Prakash Gupta v. State of J & K* on which Mr. Venkataramani, learned Senior Counsel appearing for the private Respondents strongly relied upon. Question 3 in this case was, whether ad hoc, stopgap promotion of Assistant Engineers could be made beyond 6 months and till regularization, by the Government without consulting the Public Service Commission can be counted for the purpose of seniority. So far as Question 3 is concerned, the Court answered by referring to Regulation 4(d)(iii) of J & K Public Service Commission (Limitation of Functions) Regulations, 1957 and Rule 23 of the J & K. Civil Services (CCA) Rules, 1956, that the State Government has the power to regularize the services from an anterior date, as provided under Rule 23, and therefore, when appointment is made without consultation with the Public Service Commission, entire service will not be wiped off. This conclusion was possible because of the existence of Rule 23. In the case in hand we do not have any rule corresponding to Rule 23, and therefore the ratio of the aforesaid case will have no application. Mr. Venkataramani, however, vehemently urged that the observations made in the aforesaid case are of general nature and should apply to every case irrespective of existence, of any rule corresponding to Rule 23 of the J & K Civil Services (CCA) Rules. We are, however, not persuaded to accept this submission of learned Counsel for the Respondents. In view of the analysis of different provisions of the Recruitment Rules, the West Bengal Public Service Commission (Consultation by Governor) Regulation, West Bengal Public Service Commission (Exemption from Consultation) Regulation, we have no doubt that the initial appointment of Respondents 6 to 30, purely on ad hoc basis without consultation with the Public Service Commission cannot be held to be a regular service in the cadre of Employment Officer, and as such the same cannot be counted for the purposes of reckoning their seniority in the cadre.

37. The above observations, made in *Md. Israil* (supra), convey that if the initial appointment itself is not regular, question of reckoning the period of service rendered by an illegal appointee, for the purpose of determining his seniority, does not arise at all.

38. When the appointment to the promotional cadre is de hors the recruitment Rules, the Court cannot direct that the period of service rendered on the promotional post, by virtue of the illegal promotional appointment, should be counted for the purpose of seniority in the cadre even if the promotee possesses the requisite qualification for such promotional appointment. See *UOI and Ors. v. Satish Chandra Mathur*, 2001 (10) SCC 185

39. We, now, come to, and deal with, the question as to whether the seniority of an appointee can be challenged on the ground that the appointment of the person, who is treated as senior, is in violation of the relevant Recruitment Rules,

when the challenger to such an appointment did not seek removal of the illegal appointee and only seeks direction to the Government to treat the challenger, i.e., the regular appointee, as senior to the illegal appointee?

40. Answer to the above question is fully covered by the Apex Court's decision in *State of U.P. Vs. Rafiquddin and Others*, In this case, the Apex Court was confronted with a situation in which while, on the one hand, a batch of persons was appointed in the judicial service of the State in violation of the relevant Rules of recruitment, another batch of persons was, on the other hand, appointed in the same service in accordance with the Rules, the irregular appointees having, however, been accorded seniority over the regular appointees on the ground that the irregular appointees were selected from the selection test held in the year 1970, whereas the regular appointees were selected from the selection test held in the year 1972. Dealing with such a situation, the Apex Court observed and held as follows:

13? The appointment of unplaced candidates made in pursuance of the decision taken by the high level committee is not countenanced by the Rules. There is no escape from the conclusion that the unplaced candidates were not appointed to the service on the basis of the result of the competitive examination of 1970. Their appointment was made in breach of the Rules, in pursuance to the decision of the high level committee. It is well settled that where recruitment to service is regulated by the statutory rules, recruitment must be made in accordance with those Rule, any appointment made in breach of rules would be illegal. The appointment of 21 "unplaced candidates" made out of the third list was illegal as it was made in violation of the provisions of the Rules. The high level committee which took decision for recruitment of candidates to the service on the basis of the 40 per cent aggregate marks disregarding the minimum marks fixed by the Commission for viva voce test had no authority in law as the Rules do not contemplate any such committee and any decision taken by it could not be implemented.

14. We are surprised that the Chief Justice, Chief Minister or as well as the Chairman of the Commission agreed to adopt this procedure which was contrary to the Rules, The high level committee even though constituted by highly placed persons had no authority in law to disregard the Rules. and to direct the Commission to make recommendation in favour of unsuccessful candidates disregarding the minimum marks prescribed for the viva voce test. The high level committe's view that after the amendment of Rule 19, the minimum qualifying marks fixed for viva voce could be ignored was wholly wrong. Rule 19 was amended in January. 1972, but before that 1970 examination had already been held. Since the amendment was not retrospective the result of any examination held before January, 1972 could not be determined on the basis of amended Rules. The Public Service Commission is a constitutional and independent authority. It plays a pivotal role in the selection and appointment of persons to public services. It secures efficiency in the public administration by selecting

suitable and efficient persons for appointment to the services. The Commission has to perform its functions and duties in an independent and objective manner uninfluenced by the dictates of any other authority. It is not subservient to the directions of the Government unless such directions are permissible by law. Rules vest power in the Commission to hold the competitive examination and to select suitable candidates on the criteria fixed by it. The State Government or the high level committee could not issue any directions to the Commission for making recommendation in favour of those candidates who failed to achieve the minimum prescribed standards as the Rules did not confer any such power on the State Government. In this view even if the Commission had made recommendation in favour of the unplaced candidates under the directions of the Government the appointment of the unplaced candidates was illegal as the same was made in violation of the Rules.

15. ...But even if the Commission had agreed to the Government's suggestion, their appointments continued to be illegal, as the same were made in breach of Rules. There was no justification for the appointment of the unsuccessful candidates in 1975, because by that time result of 1972 examination had been announced and duly selected candidates were available for appointment."

16. ...If selected candidates are available for appointment on the basis of the competitive examination of subsequent years, it would be unreasonable and unjust to revise the list of earlier examination by changing norms to fill up the vacancies as that would adversely affect the right of those selected at the subsequent examination in matters relating to their seniority under Rule 22. The 1970 examination could not be utilized as a perennial source or inexhaustible reservoir for making appointments indefinitely.

19. The unplaced candidates were appointed to the service in breach of the Rules and they form a separate class. They cannot be equated with those who were appointed to the service from the first and second list of 1970 examination as their appointment was made on the recommendation of the Public Service Commission. They remain unchallenged Similarly, candidates appointed, to the service on the basis of the result of the competitive examination of 1972 before the unplaced candidates were appointed, formed separate class as they were also appointed in accordance with the Rules. The unplaced candidates" of 1970 examination cannot claim seniority over them on the basis of Rule 22 as their appointment was not made on the basis of the list approved by the Commission under Rule 19, In *Shitla Prasad Shukla Vs. State of U.P. and Others*, this Court held that an employee must belong to the same stream before he can claim seniority vis-a-vis others. Those appointed irregularly belong to a different stream and they cannot claim seniority vis-a-vis those who may have been regularly and properly appointed,

20. ... But we are also of the view that having regard to the period of 12 years

that have elapsed, we do not propose to strike down their appointments,

21. Now the question arises as to when seniority should be assigned to the unplaced candidates. Their claim for assigning them seniority on the basis of the competitive examination of 1970 is not sustainable in law as discussed above. They were appointed to service after five years of the examination and before their appointment, competitive examination of 1972 had taken place and candidates selected under that examination had been appointed to service prior to their appointment. The directions issued by the High Court for rearranging the merit list of 1970 examination seriously affect the seniority of those who were regularly selected in accordance with the norms prescribed by the Commission. Having regard to these facts and circumstances of the case we are of the opinion that the view taken on by the High Court on its administrative side and the State Government that the unplaced candidates of 1970 examination should be assigned seniority below the last candidate of 1972 examination appointed to the service is just and reasonable. In our opinion it would be just and proper to assign seniority to the unplaced candidates of 1970 examination at the bottom of the line of 1972 candidates. There were 37 unplaced candidates of 1970 examination who were included in the third list, of them 16 candidates appeared in the 1972 examination and they were successful and their names were approved by the Commission in the list prepared under Rule 19. The State Government appointed them in service. Under Rule 22 they are entitled to seniority of 1972 examination but in view of the judgment of the High Court in Rafiquddin's case their seniority has been determined on the basis of their recruitment to service under the 1970 examination. We have already recorded findings that unplaced candidates of 1970 examination (as included in the third list) have not been recruited in service according to the Rules and their recruitment to service cannot be treated under 1970 examination for purposes of determining their seniority under Rule 22. We have further directed that 21 unplaced candidates of 1970 examination should be placed below the candidates of 1972 examination. But so far as 16 remaining candidates are concerned, they were appointed to the service on the result of 1972 examination and their appointment does not suffer from any legal infirmity. They are therefore entitled to seniority of 1972 examination on the basis of their position in the merit list of that examination. They are however not entitled to the seniority of 1970 on the basis of the examination of that year as held by the High Court.

41. From the case of Rafiquddin (supra), it is clear that even when the High Level Committee consisted of persons, who had occupied highest of offices in the State, the action taken by such a High Level Committee was, being in breach of the rules, not upheld by the Apex Court reminding all of us of the principle, "however high you may be the law is above you".

42. The second underlying principle of the decision in Rafiquddin (supra) is that even when, on account of lapse of a long period, appointment made to a service, in breach of the relevant recruitment rules, is not set aside and quashed, such

irregular appointee shall not be allowed to steal a march over the regular appointees, for, as reiterated in Rafiquddin (supra):

an employee must belong to the same stream before he can claim seniority vis-a-vis others. Those appointed irregularly belong to a different stream and they cannot claim seniority vis-a-vis those, who may have been regularly and properly appointed.

43. Following the principle of law as indicated hereinabove, it is possible that without setting aside and quashing the appointment of an irregular appointee, the Court or Tribunal may direct the appointing authority to treat a regular appointee in service, though appointed later in point of time than the irregular appointee, as senior to the irregular appointee. In other words, an irregular appointee, particularly, if his appointment suffers from arbitrariness, mala fide and colourable exercise of powers, cannot be allowed to gain seniority on the regular appointee, for, they cannot be said to belong to the same stream even if the appointment of the irregular appointee is prior in point of time and is not disturbed on account of long period of service, which the irregular appointee might have put in.

44. What clearly follows from the above discussion is that even if the very appointment of the Appellants are not, now, interfered with and set aside, it is still within the powers of the Court to direct that the writ Petitioner-Respondent No. 1 be treated senior to the Appellants.

45. It may be pointed out that the principles governing seniority between a regular appointee and an irregular appointee, as enunciated in Rafiquddin (supra), have also been followed in State of Orissa and others Vs. Smt. Sukanti Mohapatra and others, In Sukanti Mahapatra (supra), the Tribunal, on review of its earlier order, reversed its earlier finding and directed that the appointees, whose entry into the service was irregular being de hors the Rule, would rank junior to the regular appointees. In Sukanti Mahapatra (supra) too, if we may emphasise, the Tribunal did not set aside the appointment of the irregular appointees having regard to the long period of service put in by the irregular appointees. While not setting aside the appointment of irregular appointees, the Tribunal, however, moulded the relief as regards seniority between the irregular appointees vis-a-vis the regular appointees by directing that the irregular appointees shall rank junior to the regular appointees.

46. In view of the fact that the Appellants are found to have been appointed de hors the Rules and also for the reasons, which we have already assigned hereinabove and which lead one to the lone and only conclusion that the appointments of the Appellants are not really sustainable in law, question of giving them seniority by taking into account the past services, if any, rendered by them to the Government, State or Central, before they came to be appointed regularly, does not arise at all.

47. Such brazen faced flouting of laws, as the present case reveals, and such

exhibition of the unbridled might by a chosen few, contrary to the provisions of law, as the case at hand demonstrates, cannot be ignored and allowed to stand good on record, for, reluctance, on the part of the Court, to interfere with such a process of selection will shake the confidence of the people in the ability of the Courts to check and ensure that neither the APPSC nor the State Government be allowed to flout the law with impunity and confer thereby legitimacy on such unconscionably made appointees, such as, the present Appellants are.

48. Because of what have been discussed and pointed out above, we do not find that the Appellants have been able to make out any case warranting interference with the ultimate directions issued by the impugned judgment and order. This appeal, therefore, fails and the same shall accordingly stand dismissed.

49. No order as to costs.