

State and ors. Vs. Anil Kumar and ors.

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Court : Rajasthan

Decided On : Apr-22-2008

Reported in : RLW2008(4)Raj2830

Judge : N.P. Gupta and; Kishan Swaroop Chaudhari, JJ.

Appellant : State and ors.

Respondent : Anil Kumar and ors.

Disposition : Appeal dismissed

Judgement :

N.P. Gupta, J.

1. This Special Appeal has been filed by the State of Rajasthan, against the judgment of learned Single Judge dated 21.9.1999, allowing the writ petition of the present respondents, who are 5 in number, precisely relying on the judgment of Hon'ble the Supreme Court, in Vijay Singh Deora and Ors. v. State of Rajasthan and appointed on ad-hoc basis as Junior Engineers, and were continued in service as degree holder Junior Engineers, till they were regularly selected later on, and during the period of their recruitment as ad-hoc, and till they were regularised in service, there was no break in the service, several persons among the diploma holder Junior Engineers have acquired Engineering Degrees, who were transferred to the seniority list of degree holder Junior Engineers, and that in doing

so, an error was committed, and those transferred persons were shown senior to the petitioners, on the ground, that the appointment of the petitioners was ad-hoc, though prior in time. It was found that in Vijay Singh's case, Supreme Court has ordained, that in such circumstances, the degree holder Engineers shall rank senior to the diploma holders, who have come into the cadre as diploma holders and acquired qualification of degree after the date of recruitment of the degree holders, originally so recruited, as they have been recruited prior in point of time. Against this judgment, this appeal came up for admission on, 3.4.2000, and after hearing the appellant and the caveator, the appeal was dismissed in limine, without notice to other side. This order of this Court dated 3.4.2000 was challenged by way of SLP before Hon'ble the Supreme Court, and Hon'ble the Supreme Court, vide order dated 6th of February 2001 allowed the appeal of the State. It was held, that the learned Single Judge has decided the writ petition holding that the controversy was covered in Vijay Singh Deora's case, but the learned Single Judge did not consider the effect or validity of Rule 28, which was reproduced and that in Vijay Singh's case applicability, effect or validity of Rule 28, had not been dealt with at all, as in that case, seniority was not fixed on basis of this Rule, and therefore, the question raised was not covered by that decision, rather this aspect raised in the writ petition should have been considered on merits, as such, the order was set aside, and the matter was sent back to the Division Bench, for consideration of appeal on its merits. Accordingly, the appeal has come up now, for hearing before us.

2. We may briefly recapitulate the facts of the case, which are as under:

3. According to the writ petition, the petitioners passed Graduation in Civil Engineering, and after passing such graduation, they got registered their names in the Planning (Men Power) Department, Government of Rajasthan, they were appointed as Junior Engineers in Public Health and Engineering Department in the month of February, 1984 on ad-hoc basis. However, regular selections were made in the month of July 1984 and the names of the petitioners were not included in the select list, therefore, their services were terminated in the month of September 1984. This termination was challenged unsuccessfully by way of writ petition. Be that as it may. The case of the petitioners then is, that thereafter they were again

appointed on ad-hoc basis, vide orders dated 20.5.1985, 27.5.1985 and 28.6.1985 respectively, being Annexures-1, 2 and 3. It may be observed that these orders Annex. 1, 2 and 3 have been passed by the Chief Engineer, of the concerned Engineering Department, and recites that names had been obtained from Planning (Men Power) Department, Government of Rajasthan, being registered unemployed civil engineering graduates. It is then alleged, that although vacant posts of Junior Engineers were available with the respondents in the year 1985, but for reasons best known to the respondents, the respondents did not hold regular selections for two years. The petitioners submitted representation, however, after lapse of about two years of ad-hoc appointment, advertisements were issued on 24.10.1987 and 7.10.1987 inviting applications for regular selection to the post of Junior Engineers. The petitioners applied in response thereto, and were selected by the Selection Committee constituted for appointment, and they were appointed on 22.6.1988. It may be observed here, that a controversy precisely starts from this point. It is alleged that this order dated 22.6.1988, being Annex.5, was issued in continuation of the ad-hoc appointment of the petitioners, and they were in continuous service as Junior Engineers, since the date of initial appointment. It is alleged that a provisional seniority list of Junior Engineers (Degree holders) was issued on 13.12.1988, being Annex.6, which did not contain names of the petitioners. Thereupon representation was submitted for inclusion of their names, which was replied, and it was mentioned, that seniority cannot be given to them from the date of initial appointment, as the same was not provided under the Rules. Then yet another provisional seniority list was issued on 14.6.1991, Annex.9. In this list, the petitioners have been assigned seniority from the date of appointment made in the year 1988, and their past service of three years has been given a go-bye in the matter of determination of seniority. The petitioners again submitted objections. Then the final seniority list was issued, being Annex. 11, and therein, the assignment of seniority to the petitioners from 22.6.1988 was maintained.

4. It is contended that the service conditions of the petitioners were governed by the provisions of Rajasthan Engineering Subordinate Service (Public Health Branch) Rules, 1967 (hereafter to be referred to as the 'Rules'), Rule 6 thereof deals with the matter of recruitment, and proviso 4 to Rule 6 provides, that if a

Sub-Engineer (Diploma-holder) attains the qualification required for Junior Engineers (Degree-holder), he shall be entitled, on his application, and subject to availability of vacant post, to be appointed as Junior Engineer by transfer against the quota of direct recruitment, but in that case, his seniority amongst the Junior Engineers shall be counted from the date of occurrence of the vacancy of a post of Junior Engineers, or actual appointment thereto, whichever is later. It is then contended that Rule 9 provides for year-wise determination of vacancies, and the vacancies are required to be determined on 1st day of April of each year. Then Chapter IV provides for procedure for direct recruitment. Then it does not lay down any guidelines, as to within what time the steps for direct recruitment shall be taken after determination of the vacancies. It is in this background, that Rule 28 provides for determination of seniority, and provides, that seniority in the service shall be determined in each group of service, by the year of substantive appointment. It is alleged, that the petitioners are entitled to seniority from the date of their initial appointment of 1985, as, despite working since 1985, the persons, who have been appointed by transfer under proviso 4 to Rule 6 have been given appointment from the date of acquiring degree, and thus, the petitioners have made to rank junior. This results into the consequence, that the persons, who had been appointed on the post of Sub-Engineers (Diplomaholders) and have been appointed under proviso 4 to Rule 6, to the posts of Junior Engineers (Degreeholders), have been given appointment from back date, although appointed against the direct recruitment quota, yet persons like the petitioners, who have been given appointments against the direct recruitment quota, have been denied appointments from the date they are actually serving i.e. 1985. Then in para 26 it is alleged, that the petitioners were given appointment out of the list supplied by the Planning (Man Power) Department, and that, this list is prepared by the Planning Department, on the basis of merit, determined with respect to the marks obtained at the degree examination, and the experience of the concerned persons, which list is revised annually. The department issues advertisement, asking the registered unemployed engineers to get their registration renewed every year, by giving particulars regarding experience etc. and accordingly the list is revised annually. Consequently, the petitioners could not be deprived of their seniority for three years, merely for inaction of the department, in not advertising

the posts in time. The petitioners seek to challenge the validity of Rule 28, in so far as it provides for seniority from the date of substantive appointment, by contending, that under Rule 9, the vacancies are to be determined, and even if the Promotion Committee meet in a latter year, than that of the year to which the vacancy relates, then too the seniority relates back to the year of vacancy; While in case of direct recruits, the seniority is given from the date of actual appointment, and in absence of any provision being there giving guidelines, as to within what time of determination of vacancies, the recruitment exercise is to be undertaken, simply because for fortuitous reasons, the recruitment exercise is not undertaken for good number of years, and on the basis of existence of substantive vacancies temporary or ad-hoc appointments are made, the persons like the petitioners stand deprived of the seniority, and therefore, Rule 28 is bad. Then it is also contended, that direct recruitment of Junior Engineers is made by duly constituted Selection Committee, and in order to get selected, one has to compete with all eligible candidates, who applied, as against this, if a diploma holder acquires degree or equivalent qualification, and simply applies for transfer, then he is not subjected to any competitive consideration, and gets appointment on the post of Junior Engineer (degree holder), without competing with the degree holders, and gets seniority from the date of acquiring, qualification, whereas the persons like the petitioners are given seniority after regular selection. Thus, the petitioners have prayed that the Rule 28 be struck down, the petitioners be assigned seniority from the date of their initial appointment of the year 1985, the seniority list be accordingly recast, and the petitioners be granted all consequential benefits.

5. Reply to the writ petition was filed by the State, contending inter alia, that it is not admitted that in the year 1985, the posts were available, and that the respondent did not hold regular selection for two years, rather as a matter of fact, the posts were created in the year 1987, and to fill the newly created regular posts, applications were invited vide advertisement dated 24.8.87. Then it is pleaded that the services of only such diploma holder Junior Engineers already working in the department, who submitted proof of their passing BE. or equivalent A.M.I.E. Examination, after obtaining departmental permission were regularised as Junior Engineers (degree holder) as per Rule 6-4. Then it is contended that ad-hoc services cannot be counted for the purpose of seniority, and the petitioners were

rightly assigned seniority from the date, they were regularly selected in the year 1988. It was then contended that there is no provision in the Rules for assigning seniority to the employee appointed on ad-hoc basis, and that the seniority was assigned as per Rule 28 of the Rules w.e.f. 22.6.1988. It was pleaded that the Junior Engineers referred to in Annex. 12 were regularly selected Junior Engineers (diploma holders) and subsequently they passed B.E. or equivalent A.M.I.E. Examination, and on being informed of their passing the said examination, their services were regularised from the date of passing of the said examination on the post of Junior Engineers (degree holders), against the vacant posts, as per Rule 6(4) of the Rules. Then in para 26, the stand is taken to the effect, that the names of unemployed engineers, registered by Man Power Planning Department, is applicable only for ad-hoc appointments, and for regular selection, only relevant service rules are applicable, and therefore also, the period of ad-hoc appointment cannot be reckoned for the seniority.

6. Then a rejoinder has been filed on behalf of the petitioners, contending inter alia, that condition in the appointment order, about the appointment being purely on ad-hoc basis, does not entitle the respondents not to make regular selections indefinitely. It was denied that regular vacancies were created in June 1987. It was contended, that no document has been produced by the respondents in support of this averment, apart from the fact, that the respondents have not explained as to what was done by them to the vacancies against which the petitioners were given appointment on ad-hoc basis, rather as a matter of fact, the respondents have been making appointment by transfer right since 1985 and onwards, from amongst persons working on the post of Junior Engineers (diploma holder), to the post of Junior Engineers (degree holders), which exercise could be undertaken only in the event of availability of substantive vacancies. Thus, the stand taken about absence of vacancies in 1985, and vacancies having been created only in 1987 is wrong. Rather the appointments of the petitioners were made against the vacancies, which were available after 1984, on which the petitioners continued right since 1985, till they were subjected to regular selections in the year 1987. It was then contended, that the petitioners have no control on the respondents, in the matter of undertaking regular selection exercise, at a specified period of time, but then, on that count the petitioners cannot be denied the benefit of seniority,

with regard to service put in by them from the date of initial appointment, more so, when the appointment was made against substantive vacancies, and the petitioners are entitled to reckon their seniority from the date of their initial appointment made in the year 1985. Reliance was also placed, on the judgment in Vijay Singh Deora's case. Then it was pleaded in para 26, that registration with the Man Power Department, and the list prepared by that Department is based on a pre-determined formula, providing for the weightage to the academic qualifications, and therefore, it cannot be said that the list supplied by that department is not at all relevant. It was maintained that claims of all eligible candidates are considered by the Man Power Department, in the matter of sending names to any particular department, and the names are so sent in the order of merit, and consequently, seniority could not be denied. It was reiterated, that it is wrong to contend, that the regular selections of the petitioners were made against the vacancies of the year 1987, as nothing has been shown, as to what has been done to the vacancies against which the petitioners were given appointment in the year 1985, which shows that the substantive vacancies did exist at that time.

7. This is the resume of the pleadings of the parties.

8. From the above pleadings this much is clear, and is not in dispute, that the petitioners after first termination were appointed on ad-hoc basis in 1985, and continued, consequent upon the said appointment, and they were regularly selected in the year 1988, and were given regular appointment vide order dated 22.6.1988, and in the interregnum period, there was no brake in the service. It is also not in dispute, rather it is clear from the seniority list Annex. 11, that up to serial No. 147 therein, are the Junior Engineers (degree holders), appointed in the year 1984 and January 1985, and thereafter, up to Serial No. 203 are all persons, who have been appointed by transfer under proviso 4 to Rule 6, and from serial No. 165 onwards are the persons, who have been appointed even as Junior Engineers (diploma holders), after the petitioners' initial appointment as Junior Engineers (degree holders) on ad-hoc basis in the year 1985, as these are the persons appointed since 13.9.85, 4.4.86, 19.9.86, 27.3.87, 16.11.87 and 20.4.88, as Junior Engineers (diploma holders), and it further transpires, that many of these persons have acquired the degree, much after the petitioners' initial appointment of the

year 1985. Still they have been ranked senior to the petitioners.

9. It is in this background that the question required to be examined is, as to whether the petitioners are entitled to reckon their seniority from the respective date of the year 1985, or from 22.6.1988, i.e. from the date of their initial appointment on, ad-hoc basis, which continued till they were regularly selected and appointed, or from the date of their regular appointment.

10. The provisions regarding seniority are contained in Rule 28 of the Rules, which read as under:

28. Seniority: Seniority of persons appointed to the lowest post of the Service or lowest categories of posts in each of the Group/Section of the Service, as the case may be, shall be determined from the date of confirmation of such persons to the said post but in respect of persons appointed by promotion to other higher posts in the Service or other higher categories of posts in each of the Group/Section in the Service, as the case may be, shall be determined from the date of their regular selection to such posts.

Provided--

(i) that the seniority inter-se of the persons appointed to the Service before the commencement of these Rules and/or in the process of integration of the Service of the pre-re-organisation State of Rajasthan or the Services of the new State of Rajasthan established by the State Re-organisation Act, 1956 shall be determined, modified or altered by the Appointing Authority on an ad-hoc basis;

(ii) that if two or more persons are appointed to a post in the same Group in the same year, a person appointed by promotion, shall be senior to a person appointed by direct recruitment.

(ii-a) that a person appointed initially by direct recruitment on the regular post shall be senior to person appointed by absorption under Rule 6(c) and the existing regular employees if eligible for promotion as on 1.4.1971 and are promoted on a later date shall rank senior, in that particular category, to the persons appointed by absorption under Rule 6(c).

(iii) that the seniority inter-se of persons appointed to post in a particular Group by direct recruitment on the basis of one and the same selection except those who do not join Service when a post is offered to them, shall follow the order in which their names have been placed in the list prepared by the Appointing Authority under Rule 20;

(iv) that the seniority inter-se of persons appointed to posts in a particular Group by promotion shall follow the order in which their names have been placed in the lists prepared under sub Rule (4) of Rule 24;

(v) that the persons selected and appointed as a result of a selection which is not subject to review and revision, shall rank senior to the persons who are selected and appointed as a result of subsequent selection. Seniority inter-se of persons selected on the basis of seniority cum-merit and on the basis of merit in the same selection shall be the same as the next below grade.

(vi) that persons recruited in accordance with the provisions of these Rules or orders superseded by these Rules till the Persons are screened shall rank senior to those appointed on the basis of screening under proviso 4 to sub-rule (b) of Rule.

(vii) Subject to any pre-determined seniority, the interlaced seniority of persons holding the posts mentioned in column 5 against Serial No. 2 of Group III of the Schedule for the purpose of promotion, shall be determined on the basis of length of continued officiation followed by regular selection on the post from which promotion is to be made.

(viii) that persons screened in accordance with proviso (5) to Rule 6 shall be placed en-block junior to all persons recruited by direct recruitment through the Commission in the year, 1967 and also below those persons who are screened under proviso (3) to Rule 6.

(ix) that the persons appointed under proviso (8) to Rule 6 shall rank junior to those appointed in accordance with part IV of these rules, before 25.9.70 and shall rank senior to those appointed under the said part of the rules after 30.6.78.

11. A look at this provision shows, that the seniority is to be determined from the date of confirmation of such person to the said post. On the face of it, this does not talk of seniority to be reckoned from the date of even regular appointment. While from the pleadings referred to above, it is not in dispute, even on the side of the present appellants, that the seniority of the writ petitioners is to be reckoned from the date of their regular appointment being 20.6.1988, and not from the date of any confirmation.

12. Then reference can be made to the Constitutional Bench judgment of Hon'ble the Supreme Court, in Direct Recruit Class II Engineering Officers' Association v. State of Maharashtra and Ors. reported in : [1990]2SCR900 , cited by the learned Counsel for the writ petitioners, wherein it has clearly been held, that where appointment are made in accordance with rules, the seniority is to be counted from the date of appointment and not from the date of confirmation and that where initial appointment is not made by following uninterrupted till regularisation of his service in accordance with the rules, the period of officiating service will be counted. This is one aspect of the matter.

13. Then we may just review the scheme of the Rules. We find that according to Rule 9, determination of vacancies is to be made on 1st April of every year, about the vacancies occurring during the financial year. Then according to sub-rule (2) of Rule 9 the appointing authority shall also determine the vacancies of earlier years year-wise, which were required to be filled in by promotion, if such vacancies were not determined and filled earlier, in the year in which they were required to be filled in. It may be observed here, that Rule 9 contemplates determination of all vacancies, whether to be filled in by promotion or by direct recruitment. Then Rule 4 confers the power on the State Government, to leave unfilled, or hold in abeyance, or abolish, or allow to lapse, any post, permanent or temporary, from time to time, without thereby entitling any person to any compensation. In this background, again a look at Rule 28 shows, that so far fixation of seniority by promotion is concerned, it provides, that in respect of persons appointed by promotion to other higher posts in the service or other higher categories of posts in each of the Group/Section in the Service, seniority shall be taken from the date of their regular selection to such posts. Thus, on the face of it, irrespective of

determination of vacancy under Rule 9(2), to be filled in by promotion with respect to any earlier year, the seniority is to be fixed on the date of regular selection to such post. Then an overall reading of the rules also does show, that it does not provide any mechanism, like calendar, to be adhered to, as to when, and within what time, the vacancies determined to be filled by direct recruitment, are' required to be filled, and it does leaves an unguided free play to the appointing authority, not to undertake any recruitment exercise, despite determination of vacancies, and despite there being no order of the State Government, passed in exercise of powers conferred in Rule 4(3)(b). In the moment, we are not called upon to adjudicate, as to whether such a situation is required to be countenanced, or is required to be interfered by this Court, exercising jurisdiction in appeal arising out of Article 226 jurisdiction, but the question before us, precisely is, as to whether this state of affairs can be allowed to be made use of, for the purpose of depriving the legitimate claim of seniority, of the persons working, or can be used to bring about discrimination, between the persons not similarly situate, or to provide a march over the persons like the petitioners, to the persons, who were appointed as Junior Engineers (diploma holder), and continued to work as such, till they acquired the degree, which they acquired, even much after the petitioners' initial recruitment of the year 1985, and as to whether the provisions of Rule 28 are required to be appropriately read down, for that purpose.

14. In this background, now we may straightway come to the judgment of Hon'ble the Supreme Court, in Vijay Singh Deora's case.

15. In Vijay Singh Deora's case, of course, the provisions of Rule 28, as such, were not considered, as rightly observed by Hon'ble the Supreme Court in the judgment dated 6.2.1001, remanding the present matter to the High Court. However, the facts of that case, and the philosophy propounded therein, is required to be grasped, and recapitulated, inasmuch as, in that case, graduate engineers Group A Officers were appointed temporarily under Rule 27 prior to 30.6.78, and were appointed subject to availability of regularly recruited candidates in accordance with the Rules. Admittedly, there were no regular recruitment made by the Chief Engineer in accordance with Rule 6, and the appointments temporarily made were sought to be regularised by Screening

Committee appointed on that behalf, which Committee, by the exercise undertaken in the year 1984, found them eligible for appointment, and the question was, as to whether the graduates qualified engineer appointed temporarily, could be treated to have been substantively appointed to the post of Junior Engineers, from the date of initial appointment, after screening, and then it was observed as under:

In this behalf, one should not lose sight of the hard reality, namely, the Graduate Engineers Group A officers have been substantively discharging the duties of the posts right from the date of their appointment. It is settled rule that a temporary appointee has no right to the post nor does he get seniority unless regularly recruited in accordance with the rules and seniority would be reckoned from the date of substantive appointment when he started discharging the duty of the post. If appointments were made de hors the Rules, the entire length of service was required to be treated as fortuitous and excluded. If appointments are made after due consideration and according to the procedure, though on temporary basis, the seniority would start from the date of appointment.

16. Then it was further considered, that when the recruitment was made temporarily, and is regularised later on, the question would be, as to from what date their seniority would be reckoned, and that question was examined in the backdrop of the facts, that Group B Officers were appointed with diploma qualification, and later then Group A Officers, and acquired degree qualification subsequently. Group C Officers on acquiring degree qualification were appointed on application by transfer later to 30.6.1978. Thus, the unqualified became qualified subsequent to the appointment of qualified graduates. In that background, the question was posed, as to whether Group A Officers, when appointed as per rules, were made junior to Groups B and C Officers, due to delay and laches on the part of Government, in getting them screened and appointed regularly. Necessarily, therefore, when they were screened by the Committee, all those found eligible for confirmation in the temporary appointments, must, of necessity, and under equity and justice, be construed to have been regularly-appointed to the post. In the above factual background, it was held, that since there was no recruitment made by the Chief Engineer, the qualified Group A

Officers need to be treated as appointed on regular basis. Otherwise, unqualified officers would become senior to the qualified graduates at the inception. Then a method was laid down, to the effect, that Chief Engineer has to find out the following method in determining the inter-se seniority of the three groups of officers. First, it is to be ascertained, as to how many substantive vacancies are available within the quota of 20% of the direct recruit Graduate Junior Engineers. Seniority of the Graduate Engineers appointed, i.e., Group A officers, to the posts of the Junior Engineers should be reckoned from the respective dates, on which substantive vacancies were available, and Group A officers were appointed to those posts. Their seniority reckons from the respective dates, of either initial appointment, or date of availability of substantive vacancies, whichever occurs later. Then the second step was, that Group B Officers, who were appointed through selection, by advertisement, subsequent to 30.6.1978, and acquired degree qualifications thereafter, would get into the quota prescribed for direct recruitment of Graduate Engineers, from the respective dates on which they became qualified, and then method was provided for Group C officers. Thus, the philosophy propounded was, that the qualified officers, who have been appointed on temporary basis, and were subsequently regularised by screening, could not be ranked junior to unqualified officers, who became senior to the qualified graduates, at the inception.

17. One more aspect is required to be considered, viz., as considered in Vijay Singh Deora's case, that when the persons were appointed temporarily as recruitment exercise was not undertaken, and were sought to be regularised by screening, they were assigned seniority from the date of initial appointment. In that event, the persons while serving as temporary appointees, if face regular selection exercise, and are selected, and continue in service, without any break, could not be placed in a worse situation, than those persons, who came to be regularised even without facing regular selection exercise.

18. In the present case, as is clear from a look at Annex. 11, the seniority list, that it includes persons, who acquired the qualification of engineering graduate after the petitioners' initial appointment of the year 1985. Consequently at the time when the petitioners appointed in the year 1985, those persons obviously would be

ranked junior to the petitioners, but by resorting to the contrivance, of not undertaking recruitment exercise for filling the post by direct recruitment, such persons have been put senior to the persons like the petitioners, at the inception. It is clear from the seniority list, Annex. 11, that right from serial No. 148 to 203, enblock Junior Engineers (diploma holders) have been transferred as Junior Engineers (degree holders).

19. At this place, we may now also refer to the proviso (4) to Rule 6, which reads as under:

6(4) If a Diploma Holder Junior Engineer attains the qualification of B.E. (Civil/Mechanical/Electrical), or AMIE, he shall be entitled on his application and subject to availability of vacancy, to be appointed as Junior Engineer (Degree Holder) by transfer against the quota of direct recruitment but in that case his seniority amongst the Junior Engineers (Degree Holders) shall be determined from the date of occurrence of vacancy against which such Junior Engineer (Degree Holder) and one third of his previous experience shall be counted as experience on the post of Junior Engineer for the purpose of promotion to the next higher post.

20. The significant words used in this proviso (4) are, that in those cases the seniority amongst the Junior Engineers (Degree Holder), is required to be determined from the date of 'occurrence of vacancy against which such Junior Engineers (Degree Holder)' is to be counted. With this, it is required to be noticed, that Rule 6 provides a procedure for recruitment, and Clause (a) provides for direct recruitment, and this proviso (4) is in the nature of an exception, which provides for appointment by transfer, in the event of an unqualified person acquiring qualification, while in service, and is to get appointment after acquiring the qualification, and/or availability of the vacancy, whichever is later. This proviso thus does leave no manner of doubt, that before making appointment by transfer, as done, of the persons at serial No. 148 to 203 of the seniority list, Annex. 11, the availability of vacancy was the sine-qua-non.

21. Therefore, it has but to be assumed, that the vacancies were available, and since these appointments by transfers have been made right since 23.3.1985

onwards, so much so, that the 7 persons have been appointed on 23.3.1985. Then good number of persons have been appointed on 13.9.1985, with the result, that as on the date when the petitioners were initially appointed in June 1985, it cannot be disputed, that substantive vacancies were available, and it was against those substantive vacancies, that the petitioners were appointed vide Annex. 1, 2 and 3.

22. Thus, it becomes clear, that as at the time when the petitioners were appointed vide Annex. 1, 2 and 3, the substantive vacancies of Junior Engineers (degree holders) were available, and obviously vide these three orders, appointments had been made, purportedly on an ad-hoc basis, but then, the orders do further show, that these appointments had been made by the Chief Engineer himself, who was the appointing authority, even for making regular appointment by direct recruitment, under Rule 6(4). With this, it is also clear from these three documents, that the procedure employed for appointing the petitioners, may not be the regular selection process, but then some selection process was employed, which was in keeping with the letter and spirit of Article 14 and 16 of the Constitution, inasmuch as, the list of unemployed graduates civil engineers is maintained by the Planning (Man Power) Department of the Government, and from the pleadings it is clear, that the list is maintained on the basis of the marks obtained by the candidate, coupled with the experience acquired, and the list is revised annually i.e. the list can be said to be a list, based on merit, and from out of that list, the names were sent, and they were appointed. Thus, it cannot be said, that the appointment was in utter violation of the letter and spirit of Article 14 and 16 of the Constitution of India.

23. Then the difficulty is, that the word used in the appointment order is 'ad-hoc'. However the Constitutional Bench of Hon'ble the Supreme Court, in Rudra Kumar Sain v. Union of India and Ors. reported in : AIR 2000 SC2808 , has drawn a thorough distinction between the terms 'ad-hoc', 'fortuitous' and 'stop gap'. And if the appointment of the petitioners, in the present case, were to be considered on those parameters, the appointment cannot be said to be 'ad-hoc', rather it was nothing except temporary, inasmuch as, in the present case appointment was made to meet the contingency, arising out of the delay in completing the process of regular recruitment to the post, due to any reason, and it was not possible to

keep the post vacant till then, and to meet this contingency, if an appointment is made, then it can appropriately be called as a stop gap arrangement. It has further been held by Hon'ble the Supreme Court in the above case, that in service jurisprudence, a person who possesses the requisite qualification for being appointed to a particular post, and then he is appointed with the approval, and consultation, of the appropriate authority, and continues in the post for a fairly long period, then such an appointment cannot be held to be stopgap, or fortuitous, or purely ad-hoc. With these findings, the order of the High Court, excluding the length of service from seniority, rendered as such, was found to be erroneous. Then a look at the provisions of Rule 27 shows, that it does provide for a contingency, where vacancy in service cannot be filled in immediately, the authority competent to make appointment can appoint temporarily thereto, a person eligible for direct recruitment, in the service. The proviso prohibits continuance of such temporary appointment beyond one year without referring to case to the Commission, where such concurrence is necessary. In the present case, it is not shown, that such occurrence of the Commission was necessary. Thus, the proviso has no applicability. Thus, it cannot be said, that the appointment was made altogether de-hors the rules, rather it was made by competent authority, and can legitimately be said to have been made in the contingency, contemplated by Rule 27, which continued uptill the year 1988, when the regular selection exercise was undertaken, and the petitioners were appointed.

24. Then another aspect of the matter also requires to be considered, viz., that the post of Junior Engineer (Degree holder), which is 100% direct recruitment post, required to be filled under Rule 6 (a), obviously by undertaking an exercise, making available the opportunity, to all persons, equally situate, to compete. As against which, the appointments made in transfer under proviso (4) to Rule 6, are the appointments of the persons, who have never competed on equal footing, with the persons possessing the requisite degree at the time of initial appointment, rather they competed only with the persons being the diploma holders, and did compete for the post of Junior Engineer (diploma holder), and then by virtue of proviso (4) to Rule 6, on their subsequently acquiring qualification, instead of making over again to stand in the queue, to compete with degree holders, in regular selection, they have been provided a back door entry, in the cadre of

Junior Engineers (degree holders), but then in such circumstances, they having not entered in the cadre, after appropriate competition, rather having entered by a backdoor, provided in the rules of course, can by resorting to no contrivance, be allowed to rank senior to the persons, who have initially been appointed in the service as degree holders, earlier than the persons' acquiring degree of Junior Engineer, Civil Engineering, entitling them to have them appointed by transfer under proviso (4) to Rule 6.

25. Thus, considering from any stand point, the considerations of equity, justice, and fair play do demand, that in the peculiar facts and circumstances of the case, the petitioners should rank senior to such Junior Engineer (diploma holders), who have been appointed by transfer under Rule 6(4), after the petitioners' initial appointment in the year 1985, which included many of the persons, who have even acquired the degree of engineering much after the petitioners' initial appointment.

26. In arriving at the above conclusion, we have also taken into account, the fact, that as is clear from the seniority list, Annex. 11, that the possibilities are not ruled out, about the regular selection exercise under Rule 6(a), having not been undertaken deliberately, only in order to provide a march over, to the Junior Engineers (diploma holders), en-block, and thereafter regular selection exercise was undertaken, which otherwise was required to be undertaken earlier, and those persons could be accommodated, only if, the vacancies were still available.

27. Then we may refer to the judgment cited by the learned Counsel for the appellant, being Sanjay K. Sinha and Ors. v. State of Bihar and Ors. reported in : AIR 2004 SC3460 , which holds, that seniority is to be reckoned with reference from the date of substantive appointment, under the relevant rules. It would suffice to observe, that in that case, the appointments were found to have been made at a point of time, when the substantive posts were not even available. It has been noticed in para 13, that in that case, the post to which s'ubstantive appointments were to be made, were not available, and there could be no appointment in the service, and therefore, it was held, that they were not entitled to claim seniority from the date of appointment, but were entitled to seniority from the date of

substantive appointment. Then next case relied upon is, in State of Punjab and Ors. v. Gurdeep Kumar Uppal and Ors. reported in : AIR 2001 SC2691 , wherein it has been held, that where rules provide that seniority should be determined with respect to the date of confirmation, length of service rendered as ad-hoc cannot be taken into consideration. However, it was noticed, that in that case the appointee's seniority was to be determined only by merit, in which he/she was placed by Punjab Public Commission, and therefore, it was held, that only regular service is required to be counted for seniority. Thus, the judgment cited by the learned Counsel for the appellant, do not help the cause of the appellant.

28. Thus considering from any stand point, in our view, the petitioners cannot be denied seniority, from the date of their initial appointment of the year 1985, and to that extent, the provisions of Rule 28, are required to be read down. Consequently, though for different reasons, the writ petition is allowed, as above and the appeal of the State is dismissed. The necessary exercise of assigning appropriate seniority to the writ petitioners, as above, from the respective date of their initial appointment in the year 1985, and giving all consequential benefits, be undertaken with utmost expediency, and in any case within four months from today. In the event of failure the writ petitioners will also be entitled to interest on the amount, which they are found entitled, consequent upon the above exercise @ 12% from the date they became entitled, till the date of actual payment to them. It is further clarified, that in that event the writ petitioners will be free to enforce the order by levying execution, in accordance with the provisions of Order XXI of C.P.C. in the concerned principle civil court of original jurisdiction, who will execute it as a decree of the civil court, passed by that court itself.

29. The parties are left to bear their own costs of this litigation.