

(2018) 03 CAL CK 0016
In the Calcutta High Court
Case No : FMA 768, 881 of 2010

SMT. JABA MUKHERJEE (GHOSH)

APPELLANT

Vs

STATE OF WEST BENGAL & ORS.

RESPONDENT

Date of Decision : 20-03-2018

Acts Referred:

Constitution of India, 1950 — Article 14, 16, 162, 309
West Bengal Services (Determination of Seniority) Rules, 1981 — Rule 4, 16
Delhi Administration Seniority Rules 1965 — Rule 6

Citation : (2018) 03 CAL CK 0016

Hon'ble Judges : NADIRA PATHERYA, J; SUBRATA TALUKDAR, J

Bench : Division Bench

Advocate : Partha Sarathi Bhattacharyya, Arunava Maiti, Raju Bhattacharyya, Tapan Kumar Mukherjee

Final Decision : Allowed

Judgement

Subrata Talukdar, J

Under challenge in these appeals is the judgment and order dated 11th of July, 2008 passed by an Honâ??ble Single Bench in writ petition being WP

10657(W) of 2007, refusing the relief of computation of the seniority of the petitioners w.e.f. the date of their substantive appointments in service, i.e.

5th October, 1996 and instead, accepting their seniority w.e.f. 21st December, 2006, being their date of regularisation in the cadre of Bengali

Stenographers (for short BS).

The Honâ??ble Single Bench further held that although the seniority of the petitioners be prospectively computed from 21st December, 2006, they

shall not face any deductions on account of grant of increments/enhancement of salaries as received by them under the Career Advancement Scheme

(for short CAS).Â The issue before the Honâ??ble Division Bench therefore now stands on the sole footing as to whether the petitioners are

entitled to claim seniority from the date of their substantive appointments in service or, the action of the State-respondents in regularising the

petitioners in the common gradation list from a prospective date is legally permissible.

Presenting the short facts of this case, Mr. Parathi Sarathi Bhattacharyya, Ld. Senior Counsel for the appellants submits, that by way of a regular

appointment notice dated 6th/7th September, 1989 issued by the Deputy Secretary, Judicial Department, Government of West Bengal connected to the

District Judgeship of Birbhum, the Government decided to introduce transcription of the depositions taken in Court proceedings in the Bengali language

for both District Civil and Criminal Courts w.e.f. 18th September, 1989. Therefore, the Governor was pleased to sanction the creation of 7 posts of BS

in the Judgeship of Birbhum, i.e. 3 Bengali Translators and 4 Bengali Typists-Copyists.

The above noted communication dated 6th/7th September, 1989 was issued with the concurrence of the Finance Department, Government of West

Bengal and, with notice to the Accountant General (AG), West Bengal and the Treasury Officer, Birbhum. Pursuant to the above noted

communication dated 6th/7th September, 1989, a selection process was conducted by the DJ, Birbhum and, by the order dated 25th August, 1990 the 7

writ petitioners were appointed as BSs on temporary basis on the applicable scales of pay and allowances.Â It is pointed out by Mr. Bhattacharyya

that the petitioners were thereafter confirmed as permanent BSs in terms of GO No. 6060/F dated 15th June, 1979 w.e.f. the 5th of October, 1996.

However, since the petitioners were refused their due seniority in the gradation list inspite of several representations, by the impugned Memorandum

dated 10th January, 2007, the petitioners were both regularised and placed in the gradation list w.e.f. 21st December, 2006.

The impugned Memorandum dated 10th of January, 2007, inter alia, states that the matter of regularisation of BS was under active consideration and,

the State Cabinet at its meeting held on 21st December, 2006 had observed that the regularisation claimed by the petitioners will be from a prospective

date with reference to the regular recruitment rules as applicable to BS and framed in 1994.Â The regular benefits, including promotions, of the writ

petitioners shall be therefore calculated w.e.f. the date of their regularisation, i.e. 21st December, 2006.

Mr. Bhattacharyya questions the above noted decision of the Cabinet on the ground that the petitioners deserved to be treated as regular employees

from the date of their substantive appointments, i.e. 5th October, 1996 and, not from a future date, i.e. 21st December, 2006.Â Mr. Bhattacharyya

argues that the regular recruitment procedure was followed by the Judgeship of Birbhum in consultation with the State Judicial and Finance

Departments while appointing the writ petitioners to their posts of BS.Â Such regular recruitment procedure was followed by their substantive

appointment or, confirmation in their posts w.e.f. 5th October, 1996.Â Therefore, the appellants/writ petitioners are entitled to reckon their inter se

seniority from the dates of their continuous officiation against the posts held by them at the time of confirmation or, at the very least, from the dates of

their substantive appointments, viz. 5th October, 1996.

It is further argued that the 1994 Recruitment Rules (RR) can only be prospectively applied.Â Therefore, the recruitment of the petitioners having

taken place in 1990, the 1994 RR cannot be retrospectively applied to bring within its purview the 1990 recruitment attached with regular service

status and benefits.

Mr. Bhattacharyya submits that the 1950 RR read with the 1953 Notification, relied upon by Ld. State Counsel, carries no manner of application to

recruitments in the Subordinate Courts since, both the 1950 RR and 1953 Notification are limited in their application to only the Secretariat Staff of the

State Government.Â Subsequently, the 1994 RR was introduced to envelop within the fold of the Secretariat Staff, only the officers in a direct

master-servant relationship with the State.Â In the event, therefore, the appellants/petitioners are placed in the cadre of such Secretariat Staff by

treating at par the substantive posts held by them, the Honâ??ble Single Bench erred in not appreciating their claim to seniority from the date of their

substantive appointments, viz. 5th October, 1996.

Arguing on behalf of the State-respondents, Mr. Tapan Kumar Mukherjee, Ld. Additional Government Pleader (AGP), draws the attention of this

Court to the fact that the petitioners were originally recruited on an ad hoc basis to fulfil the contingency of several vacancies having arisen within the

District Judgeship of Birbhum in the posts of BS.Â Therefore, Mr. Mukherjee points out that the common letters of appointment issued in favour of

the petitioners dated the 25th of August, 1990 clarified that the appointments were made on temporary basis.

Reliance is next placed on the point of the recruitment of the petitioners being not in consonance with the 1950 RR read with the 1953 Notification

which, therefore, disentitles the petitioners/appellants from claiming any seniority by virtue of the disability imposed by the West Bengal Services

(Determination of Seniority) Rules, 1981 (for short the 1981 Rules).

Specifically relying on Rule 4 of the 1981 Rules, Mr. Mukherjee argues that the proviso to Rule 4 makes it patently clear that the appointment of

persons made otherwise than in accordance with the relevant RR and, subsequently regularised in consultation with the State Public Service

Commission (for short PSC), the seniority of such persons shall be determined from the date of such regularisation and, not from the date of their

appointments.

Next, relying on the 1979 Rules which were pressed into service by the DJ, Birbhum for confirming the petitioners, Ld. AGP points out that such rules

shall only apply for the entry into service through the regular mode of recruitment, i.e. by following the RR and, shall not be applicable to appointees,

such as the appellants/petitioners otherwise appointed..

In support of his arguments Mr. Mukherjee relies upon the authority of In Re: Hindustan Aeronautics Ltd. vs. Dan Bahadur Singh & Ors. Reported in

2007 (6) SCC 207 at Paragraph 17 thereof.Â Paragraph 17 reads as follows:-

â??17. In B.N. Nagarajan & Ors. v. State of Karnataka & Ors. (1979) 4 SCC 507, it was held that the words ""regular"" or ""regularization"" do not

connote permanence and cannot be construed so as to convey an idea of the nature of tenure of appointments. They are terms calculated to condone

any procedural irregularities and are meant to cure only such defects as are attributable to methodology followed in making the appointments. Further,

when rules framed under Article 309 of the Constitution of India are in force, no regularization is permissible in exercise of the executive powers of

the Government under Article 162 thereof in contravention of the rules. This view has been approved by a Constitution Bench in Secretary, State of

Karnataka v. Uma Devi (2006) 4 SCC 1 (para 16). It was emphasized here that

only something that is irregular for want of compliance with one of the elements in the process of selection which does not go to the root of the process, can be regularized and that it alone can be regularized and granting permanence of employment is a totally different concept and cannot be equated with regularization.â??

It is accordingly asserted that the petitioners were correctly granted seniority in the gradation list w.e.f. the date of their regularisation as fixed by the Cabinet on the 21st of December, 2006.

Having heard the parties and considering the materials placed, this Court must first notice the law on the point as discussed above and, thereafter apply the law to the facts under consideration.Â The above observed endeavour of this Court may be elucidated by way of the below noted sequence:-

A) The law connected to inter se seniority was noticed by a Constitution Bench of the Honâ??ble Supreme Court In Re: Direct Recruit Class II

Engineering Officersâ?? Association vs. State of Maharashtra & Ors. reported in 1990 (2) SCC 715.Â Laying down the principles necessary to

decide the inter se seniority among similarly placed class of appointees, it was, inter alia, held that such principles must not be in violation of Articles 14

and 16 of the Constitution of India.Â Paragraphs 13 and 47 of the judgment require to be set out in extenso:-

â??13. When the cases were taken up for hearing before us, it was faintly suggested that the principle laid down in Patwardhan's case was unsound

and fit to be over-ruled, but no attempt was made to substantiate the plea. We were taken through the judgment by the learned counsel for the parties

more than once and we are in complete agreement with the ratio decidendi, that the period of continuous officiation by a government servant, after his

appointment by following the rules applicable for substantive appointments, has to be taken into account for determining his seniority; and seniority

cannot be determined on the sole test of confirmation, for, as was pointed out, confirmation is one of the inglorious uncertainties of government service

depending neither on efficiency of the incumbent nor on the availability of substantive vacancies. The principle for deciding inter se seniority has to

conform to the principles of equality spelt out by articles 14 and 16. If an appointment is made by way of stop-gap arrangement, without considering

the claims of all the eligible available persons and without following the rules of appointment, the experience on such appointment cannot be equated

with the experience of a regular appointee, because of the qualitative difference in the appointment. To equate the two would be to treat two unequals

as equal which would violate the equality clause. But if the appointment is made after considering the claims of all eligible candidates and the

appointee continues in the post uninterruptedly till the regularisation of his service in accordance with the rules made for regular substantive

appointments, there is no reason to exclude the officiating service for purpose of seniority. Same will be the position if the initial appointment itself is

made in accordance with the rules applicable to substantive appointments as in the present case. To hold otherwise will be discriminatory and

arbitrary. This principle has been followed in innumerable cases and has been further elaborated by this Court in several judgments including those in

Baleshwar Dass v. State of U.P. and others, [1981] 1 SCR 449, and Delhi Water Supply and Sewage Disposal Committee and others v. R.K.

Kashyap and others, [1989] Supp. 1 SCC 194, with which we are in agreement. In Narender Chadha and others v. Union of India and others, [

1986] 1 SCR 211, the officers were promoted although without following the procedure prescribed under the rules, but they continuously worked for

long periods of nearly 15-20 years on the posts without being reverted. The period of their continuous officiation was directed to be counted for

seniority as it was held that any other view would be arbitrary and violative of Articles 14 and 16. There is considerable force in this view also. We,

therefore, confirm the principle of counting towards seniority the period of continuous officiation following an appointment made in accordance with

the rules prescribed for regular substantive appointments in the service.

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.

(C) When appointments are made from more than one source, it is permissible to fix the ratio for recruitment from the different sources, and if rules

are framed in this regard they must ordinarily be followed strictly. (D) If it becomes impossible to adhere to the existing quota rule, it should be

substituted by an appropriate rule to meet the needs of the situation. In case, however, the quota rule is not followed continuously for a number of

years because it was impossible to do so the inference is irresistible that the quota rule had broken down.

(E) Where the quota rule has broken down and the appointments are made from one source in excess of the quota, but are made after following the

procedure prescribed by the rules for the appointment, the appointees should not be pushed down below the appointees from the other source inducted

in the service at a later date.

(F) Where the rules permit the authorities to relax the provisions relating to the quota, ordinarily a presumption should be raised that there was such

relaxation when there is a deviation from the quota rule.

(G) The quota for recruitment from the different sources may be prescribed by executive instructions, if the rules are silent on the subject.

(H) If the quota rule is prescribed by an executive instruction, and is not followed continuously for a number of years, the inference is that the

executive instruction has ceased to remain operative.

(I) The posts held by the permanent Deputy Engineers as well as the officiating Deputy Engineers under the State of Maharashtra belonged to the

single cadre of Deputy Engineers.

(J) The decision dealing with important questions concerning a particular service given after careful consideration should be respected rather than

scrutinised for finding out any possible error. It is not in the interest of Service to unsettle a settled position.

With respect to Writ Petition No. 1327 of 1982, we further hold:

(K) That a dispute raised by an application under article 32 of the Constitution must be held to be barred by principles of res judicata including the rule

of constructive res judicata if the same has been earlier decided by a competent court by a judgment which became final.

In view of the above and the other findings recorded earlier, we do not find any merit in any of the civil appeals, writ petitions and special leave

petitions which are accordingly dismissed. There will be, however, no order as to costs.â??

B) Next, In Re: Amarendra Kumar Mohapatra & Ors. vs. State of Orissa & Ors. reported in 2014 (4) SCC 583, the Honâ??ble Apex Court was

pleased to consider among other issues, the following issue:-

â??(i)

(ii)

(iii) Does Section 3(2) of the 2002 Act suffer from any unconstitutionality, insofar as the same purports to grant Stipendiary Assistant Engineers

seniority with effect from the date they were appointed on ad hoc basis?â??

While dealing with Issue (iii) as above the Court at Paragraphs 46, 47, 70, 71, 72, 73, 75, 76, 77, 78 and 79 held as follows:-

â??46. We need to advert to one other aspect which bears relevance to the issue whether regularisation under the impugned Enactment is legally

valid. The appointment process of unemployed degree holders, as noticed earlier, started with the resolution passed by the State Government which

envisaged appointments of such unemployed Graduate Engineers as Stipendiaries on a consolidated stipend of Rs.2,000/- p.m. The resolution further

envisaged their absorption in service after a period of two years. Not only that, appointments as Stipendiary Engineers were made on the basis of a

selection process and on the basis of merit no matter determined de hors the relevant rules which provided for appointments to the cadre to be made

only through the Public Service Commission.

47. A reference to the Public Service Commission was no doubt considered unnecessary but the fact remains that appointment of unemployed degree

holders as Stipendiary Engineers were made pursuant to a notification by which everyone who was unemployed and held an Engineering degree in

any discipline was free to make an application. A large number of unemployed engineers responded to the notification inviting applications out of

whom nearly 932 were selected by a Selection Committee constituted for the purpose. What is significant is that the empanelment of the unemployed

degree holders for appointment as Stipendiaries did not invite any criticism from any quarter either as to the method of appointment or the fairness of the selection process. The process of appointment was at no stage questioned before the Court, a feature which is notable keeping in view the number of people appointed/empanelled and a larger number who were left out and who could have possibly made a grievance if there was any. It is not, therefore, wholly correct to suggest that the entry of the degree holder Junior Engineers as Stipendiary Engineers and later as Assistant Engineers was through "the backdoor", an expression very often used in service matters where appointments are made de hors the rules. The process of selection and appointments may not have been as per the relevant rules as the same ought to have been, but it is far from saying that there was complete arbitrariness in the manner of such appointments so as to violate Articles 14 and 16 of the Constitution of India.

70. In *Direct Recruitment's* case (supra) this Court reviewed and summed up the law on the subject by formulating as many as 11 propositions out of which propositions A and B stated in Para 47 of the decision in the following words are relevant for our purposes:

"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."

71. There was some debate at the bar whether the case at hand is covered by corollary to proposition A or by proposition B (supra). But having given

our consideration to the submissions at the Bar we are inclined to agree with Mr. Rao's submission that the case at hand is more appropriately

covered by proposition B extracted above. We say so because the initial appointment of ad hoc Assistant Engineers in the instant case was not made

by following the procedure laid down by the Rules. Even so, the appointees had continued in the posts uninterruptedly till the Validation Act

regularised their service. There is, in the light of those two significant aspects, no room for holding that grant of seniority and other benefits referred to

in Section 3(3) of the impugned Act were legally impermissible or violated any vested right of the in service Assistant Engineers appointed from any other source.

72. Proposition A, in our opinion, deals with a situation where an incumbent is appointed to a post according to the rules but the question that arises for

determination is whether his seniority should be counted from the date of his appointment or from the date of his confirmation in the said service. The

corollary under proposition A, in our opinion, deals with an entirely different situation, namely, where the appointment is ad hoc and made as a stop-

gap-arrangement in which case officiation in such post cannot be taken into consideration for seniority. Be that as it may, as between proposition A

and B the case at hand falls more accurately under proposition B which permits grant of seniority w.e.f. the date the appointees first started officiating

followed by the regularisation of their service as in the case at hand.

73. We may also refer to a three-Judge Bench of this Court in *Union of India and Anr. etc. etc. v. Lalita S. Rao and Ors. etc. etc.* (2001) 5 SCC 384

where doctors appointed by Railway Administration on ad hoc basis had been upon regularisation granted seniority from the date of their ad hoc

appointment. This Court held that proposition B stated in *Direct Recruits case* (supra) permitted such seniority being granted. This Court observed:

“Obviously the Court had in mind the principle B evolved by the Constitution Bench in the *Direct Recruit Engineering Officers Association case*

(supra). If the initial appointment had not been made in accordance with the prescribed procedure laid down by the Recruitment Rules, and yet the

appointees Medical Officers were allowed to continue in the post uninterruptedly and then they appeared at the selection test conducted by the Union

Public Service Commission, and on being selected their services stood regularised then there would be no justification in not applying the principle 'B'

of the *Direct Recruit Class II Engineering Officers Association case* (supra) and denying the period of officiating services for being counted for the

purpose of seniority.”

75. In *Narender Chadha & Ors. v. Union of India & Ors.* (1986) 2 SCC 157, this Court was dealing with a somewhat similar fact situation. The

petitioners in that case were not promoted by following the actual procedure prescribed by the relevant Service Rules even though the appointments

were made in the name of the President by the competent authority. They had based on such appointments, continuously held the post to which they

were appointed and received salary and allowances payable to incumbent of such post. The incumbents were entered in the direct line of their

promotion. The question, however, was whether it would be just and proper to hold that such promotees had no right to the post held by them for 15-

20 years and could be reverted unceremoniously or treated as persons not belonging to the service at all. Repelling the argument that such service

would not count for the purposes of seniority, this Court observed:

“It would be unjust to hold at this distance of time that on the facts and in the circumstances of this case the petitioners are not holding the posts in

Grade IV. The above contention is therefore without substance. But we, however, make it clear that it is not our view that whenever a person is

appointed in a post without following the Rules prescribed for appointment to that post, he should be treated as a person regularly appointed to that

post. Such a person may be reversed from that post. But in a case of the kind before us where persons have been allowed to function in higher posts

for 15 to 20 years with due deliberation it would be certainly unjust to hold that they have no sort of claim to such posts and could be reverted

unceremoniously or treated as persons not belonging to the Service at all, particularly where the Government is endowed with the power to relax the

Rules to avoid unjust results. In the instant case the Government has also not expressed its unwillingness to continue them in the said posts. The other

contesting respondents have also not urged that the petitioners should be sent out of the said posts. The only question agitated before us relates to the

seniority as between the petitioners and the direct recruits and such a question can arise only where there is no dispute regarding the entry of the

officers concerned into the same Grade. In the instant case there is no impediment even under the Rules to treat these petitioners and others who are

similarly situated as persons duly appointed to the posts in Grade IV because of the enabling provision contained in the Rule 16 thereof. Rule 16 as it

stood at the relevant time read as follows :

16. The Government may relax the provisions of these rules to such extent as may be necessary to ensure satisfactory working or remove inequitable results.â?? (emphasis supplied)

76. The ratio of the decision in the above case was not faulted by the Constitution Bench of this Court in *Direct Recruitment*'s case (supra). As a matter of fact the Court approved the said decision holding that there was force in the view taken by this Court in that case. This Court observed:

â??In *Narender Chadha v. Union of India* the officers were promoted although without following the procedure prescribed under the rules, but they continuously worked for long periods of nearly 15-20 years on the posts without being reverted. The period of their continuous officiation was directed to be counted for seniority as it was held that any other view would be arbitrary and violative of Articles 14 and 16. There is considerable force in this view also. We, therefore, confirm the principle of counting towards seniority the period of continuous officiation following an appointment made in accordance with the rules prescribed for regular substantive appointments in the service.â??

77. In the light of what we have said above, we do not see any illegality or constitutional infirmity in the provisions of Section 3(2) or 3(3) of the impugned legislation.

78. Having said so, there is no reason why a similar direction regarding the writ-petitioners degree holder Junior Engineers who have been held by us to be entitled to regularisation on account of their length of service should also not be given a similar benefit. We must mention to the credit of Dr.

Dhawan, appearing for the Stipendiary Engineers who have been regularised under the provisions of the Legislation that such Stipendiary ad hoc

Assistant Engineers cannot, according to the learned counsel, have any objection to the degree holder Junior Engineers currently working as Assistant

Engineers on ad hoc basis being regularised in service or being given seniority from the date they were first appointed. It was also conceded that

Stipendiary Engineers all of whom were appointed after the appointment of the Junior Engineers would en bloc rank junior to such ad hoc Assistant

Engineers from out of degree holder Junior Engineers. But all such regularised Assistant Engineers from Stipendiary Stream and from Junior

Engineers category would together rank below the promotee Assistant Engineers.

79. Question No.3 is answered accordingly.â??

C) The abovenoted provisions governing inter se seniority was also considered In Re: Delhi Water Supply and Sewage Disposal Committee & Ors.

vs. R. K. Kashyap & Ors. reported in 1989 Supp (1) SCC 194 at Paragraphs 8, 9, 26 and 28.Â The said Paragraphs read as follows:-

â??8. The aggrieved officials challenged the validity of that seniority list before the Delhi High Court in C.W. No. 1339 of 1973. The PG NO 638

learned single judge before whom the Writ Petition came for disposal dismissed the same. He held that Rule 6 of the Delhi Administration Seniority

Rules 1965 would govern the determination of seniority of the officers. He also held that that seniority should be in the order of regularisation and not

on the basis of original ad hoc appointments. But the Division Bench upon appeal took a different view. The learned judges held that the determination

of seniority of officers is not governed by any statutory rule and continuous officiation in the post should be the basis. To be more specific, the learned

judges observed:

The normal rule is that seniority is governed by the period of continuous officiating service in the absence of any other seniority rule. The period of

continuous officiating in the case of the present petitioners will, therefore, be the governing principle.

The reason we have found is that the delay in making recruitment rules and making regular appointment in accordance with the procedure envisages

by the Act really been the result of a conflict between the Corporation and the Union Public Service Commission. In the result, for years on, the

persons have continued on an ad hoc basis. This has happened even in cases where the appointment was not on ad hoc basis initially. In such cases,

the period of continuous ad hoc service cannot be treated as a stop gap arrangement. This is, infact a regular appointment, which is held in abeyance

because the recruitment rules were not settled and the procedure not finalised. These appointments have eventually been regularised after the

recruitment rules had been settled and the procedure laid down.

9. The correctness of the view taken by the High Court has been challenged in these appeals.â??

26. So much as regards to general principle governing seniority in service

jurisprudence. There is, however, one other important and fundamental principle which should not be forgotten in any case. The principle of counting service in favour one should not be violative of equality of opportunity enshrined in Article 14 and 16 of the Constitution. If ad hoc appointment or temporary appointment is made without considering the claims of seniors in the cadre, the service rendered in such appointment should not PG NO 646 be counted for seniority in the cadre. The length of service in ad hoc appointment or stop-gap arrangement made in the exigencies of service without considering the claims of all the eligible and suitable persons in the cadre ought not be reckoned for the purpose of determining the seniority in the promotional cadre. To give the benefit of such service to a favoured few would be contrary to the equality of opportunity enshrined in Article 14 and 16 of the Constitution. But if the claims of all eligible candidates were considered at the time of ad hoc appointments and such appointments continued uninterruptedly till the regularisation of services by the Departmental Promotion Committee or the Public Service Commission there is no reason to exclude such service for determining the seniority. Of course, if any statutory rule or executive order provides to the contrary, the rule or order will have supremacy. In the absence of any rule or order the length of service should be the basis to determine the seniority.

28. From the foregoing discussions and in the light of the decisions to which we have called attention, we have no hesitation in holding that the conclusion reached by learned judges of the Division Bench of the Delhi High Court is correct and does not call for any interference.â??

D) The inter se seniority of similarly situated employees came up for consideration In Re: Shitala Prasad Shukla vs. State of U.P. & Ors. reported in

AIR 1986 SC 1859 and, at Paragraph 9, it was held as follows:-

â??9. An employee must belong to the same stream before he can claim seniority vis-a-vis others. One who belongs to the stream of lawfully and regularly appointed employees does not have to contend with those who never belonged to that stream, they having been appointed in an irregular manner. Those who have been irregularly appointed belong to a different stream, and cannot claim seniority vis-a-vis those who have been regularly and properly appointed, till their appointments became regular or are regularized by the appointing authority as a result of which their stream joins the

regular stream. At that point of confluence with the regular stream, from the point of time they join the stream by virtue of the regularization, they can claim seniority vis-a-vis those who join the same stream later. The late comers to the regular stream cannot steal a march over the early arrivals in the regular queue. On principle the appellant cannot therefore succeed. What is more in matters of seniority the Court does not exercise jurisdiction akin to appellate jurisdiction against the determination by the competent authority, so long as the competent authority has acted bona fide and acted on principles of fairness and fair play. In a matter where there is no rule or regulation governing the situation or where there is one, but is not violated, the Court will not overturn the determination unless it would be unfair not to do so. In any view of the matter the appellant who did not even belong to the stream of regularly (he was allowed to teach only in an irregular and unauthorized manner) and lawfully appointed lecturers cannot claim seniority against any one already in the stream before he joined the stream himself. The view taken by the High Court is unexceptionable.â??

E) This Court must finally notice the reasons advanced by a Constitution Bench of the Honâ??ble Apex Court In Re: S. G. Jaisinghani vs. Union of India & Ors. reported in AIR 1967 SC 1427.Â The Honâ??ble Apex Court permitted the State to prepare the list of promotees and/or recast such list based on the fundamental proposition of conformity with Articles 14 and 16 of the Constitution of India.

F) Applying the law on inter se seniority, as discussed above, to the facts of the present case this Court admittedly finds that the appellants/petitioners were appointed, although on ad hoc basis but, following a regular selection procedure.Â It is also noticed that pursuant to such selection the appellants/writ petitioners stood substantively appointed on and from 5th of October, 1996.

G) The substantive appointments of the appellants/writ petitioners was not interfered with or challenged before any forum by the State-respondents. On the contrary the State-respondents permitted the appellants/writ petitioners to draw the scales of pay and other benefits as stood attached to such substantive appointments.

H) The law on inter se seniority enables, among other things, the appellants/writ petitioners to claim seniority in the common gradation list from the

dates of their continuous officiation against the posts held by them.Â In any event such enabling right can be always exercised from the date on

which the appellants/writ petitioners stood substantively appointed against their posts, thereby acquiring a status in the service.

Following the trite law laid down in AIR 1986 SC 1859 (supra), it does stand to reason that the appellants/writ petitioners must be permitted to avail of

their benefits in the common cadre from the date they were substantively born in the service.Â Conversely, it does not stand to reason, that the State-

respondents can permit latter entrants into the cadre of BS on the plea of framing the RR in 1994, thereby depriving them of their long substantive

service.Â In the event the appellants/writ petitioners are appointed below the appointees subsequently selected to the cadre, such action would be

violative of Articles 14 and 16 of the Constitution of India - a position which is legally unsustainable.

I) It is symptomatic of the knee-jerk reaction sometimes typical of State action that the Cabinet decided to regularise the services of the

appellants/writ petitioners w.e.f. 21st December, 2006, i.e. the day on which the Cabinet met.Â Therefore, such decision speaks volumes for the non-

exertion of the mind otherwise required to be applied on the issue. The argument is not wasted before this Court that at no point of time the selection

of the appellants/writ petitioners was ever questioned on the touchstone of the so-called 1950 RR, the 1953 Notification as well as the 1981 Seniority

Rules.

J) It is also perceptible to this Court that the sophistic arguments advanced in defence of State action rob the appellants/petitioners of the fundamental

guarantees extended to them, i.e. not to be unequally treated in employment.Â Besides, the placement of the appellants/writ petitioners into the

common cadre of BS, although w.e.f. 21st December, 2006, is an acknowledgement by the State of their shared class identity.Â Therefore, to argue

away a shared identity on the platform of non-compatibility of their service status arising out of the pre-1994 RRs, appears, to this Court, to be an

imploding contradiction.

K) At this stage this Court must usefully notice, even at the risk of repetition, the salutary principles connected to inter se seniority laid down In Re:

Pawan Pratap Singh & Anr. vs. Reevan Singh & Ors. reported in 2011 (3) SCC

267 at Paragraphs 44 and 45 which, read as follows:-

44. The Constitution Bench of this Court in *Direct Recruit Class II Engineering Officers' Association v. State of Maharashtra & Ors.*¹² stated the

legal position with regard to inter se seniority of direct recruits and promotees and while doing so, inter alia, it was stated that once an incumbent is

appointed to a post according to rules, his seniority has to be counted from the date of his appointment and not according to the date of his

confirmation.

45. From the above, the legal position with regard to determination of seniority in service can be summarized as follows :

(i) The effective date of selection has to be understood in the context of the service rules under which the appointment is made. It may mean the date

on which the process of selection starts with the 12 (1990) 2 SCC 715 issuance of advertisement or the factum of preparation of the select list, as the

case may be.

(ii) Inter se seniority in a particular service has to be determined as per the service rules. The date of entry in a particular service or the date of

substantive appointment is the safest criterion for fixing seniority inter se between one officer or the other or between one group of officers and the

other recruited from the different sources. Any departure therefrom in the statutory rules, executive instructions or otherwise must be consistent with

the requirements of Articles 14 and 16 of the Constitution.

(iii) Ordinarily, notional seniority may not be granted from the back date and if it is done, it must be based on objective considerations and on a valid

classification and must be traceable to the statutory rules.

(iv) The seniority cannot be reckoned from the date of occurrence of the vacancy and cannot be given retrospectively unless it is so expressly provided

by the relevant service rules. It is so because seniority cannot be given on retrospective basis when an employee has not even been born in the cadre and

by doing so it may adversely affect the employees who have been appointed validly in the mean time.

L) It must also be noticed, again at the risk of prolixity, that the tests laid down in *Re: Uma Devi vs. State of Karnataka* reported in 2006 (4) SCC 1 at

Paragraph 53 stand answered in favour of the appellants/writ petitioners since the selection of the appellants/writ petitioners cannot be described, to

the mind of this Court, as either irregular or, illegal.

M) The observations of the Honâ??ble Apex Court In Re: Roshan Lal Tandon vs. Union of Inda & Anr. reported in AIR 1967 SC 1889, at

Paragraph 6 deserve more than a passing mention at this leg of the present discussion:-

â??6. We pass on to consider the next contention of the petitioner that there-
was a contractual right as regards the condition of service applicable to

the petitioner at the time he entered Grade 'D' and the condition of service
could not be altered to his disadvantage afterwards by the notification

issued by the Railway Board. It was said that the order of the Railway Board
dated January 25, 1958, Annexure 'B', laid down that promotion to

Grade 'C' from Grade 'D' was to be based on seniority-cum-suitability and this
condition of service was contractual and could not be altered thereafter

to the prejudice of the petitioner. In our opinion, there,, is no warrant for this
argument. It is 'true that the origin of Government service is contractual.

There is an offer and acceptance in every case. But once appointed to his post or
office the Government servant acquires a status and his rights and

obligations are no longer determined by consent of both parties, but by statute
or statutory rules which may be framed and altered unilaterally by the

Government. In other words, the legal position of a Government servant is more
one of status than of contract. The hall-mark of status is the

attachment to a legal relationship of rights and duties imposed by the public 'law
and not by mere agreement of the parties. The emolument of the

Government servant and his terms of service are governed by statute or
statutory rules which may be unilaterally altered by the Government without

the consent of the employee. It is true that Art. 311 imposes constitutional
restrictions upon the power of removal granted to the President and the

Governor under Art. 310. But it is obvious that the relationship between the
Government and its servant is not like an ordinary contract of service

between a master and servant. The legal relationship is something entirely
different, something in the nature of status. It is much more than a purely

contractual relationship voluntarily entered into between the parties. The duties
of status are 'fixed by the law and in the enforcement of these duties

society has an interest. In the language of juris- prudence status is a condition of
membership of a group of which powers and duties are exclusively

determined by law and not by agreement between the parties concerned. The matter is clearly stated by Salmond and Williams on Contracts as

follows:

So we may find both contractual and status- obligations produced by the same transaction. The one transaction may result in the creation not only of

obligations defined by the parties and so pertaining to the sphere of contract but also and concurrently of obligations defined by the law, itself, and so

pertaining to the sphere of status. A contract of service between employer and employee, while for the most part pertaining exclusively to the sphere

of contract, pertains also to that of status so far as the law itself has seen fit to attach to this relation compulsory incidents, such as liability to pay

compensation for accidents. The extent to which the law is content to leave matters within the domain of contract to be determined by the exercise of

the autonomous authority of the parties themselves, or thinks fit to bring the matter within the sphere of status by mining for itself the contents of the

relationship, is a matter depending on considerations of public policy. In such contracts as those of service the tendency in modern times is to withdraw

the matter more and more from the domain of contract into that of status." (Salmond and Williams on Contracts, 2nd edition p. 12).

For the foregoing reasons the judgment and order under appeal dated 11th July, 2008 cannot be sustained and, stands accordingly set aside.

The State respondents are directed to take steps to settle the seniority of the appellants/writ petitioners from the dates of their substantive appointments.

FMA 768 of 2010 and FMA 881 of 2010 stand accordingly allowed.

There will be, however, no order as to costs.

Urgent Xerox certified photocopies of this judgment, if applied for, be given to the parties upon compliance of all requisite formalities.

I agree.