
(2011) 05 AHC CK 0428

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 74895 of 2010

Vidya Kant Tiwari

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 23-05-2011

Acts Referred:

Constitution of India, 1950 — Article 226
Uttar Pradesh Secondary Education Services Commission and Selection Boards Act,
1982 — Section 16E(10), 18, 33C

Citation : (2011) 6 ADJ 97

Hon'ble Judges : Sudhir Agarwal, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Sudhir Agarwal, J.—Writ petition is directed against the order dated 7.12.2010 (Annexure 8 to writ petition) passed by Joint Director of Education, Allahabad Region, Allahabad (Respondent No. 2) holding Respondent 5, Balram Mishra, senior to Petitioner on the ground that for Respondent No. 5 date of appointment reckon for seniority would be 20.4.1998 while for Petitioner it would be 17.2.2004. Petitioner has also challenged order dated 9.10.2006 passed by Respondent No. 2 whereby it has regularized Respondent No. 5 on the post of Lecturer.

2. Facts giving rise to the present dispute, as borne out from record, are as under.

3. Moti Lal Nehru Inter College, Kaundhiyara, District Allahabad is a recognised institution imparting education upto intermediate classes and is governed by provisions of U.P. Intermediate Education Act, 1921 (hereinafter referred to as "1921 Act"), U.P. Secondary Education Service Selection Board Act, 1982 (hereinafter referred to as "1982 Act") and U.P. High Schools and Intermediate Colleges (Payment of Salaries of Teachers and other Employees) Act, 1971 (hereinafter referred to as "1971 Act"). Petitioner Vidya Kant Tiwari was appointed as Assistant Teacher (L.T. Grade) on 1.8.1994 and was promoted as

Lecturer (Hindi) on 16.2.2004. The date of appointment of Petitioner is not disputed by anyone. The real issue revolves around the date of appointment of Respondent No. 5. He was appointed on ad hoc basis on 1.7.1991. His salary was not paid. He filed Writ Petition No. 14363 of 1992 wherein an interim order was passed directing payment of salary pursuant where to it was paid. Writ Petition was disposed vide judgment dated 4.3.2005 whereby this Court directed authorities concerned to consider his case for regularization u/s 33-C of 1982 Act in accordance with law pursuant where to Respondent No. 2 passed order on 9.10.2006 regularizing Respondent No. 5 on the post of Lecturer with effect from 20.4.1998. It is on the basis thereof, Respondent No. 5 has been held senior to Petitioner.

4. The question is "whether this decision of Respondent No. 2 is correct and in accordance with law."

5. Sri M.D. Singh Shekhar, Senior Advocate, has raised a preliminary objection regarding maintainability of writ petition insofar as it challenges the very order of regularization of Respondent No. 5 on the ground that in the garb of challenging seniority, Petitioner cannot raise an issue with regard to validity of appointment of Respondent No. 5. The challenge made to regularization order dated 9.10.2006 is not maintainable. He further submitted that since the date of his appointment (i.e. 1991), in the attendance register and elsewhere name of Respondent No. 5 has always been shown senior and above Petitioner, therefore, after more than a decade and half Petitioner cannot be allowed to assail this well established and settled inter se relationship of Petitioner and Respondent No. 5 regarding seniority. In this respect he relied on certain authorities which I shall discuss at appropriate stage.

6. Sri R.K. Ojha, learned Counsel for Petitioner, on the contrary stated that appointment being void ab initio, it would confer no right upon Respondent No. 5 either to hold the post or to claim salary. Anything done by the authorities so as to put on a cloak of legality upon such Act is wholly non est and illegal. It would not validate an Act which is ex facie void, has no consequence in law. Such an order can always be challenged at any point of time. He further submitted that Petitioner's seniority was never determined vis-a-vis Respondent No. 5. Earlier, he had, therefore, no cause of action or reason to challenge either appointment of Respondent No. 5 or consequential seniority. He has come to this Court only when Respondents attempted to make Respondent No. 5 senior to him.

7. In my view, following issues generate for adjudication of dispute in the present case:

(i) Whether the alleged ad hoc appointment of Respondent No. 5 on 1.7.1991 would confer any right upon him to hold the post or to claim continuity?

(ii) Whether any vacancy on the post of Lecturer (Education) was available in 1991 against which Respondent No. 5 could have been appointed?

(iii) Whether Petitioner is debarred from challenging validity of appointment and regularization of Respondent No. 5 simultaneously while disputing seniority qua him?

(iv) Whether Respondent No. 5 has rightly been regularized by Respondent No. 2 vide order dated 9.10.2006 and that too with retrospective effect, i.e. from 20.4.1998?

(v) Whether the dispute of seniority suffers the vice of extraordinary delay and laches.

Delay and laches:

8. I propose to deal with the last question first. It is no doubt true if seniority of two or more individuals has been determined long back and a person placed lower in seniority did not feel aggrieved to challenge the same within a reasonable time, he shall be non suited to do so after a long time since it may result in unsettling so many settled things. It is said that scrambled eggs cannot be unscrambled after process is completed. Challenge must come within a reasonable time. There is a long chain of decisions on this aspect but I propose to refer a few.

9. Respondent No. 5 has relied on a Full Bench decision in Smt. S.K. Chaudhari v. Manager, Committee of Management, Vidyawati Darbari Girls Inter College, Lookerganj, Allahabad and Ors., (1991) 1 UPLBEC 250 wherein this Court said that seniority list existing for the last 15 years would not be quashed after such a long time. It observed, "The law is well settled that the Court will not interfere with a seniority list which had remained in existence for a long time and which had become final."

(emphasis added)

10. In Rabindranath Bose and Others Vs. The Union of India (UOI) and Others, the Court held, "It would be unjust to deprive the Respondents of the rights which have accrued to them. Each person ought to be entitled to sit back and consider that his appointment and promotion effected a long time ago would not be set aside after the lapse of a number of years."

(emphasis added)

11. In Tilokchand and Motichand and Others Vs. H.B. Munshi and Another, the Court held that the rights which have accrued to others by reason of delay in filing the petition should not be allowed to be disturbed unless there is reasonable explanation for delay. It further says, "The party claiming Fundamental Rights must move the Court before other rights come into existence. The action of Courts cannot harm innocent parties if their rights emerge by reason of delay on the part of the person moving the Court."

(emphasis added)

12. In *Ramchandra Shankar Deodhar and Others Vs. The State of Maharashtra and Others*, the Court said that any claim of seniority at belated stage should be rejected inasmuch it disturbs rights of other persons regarding seniority, rank and promotion which have accrued to them during intervening period.

13. In *P.S. Sadasivaswamy Vs. State of Tamil Nadu*, the Court declined to interfere with an order of promotion made 14 years back. It said, "A person aggrieved by an order of promoting a junior over his head should approach the Court at least within six months or at the most a year of such promotion." The Court also said that it is not a case of lack of power of Court, but it is consistent with sound policy of public interest that a person who has not been vigilant for protection of his rights should not be allowed to agitate his rights as and when he finds it convenient irrespective of length of time. Such a litigant should not be helped by Court by invoking its jurisdiction under Article 226 of the Constitution which is equitable and discretionary both. To the same effect are the observations made in *State of U.P. and Others Vs. Raj Bahadur Singh and Another*, *Northern Indian Glass Industries Vs. Jaswant Singh and Others*,

14. In *R.S. Makashi and Others Vs. I.M. Menon and Others*, the Court held that a dispute regarding seniority can be denied to be agitated on account of delay and laches unless a plausible and adequate explanation is furnished. The Court relied on its earlier decision in *State of Madhya Pradesh Vs. Bhailal Bhai and Others*,

15. In *Dayaram Asanand Gursahani Vs. State of Maharashtra and Others*, the Court said that in absence of satisfactory explanation of inordinate delay of nearly nine years on the part of Appellant in questioning the seniority list, writ petition under Article 226 of the Constitution challenging validity of seniority and promotion assigned to other employees cannot be entertained.

16. In *K.R. Mudgal and Others Vs. R.P. Singh and Others*, it was observed:

A Government servant who is appointed to any post ordinarily should at least after a period of 3 or 4 years of his appointment be allowed to attend to the duties attached to his post peacefully and without any sense of insecurity. ... Satisfactory service conditions postulate that there should be no sense of uncertainty amongst the Government servants created by the writ petitions filed after several years as in this case. It is essential that any one who feels aggrieved by the seniority assigned to him should approach the Court as early as possible as otherwise in addition to the creation of a sense of insecurity in the minds of the Government servants there would also be administrative complications and difficulties. Unfortunately in this case even after nearly 32 years the dispute regarding the appointment of some of the Respondents to the writ petition is still lingering in this Court. In these circumstances we consider that the High Court was wrong in rejecting the preliminary objection raised on behalf of the Respondents to the writ petition on the ground of laches.

(emphasis added)

17. In *G.C. Gupta and Others Vs. N.K. Pandey and Others*, , the Court observed:

It has been observed that the attack to the seniority list prepared on the basis of 1952 Rules 15 years after the Rules were promulgated and effect given to the seniority list prepared on Aug. 1, 1953 should not be allowed because of the inordinate delay and laches in challenging the said rule.

30. Similar observations have been made by this Court in the case of *State of Orissa Vs. Pyarimohan Samantaray and Others*, *State of M.P. and Others Vs. Nandlal Jaiswal and Others*, *Ramana Dayaram Shetty Vs. International Airport Authority of India and Others*, *Ashok Kumar Mishra and Others Vs. Collector, Raipur and Others*, *K.R. Mudgal and Others Vs. R.P. Singh and Others*, and *R.S. Makashi and Others Vs. I.M. Menon and Others*, , where relief was refused on the ground of laches in moving the Court for redress of the grievances after lapse of a period of years after the cause of action arose. It has been observed in *State of M.P. and Others Vs. Nandlal Jaiswal and Others*,

"Now, it is well settled that the power of the High Court to issue an appropriate writ under Article 226 of the Constitution" is discretionary and the High Court in the exercise of its discretion does not ordinarily assist the tardy and the indolent or the acquiescent and the lethargic. If there is inordinate delay on the part of the Petitioner in filing a writ petition and such delay is not satisfactorily explained, the High Court may decline to intervene and grant relief in the exercise of its writ jurisdiction. The evolution of this Rule of laches or delay is premised upon a number of factors. The High Court does not ordinarily permit a belated resort to the extraordinary remedy under the writ jurisdiction because it is likely to cause confusion and public inconvenience and bring in its train new injustices. The rights of third parties may intervene and if the writ jurisdiction is exercised on a writ petition filed after unreasonable delay, it may have the effect of inflicting not only hardship and inconvenience but also injustice on third parties. When the writ jurisdiction of the High Court is invoked, unexplained delay coupled with the creation of third party rights in the meanwhile is an important factor which always weighs with the High Court in deciding whether or not to exercise such jurisdiction."

31. In this case the challenge to the seniority of the Appellants which was determined by order dated 20th July, 1956 was made in 197 i.e. after nearly 17 years and they have sought relief for re-determination of the seniority in accordance with the provisions of the aforesaid Service Rules. This cannot be permitted as it would amount to unjust deprivation of the rights of the Appellants which had accrued to them in the meantime. The observation that "Every person ought to be entitled to sit back and consider that his appointment and promotion effected a long time ago would not be set aside after the lapse of a number of years as made in the above case (*Rabindra Rabindranath Bose and Others Vs. The Union of India (UOI) and Others*), will be applicable to this case.

(emphasis added)

18. In B.S. Bajwa and Another Vs. State of Punjab and Others, the Court said, "It is well settled that in service matters the question of seniority should not be re-opened in such situations after the lapse of a reasonable period because that results in disturbing the settled position which is not justifiable. There was inordinate delay in the present case for making such a grievance. This alone was sufficient to decline interference under Article 226 and to reject the writ petition." (emphasis added)

19. K.A. Abdul Majeed Vs. The State of Kerala and Others, was another case where the Court declined to intervene in such a dispute raised after a long time.

20. In Shiba Shankar Mohapatra and Others Vs. State of Orissa and Others, the Apex Court held, "it is well settled, fence-sitters cannot be allowed to raise the dispute or challenge the validity of the order after its conclusion. No party can claim the relief as a matter of right as one of the grounds for refusing relief is that the person approaching the Court is guilty of delay and the laches. The Court exercising public law jurisdiction does not encourage agitation of stale claims where the right of third parties crystallises in the interregnum."

21. The Court in Shiba Shankar Mohapatra (supra) further held,"... the settled legal proposition that emerges is that once the seniority had been fixed and it remains in existence for a reasonable period, any challenge to the same should not be entertained." (emphasis added)

22. As a matter of proposition, I have no reason to take a different view. Rather the exposition of law with regard to self imposed restriction in a belated dispute is binding on this Court. However, the crux of the matter is, whether any such seniority list existed in our case which this Court may deny to unsettle after a long time. On making a direct query from Sri M.D. Singh Shekhar as to when seniority list determining seniority of Petitioner vis-a-vis Respondent No. 5 was prepared, he could not lay his hand to any such document. He only says that in various attendance registers etc. his name was mentioned above the Petitioner but simultaneously he could not dispute that the said documents are not seniority list contemplated under Chapter II Regulation 3 of the Regulations issued under 1921 Act (hereinafter referred to as "Regulations") which imposes an obligation upon the Committee of Management to cause a seniority list of Teachers in accordance with provisions contained therein and to revise it every year.

23. It appears that Respondent No. 4 did not prepare any seniority list. The Petitioner himself approached this Court in Writ Petition No. 10671 of 2010 seeking a mandamus commanding Committee of Management to prepare and finalize a seniority list as per provisions of 1921 Act. This Court disposed of writ petition vide judgment dated 25.2.2010 directing Committee of Management to look into

Petitioner's representation in this regard and take a final decision accordingly. It is pursuant to this direction, Committee of Management passed an order on

3.5.2010 declaring Respondent No. 5 senior to Petitioner where against Petitioner preferred an appeal dated 17.5.2010 which has been rejected by means of impugned order dated 7.12.2010 by Joint Director of Education.

24. Therefore, for the first time, as the record show, seniority of Petitioner qua Respondent No. 5 was determined by competent authority i.e. Committee of Management on 3.5.2010 and not earlier thereto. This is, in fact, also evident from pleadings.

25. Petitioner has specifically pleaded in para 12 of writ petition that under 1921 Act, seniority list shall be prepared and published by Committee of Management where against appeal is provided to Joint Director of Education but in the present case, no seniority list was ever prepared by Committee of Management. To be more precise, relevant averments made in para 12 reads as under:

here in this case the Committee of Management has never prepared or published any seniority list as per the provisions of the U.P. Intermediate Education Act, which is contrary to law.

26. Similarly, in para 13 of writ petition, it says:

Committee of Management has not published any seniority list as stated above..

27. Respondents 2 and 3 have replied paras 12 and 13 of writ petition in para 7 of counter-affidavit stating that the same need no comment. Respondent No. 4 i.e. Committee of Management of the College has replied the aforesaid averments in para 9 of the counter-affidavit as under:

That in reply to the averments made in paragraph number 10, 11, 12, 13 and 14 it is Most Respectfully submitted that the Petitioner is junior to the Respondent number 5 in as much as the Petitioner was promoted to the Lecturer's Grade on 16.2.2004 whereas the Respondent number 5 was appointed in the Lecturer's Grade on ad hoc basis on 1.7.1991 and his services were regularized with effect from 20.4.1998 as per the provisions of Section 33-C of the Uttar Pradesh Secondary Education Services Selection Board Act, 1982. Petitioner's name has thus been shown below the Respondent number 5 as he is junior to him. The applications dated 20.8.2009, 13.11.2009 and 21.12.2009 moved by the Petitioner are totally misconceived in as much as the Respondent number 5 is certainly senior to the Petitioner.

28. A perusal of the aforesaid averments show that even Respondent No. 4 has not been able to lay its hand to any published seniority list determining inter se seniority of Petitioner qua Respondent No. 5.

29. Respondent No. 5 in his counter-affidavit has replied paras 12 and 13 of writ petition in para 20 and 21 of the counter-affidavit where also he has not referred to any seniority list but has made other kind of averments.

30. It is thus evident that Respondents have not been able to show that in the past, at any point of time, before passing impugned order, seniority of Petitioner

qua Respondent No. 5 was ever determined by Respondent No. 4.

31. That being so, the question that seniority settled long back should not be allowed to be disturbed after long time does not arise in the factual background of the case in hand. The very basis of preliminary objection loses its ground inasmuch if the seniority itself was not determined, the question of its settling or unsettling does not arise. The submission on behalf of Respondent No. 5 is thoroughly misconceived and founded on surmises and imagination. It has to be answered against him. It cannot be said that Petitioner is guilty of challenging settled seniority of himself qua Respondent No. 5 after a long time.

32. Learned Counsel for Respondent No. 5 tried to extend this argument with respect to Petitioner's challenge to the order of regularization as also his initial appointment which I propose to deal when the question of validity of regularization order of Respondent No. 5 would be considered.

Vacancy-whether existed:

33. Now I come to second question about the existence of vacancy. It is not clear from record as to how and in what manner vacancy arose in 1991 where against Respondent No. 5 was appointed. Petitioner's claim is that there was no vacancy at all where against Respondent No. 5 could have been appointed. The entire exercise is wholly illegal and farce. It is blatantly contrary to law.

34. In para 22 (H) and (I) of the writ petition, it is pleaded that College was granted recognition upto Intermediate level by the Board of High School and Intermediate, U.P., Allahabad on 20.5.1969 (Annexure 9 to writ petition) in the following subjects:

(a) compulsory: Hindi, English and Mathematics

(b) optional: Economics, Geography, Civics, Arts, History and Sanskrit.

He has further said that no post of Lecturer (Education) was ever created till 1991 and, therefore, the appointment on the post Lecturer (Education) could not have been made of Respondent No. 5 in 1991. It was wholly illegal and void ab-initio.

35. The Respondents 2 and 3 in paras 13, to 18 of their counter-affidavit have said that by order dated 21.1.1970, the College was granted recognition in the optional subjects, Education, Sociology and Logic. It also says that one Virendra Pratap Singh was appointed on probation as Lecturer (Education) which was recognized by District Inspector of Schools, Allahabad (hereinafter referred to as "DIOS") vide letter dated 12.7.1971. Therefore, to suggest that there was no appointment of any Lecturer in the subject of Education is not correct. It further says that Sri Virendra Pratap Singh resigned from the aforesaid post on 10.8.1973 which was accepted by Committee of Management vide resolution dated 24.8.1973, hence, against this vacant post, Respondent No. 5 was appointed and has been validly appointed.

36. Respondent No. 4 has also given a similar reply in para 19 of the this counter-affidavit. The Respondent No. 5 has replied the same in paras 37 and 38.

37. However, Petitioner's further averment in para 22 (I) that a post even if created, remained unoccupied (vacant) for three months, it would stand lapsed and cannot be revived without the sanction of competent authority in view of Regulation 20 Chapter II, has not been specifically replied by any of the Respondents.

38. The question would be, whether any post sanctioned and vacant, was available in 1991 where against Respondent No. 5 could have been appointed. All the Respondents have stated that the post was created in 1970 when the power of such creation vested in Management. One Virendra Pratap Singh was appointed on that post whose appointment was recognised by DIOS. This post fell vacant in August 1973 due to resignation of Sri Virendra Pratap Singh which was accepted by Management on 24.8.1973. For the purpose of adjudication of this issue, I proceed presuming that the aforesaid averments of Respondents are correct, meaning whereby creation of post in 1970, appointment of a Lecturer (Education) thereon and its becoming vacant in August" 1973, are correct in absence of anything otherwise placed on record by the Petitioner, but then the question would be, what would be its consequences. It is evident from record that none was appointed on the said post after alleged resignation of Sri Virendra Pratap Singh which was accepted by Management on 23.8.1973 till the alleged appointment of Respondent No. 5 on 1.7.1991. No salary was paid during this period to anyone against this post. Therefore almost 18 years, the post remained vacant.

39. Regulation 20 Chapter II of Regulations says as under:

20. Where the Committee of Management has failed to advertise any sanctioned post which has fallen vacant in accordance with the Regulations contained in this Chapter within a period of three months from the date of occurrence of the vacancy, such post shall be deemed to have been surrendered and shall not be filled up unless its creation is sanctioned afresh by the Director.

40. It is nobody's case that any step was taken by official Respondents or the Management for revival. How and in what circumstances the Management decided to make appointment of Lecturer (Education) after 18 years and what was the justification for same, nothing has been said in any of the counter-affidavits. To my mind, Regulation 20 Chapter II of the Regulations came into effect in 1973 itself. The post lapsed long back. Hence unless it is revived by competent authority, it could not have been proceeded to make any appointment in 1991 treating an existing vacancy thereon. This is a serious flaw in the matter going to its root.

41. Sri M.D. Singh Shekhar, however, contended that Regulation 20 Chapter II will not apply in a case where the institution is governed by 1982 Act and placed reliance on a Division Bench decision of this Court in Mumtax Ahmad Vs. Deputy

Director of Education, Allahabad and others, In para 4 of the judgment therein, the Division Bench relying on an earlier Single Judge decision in *Yogendra Nath Singh v. District Inspector of Schools*, (1991) 1 UPLBEC 484 has observed:

It is not disputed that Regulation 20 is of no relevance in relation to the institution covered by the U. P. Secondary Education Service Selection Boards Act, 1982 and in *Yogendra Nath Singh v. District Inspector of Schools*, Jaunpur and Anr.; a learned single Judge has held so. We agree with the view taken in *Yogendra Nath Singh* (supra). The institution herein, however, does not come within the purview of the U. P. Secondary Education Service Selection Board Act, 1982 and therefore. Regulation 20 may be pressed into service provided it is otherwise applicable. Regulation 20 reads as under:

Where the Committee of Management has failed to advertise any sanctioned post which has fallen vacant in accordance with the regulations contained in this Chapter within a period of three months from the date of occurrence of the vacancy, such post shall be deemed to have been surrendered and shall not be filled up unless its creation is sanctioned afresh by the Director.

42. For the purpose of present case, I have no manner of doubt about correctness of the aforesaid proposition provided alleged vacancy on the post of Lecturer (Education) would have occurred on and after enforcement of 1982 Act. On the contrary, it is an admitted position with the parties that Sri Virendra Pratap Singh submitted his resignation on 10.8.1973 which was accepted by Committee of Management on 24.8.1973. It is nobody's case that any salary was paid to Sri Virendra Pratap Singh thereafter or that any of the parties treated the post continued to be occupied by Sri Virendra Pratap Singh despite submission of his resignation and acceptance by Committee of Management after 24.8.1973. All these things had taken place in 1973. The post remained vacant for almost nine years before enactment of 1982 Act. It would be wholly imprudent to contend that such a vacancy, which already lapsed vide Regularization 20, as soon as is shadowed by 1982 Act, would be governed by 1982 Act, and Regulation 20 Chapter II would have no application. I cannot ignore the fact that by 1982, when this Act was enforced, Regulation 20 Chapter II had already applied with its full vigour rendering the vacancy lapsed.

43. In *Sudarshan Prasad Sharma v. State of U.P. and Ors.*, 1997 AWC (Supp) 698, this distinction has been noticed by this Court as under:

The submission of the learned Counsel is not without force. Provisions of Regulation 20 would be attracted only when a post has fallen vacant and not otherwise.

It further held where the vacancy has occurred after enforcement of 1982 Act, then Regulation 20 Chapter II would not apply.

44. The question No. (ii) therefore has to be answered against Respondent No. 5 and this Court has no hesitation in holding that from the record and the

discussion made above, it is evident that in law there existed no vacancy of Lecturer (Education) in the College in 1991 where against an appointment could have been made including that of Respondent No. 5. Therefore, ex facie the alleged appointment of Respondent No. 5 is against a non est post/vacancy.

45. It leads us to question No. (i) and (iv). These questions are about the validity of appointment in 1991. Admittedly in 1991 power of appointment vested in UP. Secondary Education Service Selection Board (hereinafter referred to as "Board"). I proceed to decide this issue assuming that on 1.7.1991, there existed a substantive vacancy on the post of Lecturer (Education), though on this issue I have already decided otherwise, but only for the purpose of testing and adjudicating issue No. (i), I proceed to assume as said above.

46. There is a serious contention advanced by Petitioner. The appointment of Respondent No. 5 was void as neither the post was advertised nor any process of selection has been undergone and the appointment was illegal in view of law laid down by a Full Bench of this Court in *Radha Raizada v. Committee of Management*, 1994 (2) ESC 345 (FB). These averments are contained in para 22 (B) (C) of writ petition. On this aspect, none of Respondents have said anything in the counter-affidavits as to how and in what manner Respondent No. 5 was appointed.

47. Admittedly, Committee of Management could not have make any substantive appointment in 1991 having no such power at all. Any appointment made in violation of the procedure prescribed in 1982 Act is void as declared vide Section 16 thereof.

48. Committee of Management, however, could have made ad hoc appointment in certain contingencies i.e. contemplated in Section 18 of 1982 Act and that too after following the procedure prescribed in the Removal of Difficulties Order, first or second, as the case may be issued under 1982 Act. If the vacancy was substantive and had been requisitioned to Commission, but Commission failed to make recommendation within two months from the date of requisition, the Management could have filled vacancy on ad hoc basis following the procedure prescribed in UP. Secondary Education Services Commission (Removal of Difficulties) Order, 1981 (hereinafter referred to as "First Order"). This procedure has been held mandatory. Its violation would render an appointment void ab initio conferring no right upon the incumbent concerned either to hold the post or to continue in service or to claim salary, particularly from the State exchequer.

49. Apex Court in *Prabhat Kumar Sharma and others Vs. State of U.P. and others*, held that procedure laid down in Removal of Difficulties Order is mandatory and has to be observed in words and spirit. An appointment made inconsistent with the said procedure is void ab initio and will not confer either any right upon the incumbent to hold the post or to continue in service or to claim salary from State exchequer. The relevant observations made by the Apex Court in *Prabhat Kumar Sharma* (supra) is as under:

Any appointment made in transgression thereof is illegal appointment and is void and confers no right on the appointees.

50. Again in para 11 of the judgment the Court held:

Any appointment in violation thereof is void. As seen prior to the Amendment Act of 1982 the First 1981 Order envisages recruitment as per the procedure prescribed in para 5 thereof. It is an inbuilt procedure to avoid manipulation and nepotism in selection and appointment of the teachers by the Management to any posts in aided institution.

(emphasis added)

51. This decision has been followed and reiterated in Shesh Mani Shukla Vs. D.I.O.S. Deoria and Others, wherein the Apex Court said:

It is true that the Appellant has worked for a long time. His appointment, however, being in contravention of the statutory provision was illegal, and, thus, void ab initio. If his appointment has not been granted approval by the statutory authority, no exception can be taken only because the Appellant had worked for a long time. The same by itself, in our opinion, cannot form the basis for obtaining a writ of or in the nature of mandamus; as it is well known that for the said purpose, the writ Petitioner must establish a legal right in himself and a corresponding legal duty in the State.

52. Following Prabhat Kumar Sharma (supra), a Division Bench of this Court in Lalta Prasad Goswami v. State of U.P and Ors., (Special Appeal No. 32 of 2006) (decided on 12.1.2006) took the same view. The Division Bench upheld the judgment of Single Judge and dismissed intra Court Appeal. The appellate judgment dated 12.1.2006 was confirmed in SLP No. 6948 of 2006 by Apex Court vide order dated 28.4.2006 in the following terms:

The Petitioner having been appointed as a Principal in terms of the provisions u/s 18 of the Act, we are of the opinion that the question of his being regularized in the said post does not arise. The SLP is dismissed accordingly.

53. The Division Bench, besides holding that appointment of Lalta Prasad Goswami was illegal and void being in violation of Section 18 of 1982 Act, further observed that neither he was entitled to be considered for regularization u/s 33-C of 1982 Act nor his mere continuance on the basis of interim order passed by this Court would confer any right upon him for such purpose. The Apex Court dismissing appeal on merits observed that question of regularization would not arise since Petitioner, i.e., Lalta Prasad Goswami was not appointed as a Principal in terms of Section 18 of the Act. This verdict applies squarely in this matter also.

54. There are dozens of judgments of this Court on this aspect. I need not to burden this judgment by referring to all those since in my view it is now well settled that any appointment made in violation of Section 18 of 1982 Act read with Removal of Difficulties Orders issued thereunder is void ab initio and would

not confer any right upon the incumbent concerned either to continue or to hold the post or to claim salary from State exchequer or even to claim regularization.

55. This is also evident from another fact. The Respondent No. 5 though appointed by Committee of Management on 1.7.1991 on ad hoc basis but the said appointment was not given any weight or recognition by educational authorities. They declined to approve his appointment and pay salary from State exchequer. Respondent No. 5, faced with this situation, came to this Court in Writ Petition No. 14363 of 1992 and sought following reliefs:

(i) issue a writ order or direction in the nature of mandamus commanding upon the Respondent No. 2 to pay the salary of the Petitioner from the date of joining. (Annexure 4 to the writ petition)

(iA) to issue a writ, order or direction in the nature of mandamus commanding upon the Respondent to regularise services of the Petitioner.

(ii)

(iii)

56. An ex parte interim order was passed in the aforesaid writ petition to the following effect on 20.4.1992:

Standing Counsel is granted six weeks" time to file counter-affidavit. List this petition for admission in the month of August, 1992.

Meanwhile, if the Petitioner is working as an ad hoc teacher in Lecturer's grade, he shall continue to work and be paid salary which is due to him in law till a regular selection is made by the Commission.

57. It is this ex parte interim order which continued for more than a decade pursuant whereunto Respondent No. 5 continued to get salary on the said post. The question of validity of his appointment was not decided by this Court inasmuch when the matter came up for hearing on 4.3.2005, without deciding the issue about validity of his appointment on merits this Court simply referred the entire matter to educational authorities to decide this question in accordance with law as also Respondent No. 5's right to claim regularisation u/s 33-C. The direction of the Court reads as under:

Having heard learned Counsel for the parties, this writ petition is disposed of directing the District Inspector of Schools to place the Petitioner's case for consideration before the appropriate authority at appropriate time in accordance with the provisions of Section 33-C as inserted through UP. Secondary Education Service Commission (Amendment) Ordinance, 1998 (U.P. Ordinance No. 3 of 1998) for being considered under the said provision since inserted in accordance with law according to the wisdom and discretion of such authority provided the Petitioner fulfils eligibility criteria as well as qualification and as fulfils all conditions for such consideration provided further that the Petitioner was duly appointed and is still continuing in the service with or without the aid of the order

of this Court if the Petitioner is so continuing till today, then his service may not be interfered within until such consideration is over and his service shall be subject to the result of such consideration, in case he is not continuing in service in that event his case need not be considered and the interim order, if any, shall stand discharged.

The writ petition stand finally disposed of within the above observations there shall, however, no order as to costs.

(emphasis added)

58. When this Court required the authorities to decide something in accordance with law and subject to condition that he fulfil all conditions for such consideration i.e. regularization, the authorities were expected to consider every such aspect namely whether things have been done in accordance with law or not etc. Unfortunately that is what has not been done. The Joint Director of Education has miserably failed to discharge his duties as was expected and directed by this Court. He proceeded on certain assumptions of his own, without looking into the relevant aspects of the matter, may be deliberately or indeliberately. But the fact remains that his action of not applying his mind to the legality of appointment of Respondent No. 5 has resulted in conferment of certain undue benefits and illegal advantages upon Respondent No. 5 which otherwise would not have been conferred, not only to him but to none else.

59. In the entire order of regularization, Joint Director of Education has not averted to the question whether the alleged ad hoc appointment of Respondent No. 5 was made in accordance with procedure prescribed in Removal of Difficulties Orders or not which was a conditions precedent to attract Section 33-C of 1982 Act. A bare perusal of Section 33-C shows that without looking into this aspect of the matter, the question of regularisation could not have been considered.

60. Section 33-C (1) of 1982 Act reads as under:

33C. Regularisation of certain more appointments.--(1) Any teacher who,--

(a) (i) was appointed by promotion or by direct recruitment on or after May 14, 1991 but not later than August 6, 1993 on ad hoc basis against substantive vacancy in accordance with Section 18, in the Lecturer grade or Trained Graduate grade;

(ii) was appointed by promotion on or after July 31, 1998 but not later than August 6, 1993 on ad hoc basis against a substantive vacancy in the post of a Principal or Headmaster in accordance with Section 18;

(b) possesses the qualifications prescribed under, or is exempted from such qualifications in accordance with, the provisions of the Intermediate Education Act, 1921;

(c) has been continuously serving the Institution from the date of such

appointment up to the date of the commencement of the Uttar Pradesh Secondary Education Services Commission (Amendment) Act, 1998;

(d) has been found suitable for appointment in a substantive capacity by a Selection Committee constituted under Sub-section (2);

shall be given substantive appointment by the Management.

61. Therefore, only such Teachers are entitled to claim regularization u/s 33-C who are appointed on ad hoc basis in accordance with Section 18 which by necessity also includes the Removal of Difficulties Order. If one has not been appointed according to Removal of Difficulties read with Section 18, he can not be held entitled for regularization.

62. Since the Respondents have pleaded that the vacancy had caused due to resignation of Sri Virendra Pratap Singh, even if I presume for a moment that ignoring Regulation 20 Chapter II of the Regulations, the Respondent No. 4 could have proceeded to make ad hoc appointment on the said post, following steps were obligatory before making ad hoc appointment otherwise it was void, namely;

(I) Requisition of vacancy to Commission;

(II) lapse of two months time from the date of sending of such requisition and failure of commission to recommend any person

(III) observance of procedure prescribed in Clause 5 of Removal of Difficulties (First) Order.

63. In this case, all these things had been ignored with impunity. Under the shield of an ex parte interim order of this Court which unfortunately continued more than a decade, Respondent No. 5 has managed to get something which in law could not have conferred upon him. Even the Joint Director of Education who was under a legal and statutory obligation to consider this aspect of matter before passing an order of regularization u/s 33-C has also miserably failed to look into it. I cannot assume that this omission is in deliberate for the reason that he is an Officer who comes across such kind of matters everyday and is supposed to know all the intricacies of the subject having expertise in the field. Even then if he turned blind to all these issues which normally come across in various orders passed in other matters where authorities had to pass detail orders discussing each and every aspect, the omission cannot be but for the reasons other than bona fide.

64. This is nothing but a sheer abuse of process of law and shows how the provisions of statutes can be twisted and distorted in order to confer an illegal benefit upon an individual candidate. I have no doubt in my mind that educational authorities in order to allow such a situation have shown some kind of ignorance rather defiance to Rule of law and have acted in collusion. But the fact remains that non consideration of obligatory procedure and requisite

conditions precedents of law or their omission, deliberately, wilfully or otherwise, has resulted in that a wholly fraudulent appointment of Respondent 5 has been validated by Joint Director of Education by issuing an order of regularization and that too on the pretext of acting in consonance with directions of this Court, though this Court has said that authority shall Act in accordance with law and consider several aspects mentioned in the order.

65. I find these kinds of omissions frequent in the hands of educational authorities for conferring undue and illegal benefits upon individuals. I have no manner of doubt to express my reasonable suspicion that it cannot be on account of any bona fide mistake but a deliberate intentional defiance or omission going to the extent of collusion of educational authorities. Nobody, particularly, a public authority would have acted illegally unless inspired by reasons, extraneous and collateral and, therefore, the action of authorities in such flagrant violation of statutory provisions is void ab initio.

66. Contention of learned Counsel for Respondent No. 5 that validity of his appointment cannot be disputed by Petitioner after such a long time in the backdrop as discussed above thus looses ground. The narration of chain of events make it clear that validity of appointment of Petitioner itself was sub-judice before this Court for almost 13 years in writ petition No. 14363 of 1992. The relevant parties were already impleaded therein. The Petitioner had neither any occasion nor cause of action at that stage to come forward to challenge appointment of Respondent No. 5. All the necessary parties, i.e., educational authorities as also the appointing authority, i.e. Committee of Management were party in that writ petition. The Court in its judgment dated 4.3.2005 did not adjudicate upon the validity of ad hoc appointment of Respondent No. 5. Since a provision was made vide Section 33-C of 1982 Act by the legislature for considering regularization of ad hoc appointment, it directed the competent education authority to look into this aspect and decide in accordance with law.

67. To attract Section 33-C, the first and foremost condition precedent was that the ad hoc appointment was made u/s 18. Without recording a finding of fact that the appointment on ad hoc basis was made following the procedure prescribed in relevant provisions discussed above, the competent authority could not have passed an order of regularization. If the appointment itself was not made in accordance with Section 18, Section 33-C would not have come into picture. Therefore, the issue of validity of ad hoc appointment of Respondent No. 5 was left open to be decided by the competent education authority ? while simultaneously deciding of claim of regularization u/s 33-C.

68. The competent education authority unfortunately failed to discharge its duties and mechanically passed order dated 9.10.2006 regularizing Respondent No. 5 with retrospective effect. I, therefore, have no doubt in my mind that neither appointment of Respondent No. 5 was validly made in 1991 nor he could have been regularized u/s 33-C since the appointment was not made in accordance with Section 18 of 1982 Act.

69. In *Lalta Prasad Goswami* (supra) this Court has already held, relying on various authorities of Apex Court as also a Full Bench decision, that an appointment in violation of Section 18 of 1982 Act is void ab initio and this decision has been confirmed by Apex Court observing that non compliance of Section 18 would make the appointment illegal and the persons would not be entitled for regularization.

70. Therefore, Issue No. (i) and (iv) are answered in favour of Petitioner and against Respondent No. 5.

71. Now I come to next and the last issue, i.e. question (iii). There is nothing on record to show that this order dated 9.10.2006 was ever communicated to Petitioner and/or was pasted on the notice board of the institution concerned so as to bring to the notice of all other parties concerned. Petitioner has claimed that a list was prepared by Committee of Management (Annexure 3 to the writ petition) wherein Respondent No. 5 was placed above Petitioner showing date of appointment of Respondent No. 5 on the post of Lecturer much earlier than Petitioner. This list was not a seniority list prepared by Committee of management. In any case, Petitioner represented against the said list and claimed seniority over Respondent No. 5. That is how the dispute arose for the first time in 2010. The cases which we have discussed above regarding delay and laches relates to matter where some kind of irregularity had occurred which was condonable by individual concerned, viz. if ignoring seniority a junior person is promoted the individual senior can always be held to have waived his right and to accept supercession but where the question is about very legality of an appointment, it has nothing to do with the waiver or relinquishment of any right by an individual. Here is a question of operation and observance of law in the matter of individual's appointment. Whether one's appointment is made validly or not is a question not dependent upon one's own sweet will. One cannot condone or waive something so as to validate it which is wholly illegal and void being in transgression of law.

72. In order to suggest that, disputing seniority, validity of appointment cannot be challenged, learned Counsel for Respondent No. 5 referred a Division Bench decision in *Vijay Narain Sharma v. District Inspector of Schools, Etawah and Ors.*, 1986 UPLBEC 44. This Court in paragraphs 25 and 26 of the judgment held:

25. On a reading of Regulation 3 of Chapter II, it is clear that it nowhere contemplated that the teacher who challenges the seniority list can again challenge the validity of the appointment or promotion of a teacher in the college. He can Only be aggrieved by the factors, if wrongly decided, as mentioned in Regulation 3. The dispute can be taken in appeal under Clause (1) of Regulation 3 quoted above. In my opinion, it is clear that while disputing the validity of the seniority list, it is not open to a teacher to challenge the appointment and promotion which had already been done. The challenge to the appointment and promotion has been specifically provided. If no challenge is made at that stage then the appointment and promotion becomes final. If the

Legislature intended that the appointment and promotion can be challenged at the time of determining seniority, the Legislature would have specifically provided in the Regulations. This has not been done.

26. There is another aspect of the matter that once the appointment or promotion becomes final, a vested right is created in favour of a teacher. A colleague of his in the institution having acquiesced to the appointment and promotion cannot be, subsequently, permitted to raise the dispute.

(emphasis added)

73. In the case of Smt. Rani Srivastava v. State of U.P. and Ors., 1990 (1) UPLBEC 425 this Court has held as under:

5. Principle infirmity in appointment of Petitioner, that could be pointed out, was that it was made without issuing any advertisement and recommendation by Selection Committee. May be but could the management which appointed Petitioner in 1984 and the Basic Shiksha Adhikari who did not raise any objection to payment of salary for five years raise this objection in 1989. The appointing authority under Rules is the committee of Management. And the approving authority is the Basic Shiksha Adhikari, who under U.P. Act No. 6 of 1979 is also to supervise the payment of salary and is empowered to inspect and check. For five years no objection was raised by him. And then suddenly when one of the members desired that a male principal, should be appointed, he also raised an objection. The Petitioner had raised objection as far back as 1985 against her being treated as temporary employee. No action was taken on it. Nor any decision was given. For procedural irregularity the Petitioner should not be made to suffer. Normally it is to be presumed that Management must have sent papers for appointment of Petitioner to Basic Shiksha Adhikari who must have granted approval unless it is rebutted either by placing any communication by Management from record of Basic Shiksha Adhikari to show that things did not proceed as they are provided in the Act. In absence of any material there is no reason to doubt that Committee of Management would have appointed without intimating Basic Shiksha Adhikari and would have even issued letter appointing Petitioner permanently and Basic Shiksha Adhikari would not have raised any objection in respect of payment of salary etc. from 1984 to 1989. Change of Secretary or Basic Shiksha Adhikari should not be permitted to create any difference otherwise it shall result in creating arbitrariness and expose teachers of being thrown out of employment on one or the other pretext and shall never have security which is necessary for efficient discharge of duty. Equity stands in her favour and prevents both the appointing and approving authority from taking recourse to their own mistakes, for causing prejudice to Petitioner. Estoppel, the principle of equity, is the shield for such unjust and unfair actions.

(emphasis added)

74. In Dr. Asha Saxena v. Smt. S.K. Chaudhary and Ors., 1991 (2) UPLBEC 1202 a Full Bench of this Court has held:

16. ...In any view of the matter, the appointments which were existing for the last 17 years could not be set aside after a lapse of such a long period. Even the earlier Full Bench had quashed the order of the Regional Inspectress of Girls Schools referring the matter u/s 16-E (10) of the Act and we are also of the opinion that the aforesaid order is liable to be quashed. It is true that there is power u/s 16-E (10) of the Act to cancel the appointments but the power has to be exercised within a reasonable time. The appointment had been made in the year 1973 and by no stretch of imagination it can be said that the exercise of that power after the lapse of 17 years by the Director of Education u/s 16-E(10), on the facts and circumstances of the case can be said to be exercise of a power within a reasonable time.

75. This Court Smt. Manju Keshi Dixit Vs. State of U.P. and Others, reiterated the aforesaid view making following observations:

13. Thus, the consistent view of this Court is that the appointment cannot be challenged while determining the seniority and if the appointment has been made and is continued for long period, it should not be disturbed or set aside on some technicalities or procedural irregularities.

76. Both the above judgments have been followed recently in Smt. Bharti Roy v. Deputy Director of Education, II, Kanpur and Ors., 2008 (2) ESC 911 and Sughar Singh v. State of U.P. and Ors., 2010 (2) ADJ 214.

77. The above decisions in different context, no doubt, have observed that in the garb of challenging seniority list, one cannot be allowed to assail the very appointment of the incumbent and that too after a long time and should be non suited on this aspect. However, can it be said that this proposition is so wide so as to be applied as a Rule of thumb that whenever a issue regarding seniority is raised, one cannot challenge simultaneously validity of appointment of the incumbent concerned on the ground that it is wholly illegal and void ab initio.

78. From a careful reading of all the judgment referred above, I find that to put this proposition at such a high pedestal would amount to do violence with legal proposition laid down in the above cases. This has to be read in the light of the context and the relevant provisions.

79. In Vijay Narain Sharma (supra), the Court considered, whether the statutory remedy challenging seniority list under Regulation 3 Chapter II would cover a grievance with respect to challenging appointment of a Teacher. The Court clearly observed that there is a different provision made for challenging appointment and promotion. If nobody avail the remedy, his right to challenge appointment cannot be included within the ambit of Regulation 3 Chapter II which provides a procedure for challenging only a seniority list and not the appointment or promotion. The Court also observed that once the appointment and promotion becomes final, a vested right is accrued and a colleague cannot be permitted to raise dispute with regard to appointment and promotion at a belated stage disputing seniority. Meaning thereby, the Court has not laid down a wide

proposition that appointment cannot be challenged at all while disputing seniority, but this would depend on various factors either way and would have to be considered on case to case basis. Thereafter Court confined to which could be raised under Regulation 3 Chapter II and held that its scope cannot be widened.

80. Similar is the position in Smt. Rani Srivastava (supra). There the appointment was made by Committee of Management and the educational authorities. Later on they themselves attempted to challenge the appointment. The Court found that in absence of anything contrary, it cannot be presumed that procedure has not been followed. The authorities who had to observe procedure were the complainants. The Court did not allow them to raise this plea after a long time. It is in these circumstances, the principle of estoppel was also invoked by the Court.

81. However, if the authorities responsible for observing a mandatory provision acting illegally have helped an individual to get certain benefits, can it be said that a person who has no occasion of possessing all such information and has never acquiesced to the situation cannot challenge such illegal appointment whenever he is sought to be affected adversely by the authorities and by such illegal appointee. The answer would be No.

82. Moreover, the validity of appointment of Respondent No. 5 was never accepted even by education authorities. It was sub-judice for almost 14 years whereafter the matter was placed in arena of Joint Director or Education to look and decide validity of Respondent No. 5's appointment but unfortunately he also failed and passed a short, cryptic, mechanical order to give undue advantage to Respondent No. 5. Question of any acquiescence on the part of Petitioner, in absence of anything placed on record to show that all these things were ever brought to the notice of Petitioner, would not arise.

83. In Dr. Asha Saxena (supra), this Court found that the power of cancellation of appointment cannot be allowed to be exercised after 17 years since the person, who attempted to exercise that power, ought to have exercised within a reasonable time. But here that would not apply as here there was no occasion on the part of the Petitioner to rack up his claim vis-a-vis Respondent No. 5 till he was sought to be prejudiced or adversely affected by Respondent No. 5, which exercise had been taken only in 2010 and not earlier thereto.

84. In Smt. Manju Keshi Dixit (supra), the Court clearly observed that mere some technical or procedural irregularity ought not to result in setting aside an appointment continued for a long time when seniority issue arises. This also leads to the conclusion that these are only such irregularities or technicalities which are rectifiable or condemnable but where the omission or violation goes to the very root of the matter making appointment illegal and void ab initio, the Court would be failing in its duty if it declines to set the things right else that would amount to perpetuate an illegality causing a permanent loss to an incumbent who has no role to play on his part and is not guilty of either waiver

or acquiescence or estoppel or any other similar principle of law.

85. Just to repeat therefore I have no hesitation to say that consistent view of this Court is that normally/ordinarily an appointment cannot be challenged while determining seniority, if the appointment has been made and continued for long period, it should not be disturbed or set aside on some technicalities or procedural irregularities but where it is wholly illegal and non est, the situation would be different. The proposition of law is not so wide to be attracted in every case like this one.

86. Here the very appointment of Respondent No. 5 in view of law laid down by the Apex Court in Prabhat Kumar Sharma (supra), Shesh Mani Shukla (supra) and Lalita Prasad Goswami (supra) is void ab initio. Therefore, it is not a mere challenge to appointment but the state of affairs as existed in law in the light of law laid down by Apex Court. Petitioner has not challenged the appointment of Respondent No. 5 in the garb of challenging only seniority but he has said that a person whose appointment is illegal since inception cannot be treated a Lecturer having been appointed from a date earlier to the Petitioner so as to affect his interest otherwise.

87. There is another aspect of the matter. Admittedly, the order of regularization of Respondent No. 5 was passed on 9.10.2006. Learned Counsel for Respondents failed to show that the executive authorities could have passed an executive order giving it a retrospective effect so much so that it may affect the accrued and vested rights of others in between. Petitioner was admittedly appointed as Lecturer by promotion within his quota in 2004. Till then Respondent No. 5 was not appointed on substantive basis on the post of Lecturer. The executive order of regularization was issued by Respondent No. 2, adversely affecting Petitioner for the first time in 2006, by giving retrospective effect to such order. It gave effect to the regularization of Respondent No. 5 from a back date, i.e. of 1998. It is well settled that an executive order affecting vested rights of a person shall not be issued retrospectively.

88. Till the order of regularization was issued by Respondent No. 2, the Petitioner constitute a stream different to Respondent No. 5. Respondent No. 5 joined that stream when Respondent No. 2 considered his case and found him suitable for regularization whereafter regularization order was issued on 9.10.2006. In, the Apex Court said:

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.

(emphasis added)

89. The distinction of two streams to which Petitioner and Respondent No. 5 belong upto 2006, was sought to be lifted by Respondent No. 2 by giving effect to his order of regularization dated 9.10.2006 from a back date i.e. 1998. Section 33-C does not confer any such power upon the competent authority to make regularization retrospectively. The procedure prescribed for regularization also suggest that the order passed u/s 33-C would be prospective and not retrospective.

90. Therefore, even if what I have held earlier is ignored, regularization of Respondent No. 5 from a date earlier from the date of order of regularization cannot be allowed to stand. The impugned order of regularization insofar as it regularizes Respondent No. 5 from 30.4.1998 is wholly illegal and without jurisdiction. For this reason alone, Respondent No. 5 cannot be allowed seniority over the Petitioner.

91. However, I am not inclined to leave the matter only hereto. The very ad hoc appointment of Respondent No. 5 and his regularization being in teeth of law and void ab initio in view of the law laid down by Apex Court as referred above, the impugned order of regularization cannot be allowed to continue otherwise this Court will be failing in its statutory and Constitutional obligation of upholding Rule of law and the Constitution.

92. In the result, writ petition is allowed. Impugned orders dated 9.10.2006 regularizing Respondent No. 5 and 7.12.2010 (Annexure 8 to writ petition), passed by Respondent No. 2, declaring him senior to Petitioner are hereby set aside.

93. Petitioner shall be entitled to cost which is quantified to Rs. 10,000/- (Rupees ten thousand) against Respondent Nos. 2 and 4 in equal proportion.