



# THE HIGH COURT OF SIKKIM : GANGTOK

(Civil Extraordinary Jurisdiction)

DATED : 25<sup>th</sup> January, 2021

SINGLE BENCH : THE HON'BLE MRS. JUSTICE MEENAKSHI MADAN RAI, JUDGE

WP(C) No.30 of 2016

**Petitioners** : Sushil Pradhan and Others

**versus**

**Respondents** : State of Sikkim and Others

Petitioner under Article 226 of the  
Constitution of India

## Appearance

Mr. A. Moulik, Senior Advocate with Ms. K.D. Bhutia and Mr. Ranjit Prasad, Advocates, for the Petitioners.

Dr. (Mrs.) Doma T. Bhutia and Mr. Sudesh Joshi, Additional Advocate Generals with Mr. S.K. Chettri, Additional Government Advocate and Mr. Sujan Sunwar, Assistant Government Advocate, for Respondents No.1 to 3.

Mr. Karma Thinlay, Senior Advocate for Respondents No.4 to 6.

Mr. J.B. Pradhan, Senior Advocate with Mr. T.R. Barfungpa and Ms. Yangchen Doma Gyatso, Advocates for Respondents No.7 to 17.

## J U D G M E N T

Meenakshi Madan Rai, J.

**1.** The discontentment of the Petitioners arises on account of their appointment and retention on Officiating basis from 08.05.2008 in the posts of Accounts Officers despite alleged existing Substantive vacancies, confirming them in the posts only on 16.03.2013, thus, depriving them of regular Promotion and Service Seniority, as against the Respondents No.7 to 17 directly recruited as Accounts Officers in January/February, 2009, who



have been ranked higher than the Petitioners in the *inter se* Seniority.

**1.(a)** They are further aggrieved that the Respondents No.4, 5 and 6, who had appeared in the same Departmental Examination as them in the year 1997, were promoted on 24.12.1997 as Senior Accountants from the Panel prepared for such Promotion. On 05.02.2005, the same Respondents were further promoted as Accounts Officers on Officiating capacity while the Petitioners No.1, 2 and 8 despite possessing similar requisite qualifying years of Service, were excluded citing lack of vacancy. The said Respondents were promoted on Substantive capacity as Accounts Officers on 21.01.2009 and as Senior Accounts Officers on Officiating basis on 11.02.2011. The Petitioners No.1 and 2 were promoted as Senior Accountants in 1998, the Petitioner No.8 in 1999 and the remaining Petitioners only on 27.06.2000.

**1.(b)** It is the Petitioners' case that they were, in fact, eligible for Promotion as Accounts Officers in 2004-2006 itself, having then put in the requisite years of Service required by the Rules as Senior Accountants. When the Cadre strength of Accounts Officers was 77 (seventy-seven), there were adequate vacancies to accommodate them in Substantive capacity, which would have made them seniors to the 11 (eleven) Direct Recruits who were appointed in January/February, 2009, allegedly from the same Cadre strength of 77 (seventy-seven) and promoted as Officiating Senior Accounts Officers on 11.01.2013 after only four years of Service, as against the required number of six years, mandated by the Rules. In December, 2008, the Cadre strength was increased from 77 (seventy-seven) to 103 (one hundred and three), resulting



in 26 (twenty-six) new vacancies but it was only on 16.03.2013, that the Petitioners were confirmed in the Substantive posts of Accounts Officers. The Petitioners No.1, 2 and 8 along with one M.R. Chettri, were promoted as Senior Accounts Officers on Officiating capacity on 22.05.2014, leaving out the remaining Petitioners who possessed the requisite qualification and merit.

**1.(c)** The Petitioners speculate that had they been promoted as Accounts Officers in 2004-2006, by 2013, they could well have been promoted as Senior Accounts Officers in the 12 (twelve) vacancies in the said posts, but vide a Notification dated 21.06.2013, these 12 (twelve) posts were downgraded to that of Accounts Officers, allegedly for the purpose of appointing Direct Recruits as Accounts Officers. Ultimately, no Direct Recruit came to be appointed to the downgraded posts but were then filled by way of Promotion. Thus, the policy of Promotions adopted by the State-Respondents No.1, 2 and 3 has been prejudicial to the Petitioners. On approaching the Respondent No.3, their prayers were declined, while steps taken by the Respondent No.1 to mitigate their grievances on their request led to their confirmation in March, 2013, by which time, the Respondents No.7 to 17 had already stolen a march against them in terms of Seniority. That, although Petitioners No.2 and 3 have retired during the pendency of the instant Writ Petition, they seek enforcement of their legal rights.

**1.(d)** Hence, the prayers in the Petition, as extracted hereinbelow;

- '(i) *A Rule upon the Government respondents to show-cause as to why the petitioners' seniority in the rank of A.O. and Sr.A.O. shall not be protected and they be declared as seniors to the directly recruited respondent nos.7 to 17 with all service benefits in*



*the rank of A.O. and Sr.A.O. and upon hearing the parties to make the Rule absolute;*

- (ii) A writ or order or direction or declaration that the petitioners are seniors to the respondent nos.7 to 17 i.e. directly recruited A.O. and in the seniority list the petitioners' name be incorporated above those of respondent nos.7 to 17 in the said rank of A.O.;*
- (iii) A writ or order or direction or declaration that the three petitioners namely petitioner nos.1, 2 and 8 be deemed to be promoted as Sr.A.O. on the same date when respondent nos.7 to 17 were promoted as Sr.A.O. on officiating capacity with all service benefits;*
- (iv) A writ or order or direction or declaration that the petitioners who were promoted as A.O. in substantive capacity on 16/3/13 be deemed to have promoted as such on 08/5/2008 when they were promoted as A.O. in officiating capacity without service benefits;*
- (v) A writ or order or direction or declaration that the 12 numbers of posts of Sr.A.O. which were downgraded vide Office Order dated 21/6/13 (Annexure-P9) shall be set aside, quashed and cancelled.*
- (vi) A writ or order or direction or declaration that the petitioners shall be given all benefits of service in the respective rank of A.O. and Sr. A.O. and they be placed senior over the respondent nos.7 to 17 in the seniority list in the said rank of A.O. and Sr.A.O.*
- (vii) A writ or order or direction or declaration that the petitioners shall be given all benefits of service in the respective rank of A.O. and Sr.A.O. and they be placed in the seniority list above those of the respondent nos.7 to 17 in both the ranks.*
- (viii) A writ or order or direction or declaration that the remaining seven petitioners namely petitioner nos.3 to 7, 9 and 10 be also promoted in the rank of Sr.A.O. in substantive capacity before those of respondent nos.7 to 17;*
- (ix) A writ or order or direction or declaration to follow the process of appointment/promotion between the petitioners and the respondent nos.7 to 17 on 50:50 ratio i.e. 50% for inservice candidates i.e. petitioners and 50% for direct recruits i.e. the respondent nos.7 to 17.*
- (ix)(a) A writ or order or direction or declaration declaring that the petitioner nos.2 and 3 even after retirement in the service shall be entitled to get their legal rights pertaining to their incidental reliefs/service benefits which they would have got prior to their retirement in the event the petitioners succeed in the instant writ petition.*

*(x).....*

*(xi).....'*

**2.(i)** While denying and disputing the averments of the Petitioners, the State-Respondents No.1, 2 and 3, in their joint



Counter-Affidavit, sought to explain that on 03.06.2003, the Cadre strength of the Accounts Officers were increased from 75 (seventy-five) to 77 (seventy-seven). On the date of Cadre revision in December, 2008, 31 (thirty-one) persons were occupying the posts of Accounts Officers while 46 (forty-six) posts were vacant. 23 (twenty-three) posts were to be filled by Direct Recruitment through Open Competitive Examination and 23 (twenty-three) by way of Promotion. Therefore, against the 23 (twenty-three) posts for Promotees, in fact, 55 (fifty-five) Officers were promoted and all were senior in rank to the Petitioners. No Direct Recruitment to the post of Accounts Officers in the 23 (twenty-three) vacant posts meant for Direct Recruits, took place during the said period, the last Direct Recruitment having been made in May, 2003. It was only on 16.07.2007 that the Respondent No.3 forwarded a requisition to the Sikkim Public Service Commission (for short "SPSC"), for filling up 11 (eleven) posts of Accounts Officers under the Sikkim Finance and Accounts Service Rules, 1978 (for brevity "Rules of 1978") by Direct Recruitment. Pending this proposal, 17 (seventeen) Senior Accountants were promoted as Accounts Officers in Officiating capacity on 08.05.2008, subject to the conditions that the Officiating Promotion shall not confer any right for regular Promotion and shall not be counted towards Seniority and their regular Promotion shall be made on the recommendation of the SPSC, which were accepted by the Petitioners without demur. The amendment of the Rules of 1978 on 15.12.2008, increased the Cadre strength of Accounts Officers from 77 (seventy-seven) to 103 (one hundred and three). On 08.04.2008, prior to the above amendment, the SPSC invited applications for



filling up of 11 (eleven) posts of Accounts Officers, consequently 11 (eleven) Direct Recruits came to be appointed vide Orders dated 31.01.2009, 02.02.2009 and 04.02.2009. Thus, the appointment of Respondents No.7 to 17 was against the Direct Recruitment Quota of 50 per cent of the Rules of 1978 and having been appointed in Substantive capacity, were made senior to the Petitioners who were promoted on Officiating capacity, as 20 (twenty) Officers senior to them were already working in Officiating capacity. That, Rule 24 Sub Clause 5 of the Sikkim Finance Accounts Service (Amendment) Rules, 1986 (hereinafter "Rules of 1986") provides for Rota Quota but the Government had considered the Promotion of Senior Accountants to the post of Accounts Officers from December, 2003 to June, 2007, duly utilizing Direct Recruitment Quota either on Officiating basis and then in Substantive capacity, or against Substantive capacity as and when vacancy existed, or against anticipated vacancies.

**(ii)** Countering the allegation of the Petitioners being made junior to Respondents No.4, 5 and 6, it was explained that they were placed at Serial Nos.1, 2 and 3 amongst 19 (nineteen) candidates in the Departmental Examination held for Promotion which was subject to availability of vacancies, which occurred on 24.12.1997. The validity of the Panel was extended up to 31.12.1999 and the Petitioners No.1, 2 and 3 were promoted as Senior Accountants on 31.12.1998. Similarly, one D.R. Pradhan and the Petitioner No.8, were promoted on 22.05.1999. On 14.06.1999, the Petitioners No.3, 4, 6, 7 and 9 submitted a Petition to the Government seeking extension of the Panel till finalization of anticipated vacancies of Senior Accountants. On due



consideration by the Government, these persons also came to be promoted as Senior Accountants on 27.06.2000. That, the Petition deserves a dismissal on grounds of delay and laches, as the Orders of the Petitioners pertaining to Officiating capacity was issued in 2008 while the Writ Petition was filed only in 2016.

**3.** The Respondents No.4, 5 and 6 filed their respective Counter-Affidavits which, in sum and substance, were similar to each other and substantially reiterated the facts as set out in the Counter-Affidavit of the Respondents No.1, 2 and 3.

**4.** Respondents No.7 to 17, while denying and disputing the allegations made in the Writ Petition, reiterated the position of Quota and Rota as spelt out by the State-Respondents No.1, 2 and 3 and averred that the prayers in the Petition are misconceived and liable to be rejected by this Court as also the Writ Petition.

**5.** In Rejoinder, the Petitioners elucidated that by the time the Cadre was revised in the month of December 2008, around 14 (fourteen) people had retired/expired which has not been addressed by the State-Respondents as they were aware that the Petitioners could well have been accommodated in the said 14 (fourteen) vacancies. The names of the 14 (fourteen) persons who had retired/expired between 2003 to December 2008, were also detailed in the Rejoinder.

**6.(i)** Advancing his arguments for the Petitioners, Learned Senior Counsel Mr. A. Moulik, while reiterating the averments made in the Writ Petition and the Rejoinder, contended that the State-Respondents have attempted to prove that the Promotion of the Petitioners as Accounts Officers in Officiating capacity was merely a stop gap arrangement and a fortuitous appointment as such, their



past Services could not be counted for the purposes of rendering them senior to the private Respondents. Relying on the decision in ***D.R. Nim vs. Union of India*<sup>1</sup>**, it was canvassed that the Petitioners have worked in the post of Accounts Officers for several years and have never been reverted, hence they are entitled to Seniority from 08.05.2008, the date of their Officiating Orders in the posts of Accounts Officers. It was further contended that the Hon'ble Supreme Court has held in ***Rudra Kumar Sain and Others vs. Union of India and Others*<sup>2</sup>** that if an appointment is made to meet a particular contingency and for a specific period, then such an appointment is *ad hoc* or stop gap. On the other hand, if the post is created to meet a sudden and temporary situation then the appointment is fortuitous but these criterion are not attracted in the Order of the Petitioners, dated 08.05.2008. Drawing support from the decision in ***O.P. Singla and Another vs. Union of India and Others*<sup>3</sup>**, Learned Senior Counsel next contended that as per the said ratio, if a temporary employee works for five to twelve years continuously and the Appointment Order reads as "*Until further orders*" then such appointment cannot be termed as *ad hoc* or fortuitous or stop gap, so also is the case of the Petitioners. That, the two conditions laid out in the Officiating Promotion Order dated 08.05.2008 were mere requirements. The Petitioners had indeed completed 6 (six) years of Service as Senior Accountants as required by the relevant Rules, making them eligible for Promotion as Accounts Officers in 2004/2006 itself. However, the Petitioners continued as Officiating Accounts Officers for years together due to

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<sup>1</sup> AIR 1967 SC 1301

<sup>2</sup> (2000) 8 SCC 25

<sup>3</sup> (1984) 4 SCC 450





inaction and negligence of the State-Respondents, thus the Petitioners have the right to claim Seniority over the private Respondents. On this count, reliance was placed on ***Baleshwar Dass and Others vs. State of U.P. and Others***<sup>4</sup>.

**(ii)** Canvassing the contention that there were sufficient vacancies in the Substantive posts in which the Petitioners could have been promoted on 08.05.2008 itself, Learned Senior Counsel pointed out that there were 10 (ten) vacancies in the rank of Accounts Officer when the Petitioners were promoted on Officiating basis on 08.05.2008, as the State-Respondents have claimed at Paragraph "5(d)" of their Counter-Affidavit that there were 46 (forty-six) vacancies as on 01.07.2003 in the rank of Accounts Officer to be filled up, out of which 9 (nine) posts were filled up on 19.12.2003, another 19 (nineteen) posts were filled up on 20.02.2004 and 8 (eight) vacancies were filled up on 08.06.2006. Thus, up to 08.05.2008, only 36 (thirty-six) vacancies out of 46 (forty-six) were filled up in the Substantive capacity and 10 (ten) vacancies were yet to be filled. Hence, it was erroneous to state that when the 10 (ten) Petitioners were promoted as Accounts Officers (Officiating), there was no vacancy.

**(iii)** It was further contended that as on 03.06.2003, the Cadre Strength of Accounts Officers was 77 (seventy-seven) for which reliance was placed on Annexure R-2. As on 01.07.2003, the vacancies to be filled up out of 77 (seventy-seven) posts was 46 (forty-six) for which, attention of this Court was invited to Annexure R-3. That, vide Annexure R-11 dated 15.12.2008, the Cadre Strength of Accounts Officers was increased from 77

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<sup>4</sup> (1980) 4 SCC 226



(seventy-seven) to 103 (one hundred and three) thereby creating 26 (twenty-six) new posts. Hence, as on the said date, total vacancies amounted to 72 (seventy-two) by adding the 46 (forty-six) existing vacancies and 26 (twenty-six) newly created posts. That, 9 (nine) Senior Accountants were promoted as Accounts Officers on Substantive basis of which, 4 (four) retired/died before the Petitioners were promoted on 08.05.2008. Thereafter on 20.02.2004, 19 (nineteen) Senior Accountants were promoted as Accounts Officers in Substantive capacity out of which, 8 (eight) persons retired. Vide Order dated 23.02.2004, 22 (twenty-two) persons were promoted as Accounts Officers who were later absorbed in Substantive posts vide different Orders through the years 2006, 2008 and 2009. Thus, out of the 72 (seventy-two) vacancies existing till 15.12.2008, 56 (fifty-six) vacancies were filled by 21.01.2009 and 16 (sixteen) vacancies were yet to be filled. That, the recruitment of Respondents No.7 to 17 was against non-existent vacancies. That, the 20 (twenty) senior most Accounts Officers had to be promoted out of the 26 (twenty-six) new vacancies of which, 6 (six) vacancies then remained in hand, in which Respondents No.7 to 17 could not be accommodated besides, the State-Respondents have not addressed the death or retirement of 14 (fourteen) Accounts Officers up to the end of 2008, thereby creating vacancies by 2008 in addition to the stated 72 (seventy-two) vacancies.

**(iv)** That, the delay in approaching the Court is on account of the absence of any Seniority List and that there is still no Confirmation List as on date. On the point of delay, reliance was placed on ***Ram Nath Sao alias Ram Nath Sahu and Others vs.***



**Gobardhan Sao and Others**<sup>5</sup>. Relying on proposition "(B)" of Paragraph "47" of the ratio in **Direct Recruit Class II Engineering Officers' Association vs. State of Maharashtra and Others**<sup>6</sup>, Learned Senior Counsel for the Petitioners submitted that in terms thereof, in the instant matter, even assuming that the initial appointment was not made by following the procedure prescribed, the Petitioners continued in Service uninterruptedly till regularization in accordance with the Rules, therefore the period of Officiating Service ought to be counted towards Seniority vis-à-vis the Respondents No.7 to 17. The Petitioners could have been confirmed in 2006 and 2008 in the existing vacancies. The Petitioners have been deprived of Promotion in their right time and have been kept on Officiating basis when they are entitled to Seniority over the Respondents No.7 to 17. Garnering strength from the ratio of **Narender Chadha vs. Union of India**<sup>7</sup>, it was stated that the Petitioners' case is comparable to the said ratio as the Petitioners were qualified to fill the posts. To further reinforce his submissions, reliance was placed on the decisions in **S.B. Patwardhan and Another vs. State of Maharashtra and Others**<sup>8</sup>, **Pran Krishna Goswami and Others vs. State of West Bengal and Others**<sup>9</sup>, **G.K. Dudani and Others vs. S.D. Sharma and Others**<sup>10</sup>, **G.C. Gupta and Others vs. N.K. Pandey and Others**<sup>11</sup>, **M.V. Krishna Rao and Others vs. Union of India and Others**<sup>12</sup> and **State of W.B. and Others vs. Aghore Nath Dey and Others**<sup>13</sup>.

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<sup>5</sup> AIR 2002 SC 1201

<sup>6</sup> (1990) 2 SCC 715

<sup>7</sup> (1986) 2 SCC 157

<sup>8</sup> (1977) 3 SCC 399

<sup>9</sup> AIR 1985 SC 1605

<sup>10</sup> AIR 1986 SC 1455

<sup>11</sup> (1988) 1 SCC 316

<sup>12</sup> (1994) Supp 3 SCC 553

<sup>13</sup> (1993) 3 SCC 371



7. Learned Additional Advocate General, Dr. (Mrs.) Doma T. Bhutia, for the State-Respondents No.1 to 3, *per contra*, contended that once the Petitioners have accepted the Officiating Promotion along with the conditions therein without demur, it tantamounts to their acceptance of the conditions and hence, they have waived their rights pertaining to Seniority as they failed to raise any issue on this point, at the relevant time. Towards this point, reliance was placed on ***P.S. Gopinathan vs. State of Kerala and Others***<sup>14</sup>. Drawing strength from the ratio in ***Rajen Kumar Chettri vs. State of Sikkim and Others***<sup>15</sup>, it was contended that the Petition has been filed belatedly and for this reason, cannot be sustained. That, there were no vacancies in the Quota for Promotees when the Petitioners were promoted on Officiating basis and their claim for Seniority is unsubstantiated and stale. On this count, reliance was placed on ***B.S. Sheshagiri Setty and Others vs. State of Karnataka and Others***<sup>16</sup>. That, Seniority can be reckoned only from the date that the Petitioners entered the Service in Substantive posts and not retrospectively. Contending that the Promotees cannot be accommodated in the Quota meant for the Direct Recruits, thus resulting in the Officiating Promotion of the Petitioners, reliance was placed on ***Nani Sha and Others vs. State of Arunachal Pradesh and Others***<sup>17</sup>. That, the Petition is hit by laches and delay, this aspect of the argument was buttressed by ***Union of India and Others vs. M.K. Sarkar***<sup>18</sup>. Relying on the facts and circumstances as detailed in the

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<sup>14</sup> (2008) 7 SCC 70

<sup>15</sup> 2019 SCC OnLine Sikk 202

<sup>16</sup> (2016) 2 SCC 123

<sup>17</sup> (2007) 15 SCC 406

<sup>18</sup> (2010) 2 SCC 59



Counter-Affidavit, it was contended that the Petition deserves a dismissal.

**8.** Learned Senior Advocate Mr. Karma Thinlay, for Respondents No.4, 5 and 6 reiterated and relied on the averments made in their Return and submitted that they were promoted as Accounts Officers on Officiating capacity in the year 2005 and were confirmed in the year 2009. That, should the Petitioners be granted reliefs in terms of Seniority from 2008, the cascading effect thereon would be to the benefit of the Respondents No.4, 5 and 6, who would also then be eligible for Seniority from the year 2005. That, 46 (forty-six) vacant posts of Accounts Officers existed in 2003 and the Officiating Order of the Respondents No.4, 5 and 6 was issued when the 46 (forty-six) posts were vacant. In fact, out of the 77 (seventy-seven) posts of Accounts Officers at the relevant time, 31 (thirty-one) were filled and against the 46 (forty-six) vacancies, Respondents No.4, 5 and 6 had been appointed on Officiating basis on 05.02.2005 and confirmed on 21.01.2009. Respondents No.4, 5 and 6 are therefore senior to the Petitioners. That, the Petition being devoid of merit ought to be dismissed.

**9.(i)** Learned Senior Advocate Mr. J.B. Pradhan, on behalf of Respondents No.7 to 17, building his arguments on the edifice of Rule 24 (5) of the Rules of 1986, pointed out that the said Rule provides that the relative Seniority *inter se* of persons recruited to the Service through Competitive Examination and by Promotion, shall be determined according to the rotation of vacancies between Direct Recruits and Promotees which shall be based on the Quotas of vacancies reserved for Direct Recruitment and Promotion respectively. That, the said Rule also provides in the "*Explanation*"



that "a Roster shall be maintained based on the reservation for Direct Recruitment and Promotion in the Rules, which shall be as follows; (1) Promotion (2) Direct Recruitment (3) Promotion (4) Direct Recruitment and so on. Appointment shall be made in accordance with this Roster and Seniority determined accordingly." Therefore, the Petitioners cannot be promoted in the Quota of the Direct Recruits, in excess to their own Quota. That, this position is fortified by Schedule II to the same Rules, which provides for 50 per cent by Direct Recruitment through Open Competitive Examination and 50 per cent by Promotion through Limited Departmental Competitive Examination/Deputation/Re-employment. Attention was also invited to Rules 6 and 16 of the Rules *supra*. That, as per the Office Note Sheet dated 30.06.2003, out of 77 (seventy-seven) numbers of Posts of Accounts Officers in the Junior Grade in the year 2003, 46 (forty-six) Posts were vacant. In terms of Schedule II of the Rules of 1986, 46 (forty-six) Posts were to be equally divided between Promotees and Direct Recruits, however, between the years 2003 up to 2008, no appointments by way of Direct Recruitment were made, whereas the 23 (twenty-three) posts for Promotees was duly filled up and exceeded as well. Learned Senior Counsel contended that when the Petitioners were promoted on Officiating basis on 08.05.2008, there was no Substantive posts neither were the Rules relaxed then by any executive Order. It was only on 19.05.2012 that a Notification pertaining to relaxation of Rules was published. The State-Respondent No.3 sent the Letter of recommendation for appointment of the Petitioners only on 13.09.2012 to the SPSC, upon which the Departmental Promotion Committee of the SPSC convened on 24.01.2013 and accepted the



recommendations. The Petitioners were then promoted to the Substantive posts of Accounts Officers only after 24.01.2013, whereas the Respondents No.7 to 17 were appointed in Substantive posts between 31.01.2009 to 04.02.2009 thereby rendering them senior to the Petitioners in terms of Rule 24 *supra*. Inviting the attention of this Court to the ratio in ***State of W.B. and Others vs. Aghore Nath Dey and Others*** (*supra*) wherein the dispute arose as a result of Promotions being made in excess of the Promotees Quota in the case of the surplus Promotees, it was contended that even if it is to be presumed that the Rules were relaxed, the relaxation can only be effective from the date of issuance of Notification by the Government in this context, i.e. in the case of the Petitioners from 19.05.2012, if not from 16.03.2013 which is the correct approach and would still render them subordinate to Respondents No.7 to 17.

(ii) That, the amendments to the Rules of 1978, notified on 25.02.1987, are relevant which provides at Rule 6 that competitive examination was to be held by the Commission and the number of vacancies to be filled up by Promotion, Deputation or Re-employment in one year, would not exceed 50 per cent of the total number of vacancies to be filled in that year. Pointing to the alleged incongruities in the grounds raised by the Petitioners, more especially in Grounds No.1, 2, 5, 8 and 11, Learned Senior Counsel contended that the Petitioners have approached the Court belatedly as they seek to challenge the appointment of Respondents No.7 to 17 after a period of 8 (eight) years of their appointment as Accounts Officers and that of Respondents No.4 to 6 after a period of 19 (nineteen) years from the date they were



appointed as Senior Accountants. That apart, it was a rather strange proposition that the Petitioners were claiming Service Seniority from the date of their Officiating Service despite the clear conditions specified in their Orders. These Orders were unassailed before the concerned authorities thereby barring the Petition by the principles of Waiver, Estoppel and Acquiescence, to buttress this submission reliance was placed on ***P.S. Gopinathan (supra)*** and ***M.P. Palanisamy and Others vs. A. Krishnan and Others***<sup>19</sup>. Besides, the Petitioners cannot pick and choose parts of the Order favourable to them and reject the others, as held in ***M.P. Palanisamy (supra)***. That, the Rota Quota Rule was not broken but procedure prescribed therein was not followed, thus to utilize the Rota Quota Rule, the Notification pertaining to relaxation of Rules was issued on 19.05.2012 to enable regularization of the appointment of the Petitioners. That, in fact, the Rota Quota Rule breaks down only when efforts are made by the Government through advertisement inviting candidates for Direct Recruitment but fails to get candidates making such appointments an impossibility. It is then that the Government has to derive a method to deviate and see how the posts can be filled up. The Government is thus under an obligation to establish by documentary evidence that there were no suitable candidates for appointment by Direct Recruitment. Paragraph "5 (e)" of the State-Respondents' Counter-Affidavit indicates that no such effort was made. On this count, succour was drawn from the ratio in ***Suraj Parkash Gupta and Others vs. State of J&K and Others***<sup>20</sup> and ***N.K. Chauhan and Others vs. State of Gujarat and***

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<sup>19</sup> (2009) 6 SCC 428

<sup>20</sup> (2000) 7 SCC 561





**Others**<sup>21</sup>. Further, support was garnered from the ratio in **Union of India vs. Dharam Pal and Others**<sup>22</sup> wherein it was observed that where the initial appointment is only *ad hoc* and not according to Rules and made as a stop gap arrangement, the period of Officiation in such post cannot be taken into account for considering the Seniority. That, even assuming that there were vacancies for the purposes of Promotion, the Petitioners were to have adhered to the procedure of appearing for Departmental Examinations and thereafter obtaining the recommendation of the SPSC, this was not done. Inviting the attention of this Court to **Keshav Chandra Joshi and Others vs. Union of India and Others**<sup>23</sup> and **Samdup Tshering Bhutia vs. State of Sikkim and Others**<sup>24</sup>, it was canvassed that the Officiating Promotion of the Petitioners was fortuitous appointments and the Direct Recruit Quota on which they were promoted, has to invariably revert back to the Direct Recruits for the next appointments. That, the Petitioners have themselves accepted by averments made in their Rejoinder that other Accounts Officers similarly circumstanced as them, were promoted in Substantive Capacity in the vacancies meant for both Promotees and Direct Recruits. Relying on the ratio of **Direct Recruit Class II Engineering Officers' Association (supra)**, Learned Senior Counsel advanced the contention that the case of the Petitioners falls under the corollary of Proposition "(A)" in Paragraph "47" therein and not under proposition "(B)", as advanced by Learned Senior Counsel for the Petitioners. That, in view of the grounds

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<sup>21</sup> (1977) 1 SCC 308

<sup>22</sup> (2009) 4 SCC 170

<sup>23</sup> (1992) Supp 1 SCC 272

<sup>24</sup> 2017 SCC OnLine Sikk 153



canvassed, the Petition being devoid of merit deserves to be dismissed.

**10.** In rebuttal, Learned Senior Counsel for the Petitioners, while agreeing with Learned Senior Counsel for Respondents No.7 to 17 that the Rota Quota Rule had not broken down, submitted that initially due to filling up of the posts of Direct Recruits by the Promotees, there was a breakdown of the Rota Quota Rule but these appointments were subsequently regularized restoring the Rota Quota. That, no condition in the Officiating Order debarred the Petitioners from claiming Seniority from the date of Promotion in their Officiating capacity once they were regularized in the Substantive posts. That, the settled position of law is as laid down in ***Direct Recruit Class II Engineering Officers' Association (supra)*** by the Constitution Bench and this is applicable to the Petitioners' case. That, the ratio in ***Samdup Tshering Bhutia (supra)*** relied on by the Respondents No.7 to 17, is not relevant in the instant matter as the Court was not informed of the correct factual position and its conclusion for arriving at the finding that the appointment was fortuitous, was sans reasons. The question of the Petitioners accepting the Officiating Promotion without demur does not arise, they being mere employees and the State-Respondents were required to look after their welfare. That, the case of ***M.P. Palanisamy (supra)*** relied on by the Respondents No.7 to 17, is distinguishable from the instant facts and not applicable to the Petitioners' case as also the ratio in ***P.S. Gopinathan (supra)*** and hence the Petitioners are deserving of the reliefs prayed for.

**11.** The rival submissions of Learned Counsel for the parties were heard *in extenso* by me and given due consideration.



The decisions relied on by Learned Counsel for the parties have also been perused as also the pleadings and all documents on record.

**12.** The only question that falls for consideration before this Court is;

Whether the fitment of Seniority determined by the Department vis-à-vis the Petitioners and the Respondents No.7 to 17, was in accordance with the Rules?

**13.(i)** To assess with clarity the grievances of the Petitioners, it is essential to briefly refer to the Rules which govern them. The Sikkim Subordinate Accounts Service Rules, 1984 was notified on 28.01.1985 and governs the posts of Accounts Clerk, Junior Accountant, Accountant and Senior Accountant. The Petitioners were initially appointed in Service under these Rules. The Rules of 1978, notified on 30.04.1979, governs the appointment of Accounts Officers and Senior Accounts Officers consisting of three Grades i.e. Junior, Senior and Selection Grades. The said Rules comprised of thirteen Clauses including Rule 13 which is the interpretation Clause. Rule 3 provided *inter alia* for "Constitution of Service", Rule 4 was for "Appointments and Postings," Rule 5 detailed "Initial Constitution of the Service," Rule 6 laid down the "Method of Recruitment to the Service," Rule 7 was concerned with "Qualification for Appointment," Rule 8 dealt with "Constitution of Selection Committees." The Committee was to comprise of the Chairman, Sikkim Public Service Commission or his nominee, the Chief Secretary to the Government, the Finance Secretary and the Establishment Secretary to the Government and was entrusted with the task of grading persons mentioned in Rule 5, for



absorption in the various Grades of the Service and under Sub Rule (4) of Rule 6. The Committee was also to make recommendations for Direct Recruitments under Clause (i) of Rule 6 or Sub Rule (4) of Rule 6. Promotion of persons mentioned in Rule 6 (1) (iv) was also vested on the Committee. The recommendations of the Committee, as finally approved by the Commission, was to be forwarded to the Government along with all other papers sent to the Selection Committee. Rule 9 elucidated the "*Training, Probation and Confirmation*" of persons appointed, while Rule 10 laid the details of how "*Seniority*" was to be computed and provided that the persons deemed to have been appointed to the Service under Rule 5 was to rank as senior to all those who may be appointed under Rule 6 and that, "*The inter-se seniority of direct recruits and promotees shall be in the order in which their names appear in the merit/select list. As for seniority between promotees and direct recruits, persons promoted in one year shall rank senior to persons recruited direct in that year.*" Schedule I to the Rules detailed the strength and composition and designation of posts. It indicated 29 (twenty-nine) posts then in the Junior Grade i.e. that of Accounts Officers.

**(ii)** The Rules came to be amended several times in the interregnum and twice in 1986, one vide Notification No.15/Fin. dated 11.03.1986 and vide Notification No.20/Fin. dated 25.02.1987. Vide the amendment on 25.02.1987, the sanctioned strength of Accounts Officers was shown to be 43 (forty-three) in Schedule I. Rules 6 and 16 of the amended Rules are extracted hereinbelow;

**"Amendment of rules**  
6, 7, 8, 9, 10, 11, 12, 13.

*In the said rules, for rules 6, 7, 8, 9, 10, 11, 12 and 13, following rules shall be substituted, namely:-*



- "6. Method of Recruitment to the Service - (1) Subject to the provision of rules 5, recruitment to the Service shall, after the appointed day, be made by the following methods, namely:-
- (i) Competitive Examination to be held by the Commission.
  - (ii) Obtaining the services of any employee of the Central Government or other State Governments.
  - (iii) **Promotion from among persons holding substantive appointment in Grade I mentioned in Schedule II to the Sikkim Sub-ordinate Accounts Service Rules, 1984.**
  - (iv) Re-employment, after retirement of any person, who in the opinion of the Government is suitable for such re-employment.
2. (i) **Government shall ordinarily decide in each year the number of vacancies in the Service to be filled in that year by direct recruitment and also the number to be filled by promotion or by any other method mentioned in sub-rule (1).**
- (ii) The number of vacancies to be filled up by promotion, deputation or re-employment in any one year shall not exceed 50 per cent of the total number of vacancies to be filled in that year."

.....  
**16. RECRUITMENT BY PROMOTION**  
.....

- (1) .....
- (2) **The Government shall, every year for the purpose of promotion to the Service under Clause (iii) of sub-rule (1) of rule 6, prepare a list of names of persons in order of seniority who have, on the first day of that year, completed not less than six years of continuous service under the Government in a post included in Grade I mentioned in the Schedule II appended to the Sikkim Subordinate Accounts Service Rules, 1984.**
- (3) **The Government shall forward to the Commission the list of persons referred to in sub-rule (2) of this rule together with their character rolls and service records for the preceding five years indicating the anticipated number of vacancies to be filled by promotion in course of the period of 12 months commencing from the date of preparation of the list.**
- (4) **The Commission after satisfying themselves that the records and information complete in all respects have been received, shall convene a meeting of the Promotion Committee. The Committee shall prepare a final list of persons who are found to be suitable for promotion to the Service on an overall relative assessment of their service records and interview.**
- (5) The number of persons to be included in the list shall not exceed twice the number of vacancies to be filled by promotion.
- (6) **The Commission shall forward the final list prepared under sub-rule (4) of this rule to the Government along with all the character rolls and service records received from the Government.**



- (7) *The list shall ordinarily be in force for a period of twelve months from the date of the recommendation of the Commission.*
- (8) *Appointment of persons included in the list to the service shall be made by the Government in the order in which the names of persons appear in the list.*
- (9) *It shall not be ordinarily necessary to consult the Commission before each appointment is made unless during the period of 12 months from the date of recommendation of the Commission there occurs deterioration in the work of the person which in the opinion of the Government, is such as to render him unsuitable for appointment to the service."*

(emphasis supplied)

**(iii)** Schedule II referred to in Rule 16 (2) *supra* details the "Designation of Posts," "Method of Recruitment" and "Eligibility Conditions" of Selection Grade I, Selection Grade II, Senior Grade and Junior Grade. So far as the Junior Grade is concerned, it includes Accounts Officer/Accounts-cum-Administrative Officer/Audit Officer and the "Method of Recruitment" is shown to be 50 per cent by Direct Recruitment through Open Competitive Examination and 50 per cent by Promotion through a Limited Departmental Competitive Examination/Deputation/Re-employment. The "Eligibility Conditions" for Promotion is reflected as follows,

**"SCHEDULE – II**

.....  
**By Promotion:** *Persons holding posts in Grade-I of the Sikkim Subordinate Accounts Service with at least 6 years of service in the grade. The promotion shall be made on the basis of seniority-cum-merit."*

(emphasis supplied)

**14.** From a reading of the above Rules, it emerges that the posts of Accounts Officers were to be filled by way of Promotion and Direct Recruitment in the ratio of 50:50 each. The Petitioners were qualified as per the Rules in 2004-2006 as well as on 08.05.2008, to be considered for Promotion as Accounts Officers. The Rules extracted *supra* required the State-Respondents to decide in each year, the number of vacancies in the Service to be



filled in that year by Direct Recruitment and Promotion and to take steps after assessing the vacancy, *viz.*, including recommending the names of the Service holders for Promotion to Substantive Posts. The State-Respondents failed to comply with this requirement of the Rules nor were Examinations for either criteria held, as mandated. From the records available before this Court, it is clear that the procedure prescribed for recruitment was not adhered to by the State-Respondents which has, in fact, led to the heartburning amongst the Petitioners and the Direct Recruits concerning their *inter se* Seniority. Besides failing to take steps as enunciated hereinabove, the Government has not prepared a List of names of persons in order of Seniority (as per Rules) who have, on the first day of that year, completed not less than 6 (six) years of continuous Service as Senior Accountants nor was the List of such persons forwarded to the Commission along with the relevant documents. The anticipated number of vacancies to be filled by Promotion in the course of the period of 12 (twelve) months, commencing from the date of preparation of the List was not indicated as well. In the absence of necessary steps by the Government, it is evident that the Commission was not in a position to take consequential steps and convene a meeting of the Promotion Committee who had been vested with the responsibility of preparing a final List of persons found to be suitable for Promotion to the higher Service on an overall relative assessment of their Service Records and interview.

**15.(i)** The State-Respondents have failed to enlighten this Court on the number of posts filled vide the two channels till 2009. Clearly, the Rules have been ignored and sidelined by the



Government and appointments to the posts of Accounts Officers made by Promotion only. By their own admission, Direct Recruitment had been kept in abeyance from December, 2003 to 2007 and the post of Accounts Officer in the Junior Grade was filled only by Promotion. While considering the conduct of the State-Respondents, it is apposite to refer to the observations made by the Hon'ble Supreme Court in **Keshav Chandra Joshi (supra)**, wherein the Hon'ble Supreme Court while faced with, once again the proposition of reckoning *inter se* Seniority, was alive to the lackadaisical attitude of the Government and *inter alia* held as follows;

"22. In a democracy governed by rule of law, it is necessary for the appropriate governance of the country that the political executive should have the support of an efficient bureaucracy. Our Constitution enjoins upon the executive and charges the legislature to lay down the policy of administration in the light of the directive principles. The executive should implement them to establish the contemplated egalitarian social order envisaged in the preamble of the Constitution.

.....  
24. It is notorious that confirmation of an employee in a substantive post would take place long years after the retirement. An employee is entitled to be considered for promotion on regular basis to a higher post if he/she is an approved probationer in the substantive lower post. An officer appointed by promotion in accordance with Rules and within quota and on declaration of probation is entitled to reckon his seniority from the date of promotion and the entire length of service, though initially temporary, shall be counted for seniority. Ad hoc or fortuitous appointments on a temporary or stop gap basis cannot be taken into account for the purpose of seniority, even if the appointee was subsequently qualified to hold the post on a regular basis. To give benefit of such service would be contrary to equality enshrined in Article 14 read with Article 16(1) of the Constitution as unequals would be treated as equals.  
....."

A similar attitude of the concerned Departments as indicated above, are reflected even in the facts and circumstances of the instant case by the nonchalant circumvention of the Rules by the State-Respondents. Besides, sloth takes away a man's welfare.





(ii) Rule 24 of the amended Rules of 1986 provides for "Seniority" and reads *inter alia* as follows;

**"24. SENIORITY:**

(1) The persons deemed to have been appointed to the Service under rule 5 shall rank as senior to all those who may be appointed under rule 6:

Provided that.....

(2) .....

(3) The seniority inter-se of the persons recruited to the Service through competitive examination shall be in the same order in which their names appear in the merit list forwarded by the Commission under sub-rule (4) of rule 7.

**(4) The seniority inter-se of the persons appointed to the Service by promotion shall be in the same order in which their names appear in the list prepared under sub-rule (4) of rule 16 and forwarded by the Commission to the Government.**

**(5) The relative seniority inter-se of persons recruited to the Service through competitive examination and appointed to the Service by promotion shall be determined according to the rotation of vacancies between direct recruits and promotees which shall be based on the quotas of vacancies reserved for direct recruitment and promotion respectively in these rules.**

**Explanation:- A roster shall be maintained based on the reservation for direct recruitment and promotion in these rules. The roster shall run as follows:-**

(1) Promotion, (2) Direct Recruitment, (3) Promotion, (4) Direct Recruitment and so on.

Appointment shall be made in accordance with this roster and seniority determined accordingly.

(6) Notwithstanding anything contained in rules 5 and 6, the seniority of persons mentioned in the third proviso to rule 5 and in clause (ii) of sub-rule (1) of rule 6, who are absorbed in the Service shall be such as may be determined by Government in each case."

(emphasis supplied)

(iii) These Rules, for the first time provided for a Roster System, for recruitment. Schedule II to the Rules elucidates that the Junior Grade comprising of Accounts Officers, is to be filled 50 per cent by Direct Recruitment through Open Competitive Examination and 50 per cent by Promotion through Limited Departmental Competitive Examination/Deputation/Re-employment. At this juncture, it is worth noticing that the State-Respondents have not explained as to how the rotation of the Quota is fixed, is it to be construed as the Promotees getting the first, third and fifth of the vacancies that occur or was it by way of



entitlement of half the vacancies? The facts placed before this Court by the State-Respondents in this context, are opaque and do not reflect the method adopted by them. There is an absence of data to indicate the Quota Rota adopted up to May, 2003, when the last Direct Recruitment to the post of Accounts Officer allegedly took place.

**(iv)** In 1988, the Rules were further amended and notified on 11.08.1988. Serial number "2" reads as follows;

**"2. Rules 6 Method of recruitment to the Service:**

*In clause (iii) of sub-rule (i) of this rule add the following words at the end of the sentence:- "to be held by the Commission."*

**(emphasis supplied)**

"Schedule I" of the existing Schedule was substituted by a new Schedule. As already pointed out, the Commission's hands were evidently tied in the absence of necessary and timely steps by the Government in terms of Rules 6 and 16 *supra*. By a Notification dated 29.06.1996, amending the Rules further, the post of Accounts Officer was indicated to be 73 (seventy-three). On 26.08.1998, another amendment took place which stated *inter alia* as follows;

**"Amendment of Schedule II.**

*2. In the Sikkim Finance and Accounts Service Rules, 1978, in Schedule-II, for the post of Accounts Officer/ Assistant Director/Accounts-cum-Administrative Officer/Audit Officer, under the heading method of recruitment, for the figures and words "66% by direct recruitment and 34% by promotion", the figures and words "50% by direct recruitment and "50% by promotion" shall be substituted respectively."*

**(v)** Indeed, this amendment is superfluous, as the amended Rules of 1986, notified on 25.02.1985, at Schedule II, already indicated 50 per cent by Promotion and 50 percent by Direct Recruitment, besides, a careful scrutiny of the Rules placed



before this Court, nowhere indicates "66 per cent by Direct Recruitment and 34 per cent by Promotion." On 05.09.2001, vide a Notification of the same date, further amendment was made to the Rules which provided that ".....in Schedule II, in serial No.4, under the column eligibility conditions for the figure '8; the figure '6' shall be substituted" which meant that Senior Accountants, would be eligible for Promotion to the post of Accounts Officers on putting in 6 (six) years of qualifying service instead of 8 (eight) years, as previously required. The Petitioners thus were in the zone of consideration for Promotion having indubitably completed 6 (six) years of Service as Senior Accountants by 2004/2006. On 03.06.2003, another amendment came to be made in the Rules vide which the post of Accounts Officer was increased to 77 (seventy-seven). However, as already pointed out, the State-Respondents were loath to take timely steps although the Rules made adequate provisions.

**16.(i)** Notably, vide Notification dated 09.12.2003, the Rules of 1978 were further amended whereby "Rule 28," a provision for relaxation of the Rules, was inserted. The said Rule reads as follows;

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

**(ii)** The Rules of 1978 (unamended) contained no powers of relaxation save to the extent that in Rule 9, the Governor was given the prerogative of extending the period of probation of the Direct Recruits and the Promotees at his discretion, for any particular case or cases and was also empowered to exempt for reasons to be recorded from passing the Examination. On the point of relaxation and *inter se* Seniority, we may relevantly refer to the



decision in ***G.S. Lamba and Others vs. Union of India and Others***<sup>25</sup> decided by a two Judge Bench of the Hon'ble Supreme Court wherein the relevant Rules provided for recruitment to the Indian Foreign Service from three different Services viz., (i) Direct Recruitment by Competitive Examination, (ii) Substantive appointment of persons included in the select list promoted on the basis of a Limited Competitive Examination and (iii) Promotion on the basis of Seniority. One of the Rules provided that a recruitment should be made from the above sources on the following basis: (i) One-sixth of the Substantive vacancies to be filled in by Direct Recruitment, (ii) 33 1/3 per cent of the remaining five-sixth of the vacancies to be filled on the basis of results of Limited Competitive Examinations, and (iii) the remaining vacancies to be filled in by Promotion on the basis of Seniority. The Hon'ble Court found that the Direct Recruitment had not been made for years, Limited Competitive Examination had also not been held for years and Promotions from the select list had been made in excess of the Quota. Thus, there was enormous departure from the Rules of recruitment in making appointments over several years. The Hon'ble Court was of the view that the situation was similar to the situation in two other earlier cases viz., ***A. Janardhana vs. Union of India and Others***<sup>26</sup> and ***O.P. Singla (supra)***. It was opined that in the circumstances, it should be presumed that the excess appointment by Promotion had been made in relaxation of the Rules since there was power to relax the Rules. The Hon'ble Court held *inter alia* as follows;

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<sup>25</sup> (1985) 2 SCC 604

<sup>26</sup> (1983) 3 SCC 601



"27. ....Therefore assuming there was failure to consult the Union Public Service Commission before exercising the power to relax the mandatory quota rule and further assuming that the posts in integrated Grade II and III were within the purview of the Union Public Service Commission and accepting for the time being that the Commission was not consulted before the power to relax the rule was exercised yet the action taken would not be vitiated nor would it furnish any help to Union of India which itself cannot take any advantage of its failure to consult the Commission. Therefore it can be safely stated that the enormous departure from the quota rule year to year permits an inference that the departure was in exercise of the power of relaxing the quota rule conferred on the controlling authority. Once there is power to relax the mandatory quota rule, the appointments made in excess of the quota from any given source would not be illegal or invalid but would be valid and legal as held by this Court in *N.K. Chauhan v. State of Gujarat* [(1977) 1 SCC 308 : (1977) 1 SCR 1037 : 1977 SCC (L&S) 127] . Therefore the promotion of the promotees was regular and legal both on account of the fact that it was made to meet the exigencies of service in relaxation of the mandatory quota rule and the substantive vacancies in service."

(iii) Similarly, in **Narender Chadha** (*supra*) decided by a two Judge Bench of the Hon'ble Supreme Court, the question therein was of *inter se* Seniority between Direct Recruits and Promotees. Evidently, *ad hoc* or *ex gratia* Promotions were made in large numbers from feeder posts to continuously fill several vacancies allocated for Direct Recruits while only few Direct Recruitments were made in deliberate derogation of the Quota Rule. The Promotees, however, had continued in their *ad hoc* posts for fifteen to twenty years without being reverted to their original posts and without their right to hold the Promotion posts being questioned. The Departmental Promotion Committee, which was required to meet annually, in accordance with Rules and instructions, met only thrice in nineteen years and selected for Promotion only those Promotees who had four years of regular Service in their feeder posts, as on a specified date of several years back. The Hon'ble Supreme Court held that Articles 14 and 16 of the Constitution



were violated and all Promotees were entitled to regular Promotion. The Seniority of the Promotees including those selected by the Departmental Promotion Committee, was to be reckoned with effect from the dates of their continuous officiation in the Promotion posts. It was observed *inter alia* as follows;

"15. At one stage it was argued before us on behalf of some of the respondents that the petitioners who have not been appointed in accordance with Rule 8(1)(a)(ii) could not be treated as members of the Indian Economic Service or of the Indian Statistical Service at all and hence there was no question of determining the question of seniority as between the petitioners and the direct recruits. This argument has got to be rejected. **It is true that the petitioners were not promoted by following the actual procedure prescribed under Rule 8(1)(a)(ii) but the fact remains that they have been working in posts included in Grade IV from the date on which they were appointed to these posts. The appointments are made in the name of the President by the competent authority. They have been continuously holding these posts. They are being paid all along the salary and allowances payable to incumbents of such posts. They have not been asked to go back to the posts from which they were promoted at any time since the dates of their appointment.** The order of promotion issued in some cases show that they are promoted in the direct line of their promotion. It is expressly admitted that the petitioners have been allowed to hold posts included in Grade IV of the aforesaid services, though on an ad hoc basis. .... But in a case of the kind before us where persons have been allowed to function in higher posts for 15 to 20 years with due deliberation it would be certainly unjust to hold that they have no sort of claim to such posts and could be reverted unceremoniously or treated as persons not belonging to the Service at all, **particularly where the Government is endowed with the power to relax the rules to avoid unjust results.** In the instant case the Government has also not expressed its unwillingness to continue them in the said posts. The other contesting respondents have also not urged that the petitioners should be sent out of the said posts. The only question agitated before us relates to the seniority as between the petitioners and the direct recruits and such a question can arise only where there is no dispute regarding the entry of the officers concerned into the same grade. In the instant case there is no impediment even under the Rules to treat these petitioners and others who are similarly situated as persons duly appointed to the posts in Grade IV because of the enabling provision contained in Rule 16 thereof. ....

17. ....Therefore it can be safely stated that the enormous departure from the quota rule year to year permits an inference that the departure was in exercise of the power of relaxing the quota rule conferred on the controlling authority. Once there is power to relax the mandatory quota rule, the appointments made in excess of the quota from any given source would not be illegal or invalid but would be valid and legal as held by this Court in *N.K. Chauhan v. State of Gujarat*....."

(emphasis supplied)



**(iv)** On the bedrock of the principle expounded above, while considering the admitted departure from the Quota Rule and prescribed procedure of recruitment in the instant matter, it is a safe assumption that the appointments of the Petitioners if made in excess of the Service Quota were valid and legal in view of the existence of the Relaxation Clause at Rule 28 of the amended Rules of 1986. A presumption thus arises that Rule 28 was invoked legalizing and validating the Promotion of the Petitioners. I cannot bring myself to agree with the submissions of Learned Senior Counsel for Respondents No.7 to 17 that the relaxation would only come into effect from the date of Notification i.e. 19.05.2012, if not from 16.03.2013, the date of confirmation, for the reason that the Notification firstly does not specify the date of such relaxation, besides, Rule 28 was inserted vide the amendment dated 09.12.2003 and therefore in existence when the Officiating Orders were issued on 08.05.2008. Thus, the inevitable conclusion is that the Relaxation Clause was invoked and effective from the date the Officiating appointment of the Petitioners were made to the posts of Accounts Officers i.e. from 08.05.2008. Conditions "1" and "2" inserted in the Officiating Order of the Petitioners are sans reasons, no Rules make provisions for insertion of such conditions.

**17.(i)** Relevantly, the impact and purpose of the word "Officiating" in the case at hand, is to be considered. The Officiating Order, dated 08.05.2008, states that the Petitioners are promoted as Accounts Officers in Officiating capacity and the Officiating Promotion shall be subject to the following conditions:

- "1. *The officiating promotion shall not confer any right for regular promotion and shall not be counted towards seniority.*



2. *Their regular promotion shall be made on the recommendation of the Sikkim Public Service Commission."*

Since the Rules of 1978 do not define "Officiating," we may refer to the Sikkim Government Service Rules, 1974 which, in Chapter II, Rule 13 provides as follows:-

**"(13) 'Officiating appointment'.**- A Government Servant is said to be holding an officiating appointment when he performs the duties of a vacant or newly created temporary post on which no Government Servant holds a lien without completing the minimum number of qualifying years of service as may have been or as may be prescribed by the Government from time to time."

**(ii)** Rule 39 of the Sikkim Government Service Rules, 1974 reads *inter alia* thus;

**"39. Officiating appointment.**-

(1) A Government Servant may be appointed to officiate in a post carrying a higher time scale of pay if the vacancy is for a period exceeding one year

(2) .....

(3) Officiating appointment shall continue till the Government Servant completes the minimum qualifying number of years as may have been or may be prescribed by the Government from time to time."

**(iii)** Therefore, it is understood that a person appointed on Officiating basis is essentially a Government servant who has not completed the minimum number of qualifying years of Service prescribed by the Government from time to time and in a post which carries a higher time scale of pay, if the vacancy is for a period exceeding one year. The qualification necessary for the Petitioners to be considered for Promotion from Senior Accountant to Accounts Officer is 6 (six) years of continuous Service in the rank of Senior Accountant. It is not the case of the State-Respondents that the Petitioners had not completed the qualifying years of Service or were lacking in any other field, which would render them eligible only for Officiating Promotion. That, having been said, while considering condition number "1." of the Officiating Order, dated 08.05.2008, it is in the first instance,





unfathomable since it states that the Officiating Promotion shall not confer any right for regular Promotion, in such a circumstance, is it to be construed that despite the person having put in the required years of Service, all other qualifications being met and Substantive vacant posts existing, he would still be deprived of his regular Promotion and would be sentenced to suffer the whims of the State-Respondents? The second condition provides that regular Promotion can be made on the recommendation of the SPSC, this condition obviously would be contingent upon the action of the State-Respondents in terms of Rule 16 (extracted *supra*) of the amended Rules of 1986, notified on 11.03.1986. The Petitioners cannot be answerable for the procrastination or indolence of the State-Respondents, thereby depriving them of timely Promotions, of course subject to fulfillment of all other requisite conditions. The uncertainty of confirmation is surely not a reflection of the inefficiency of the Petitioners.

**18.** Related to this would be the question of vacancy in the posts of Accounts Officer. On this aspect, the averments in the Counter-Affidavit are at best nebulous and fail to address the real issues pertaining to vacancy as emanates from the discussions which follow. No reasonable explanation was offered as to why the Petitioners were promoted only on Officiating capacity, besides which, a confirmed Seniority List as on date, is not exhibited. Although the State-Respondents would argue that the 11 (eleven) Direct Recruits had been appointed in the year 2009 against the 23 (twenty-three) vacancies that existed for Direct Recruits at the relevant time, however, Annexure R-15 (collectively) provides that there was a proposal on 30.06.2003 for filling up of 23 (twenty-



three) posts by Departmental Competitive Examination via Promotion. Thereafter, again in 2003, a proposal was placed for filling up of 18 (eighteen) Posts of Accounts Officers by Direct Recruitment, however, vide Letter dated 22.11.2003, Annexure R-15/5 (collectively), it was stated that the Department had already forwarded the proposal for filling up of 18 (eighteen) Posts of Accounts Officers by Promotion and a request was made to the Rule Section to allot the Roster Points. Therefore, the Office Notes reveal that for the post of 23 (twenty-three) alleged vacancies of Direct Recruits, 18 (eighteen) posts were also proposed to be filled by Promotion. The Office Notes further reveal that on 12.10.2004, the Chief Minister convened a meeting in which he directed that 10 (ten) new posts of Accounts Officers be created. On 19.05.2007, another Office Note reveals that there were 12 (twelve) posts of Accounts Officers which were proposed to be filled through Direct Recruitment against anticipated vacancy. In the light of what has ensued in the concerned Department, as also the Order of the Chief Minister, it is evident that the contention of the State-Respondents that the Direct Recruits in 2009 were being filled from the 23 (twenty-three) vacant posts of the 46 (forty-six) posts, are erroneous and not buttressed by documentary evidence. The vacancies that arose out of the death and retirements and the allocation of such vacancies to the Quota and Rota, have not been responded to at all by the State-Respondents.

**19.(i)** Turning my attention now to the Quota Rota Rule, in **N.K. Chauhan** (*supra*), the question that fell for consideration was whether the 50:50 ratio as between Direct Recruits and Promoted hands was subject to the saving clause "as far as practicable." It



was observed that the Government must give proof that it was not practicable for the State to recruit from the open market qualified persons through the specialized agency of the Public Service Commission. If it does not succeed despite honest and serious efforts, it qualifies for departure from the Rule. It was *inter alia* held as follows;

"27. ....The straightforward answer seems to us to be that the State, in tune with the mandate of the rule, must make serious effort to secure hands to fill half the number of vacancies from the open market. If it does not succeed, despite honest and serious effort, it qualifies for departure from the rule. ....The short test, therefore, is to find out whether the government, in the present case, has made effective efforts, doing all that it reasonably can, to recruit from the open market necessary numbers of qualified hands. ...."

(ii) In ***Suraj Parkash Gupta*** (*supra*), it was held *inter alia* as follows;

"38. That in such situations there can be no breakdown of the quota rule is clear from the decided cases. In *N.K. Chauhan v. State of Gujarat* [(1977) 1 SCC 308 : 1977 SCC (L&S) 127] the rule said that "as far as practicable", the quota must be followed. Krishna Iyer, J. said that there must be evidence to show that effort was made to fill up the direct recruitment quota. It must be positively proved that it was not feasible, nor practicable to get direct recruits. The reason should not be "procrastinatory". In *Syed Khalid Rizvi v. Union of India* [1993 Supp (3) SCC 575 : 1994 SCC (L&S) 84 : (1994) 26 ATC 192] it was held that mere non-preparation of select list does not amount to collapse of the quota rule. In *M.S.L. Patil v. State of Maharashtra* [(1996) 11 SCC 361] it was held that mere omission to prepare lists did not amount to breakdown of quota rule."

(iii) Therefore, both the ratio of ***N.K. Chauhan*** and ***Suraj Parkash Gupta*** (*supra*), lay down that the Quota Rule is not broken down until serious efforts are made by the Government to recruit from the open market. In the instant case, right from the inception of the Rules and several amendments thereof, the State-Respondents have not been able to establish before this Court that the Quota Rule was ever adhered to, however, the Rules do exist providing for methods of recruitment for Direct Recruits and



Promotees but no effort has been shown to have been made by the Government to recruit from the open market. On the touchstone of the principles enunciated in ***N.K. Chauhan*** and ***Suraj Parkash Gupta (supra)***, the Quota Rule thus cannot be said to have broken down. In ***Direct Recruit Class II Engineering Officers' Association (supra)***, the Hon'ble Supreme Court was also of the opinion that although the Rules fixed the Quota of the appointees from two sources and were meant to be followed but that if it becomes impractical to act upon it, it is no use insisting that the authorities must continue to give effect to it. That, on the Quota Rule not being followed, brings about its natural demise and there is no meaning in pretending that it is still vibrant with life. In such a situation, if appointments from one source are made in excess of a Quota, but in a regular manner and after following the prescribed procedure, there is no reason to push down the appointees below the recruits from the other source who are inducted in the Service subsequently. That, where the Rules permit the authorities to relax the provision relating to the Quota, ordinarily a presumption should be raised that there was such Relaxation when there is a deviation from the Quota Rules. Despite the Quota Rule not having broken down in the instant case, the safety net of Rule 28 inserted in the Rules on 09.12.2003, has come into play, as already elaborately discussed, making the appointments of the Petitioners as Accounts Officers valid and legal.

**20.(i)** In the light of the above position, it is imperative to discuss here as to how the *inter se* Seniority between the Petitioners and the Respondents No.7 to 17 was to be settled. Relevant reference may be made to the observation in ***D.R. Nim***



(*supra*), wherein it was held that when an Officer had worked continuously for a long period (as in that case for nearly fifteen to twenty years) in a post and had never been reverted, it cannot be held that the Officer's continuous Officiation was a mere temporary or local or stop gap arrangement even though the Order of appointment may state so. In such circumstances, the entire period of Officiation was to be counted for Seniority, any other view would be arbitrary and violative of Articles 14 and 16 (1) of the Constitution because the temporary Service in the post in question is not for a short period intended to meet some emergent or unforeseen circumstance. The ratio in **S.B. Patwardhan** (*supra*), may also be referred to. The pivotal question for consideration before a three Judge Bench of the Hon'ble Supreme Court was whether Departmental Promotees and Direct Recruits appointed as Deputy Engineers in the Engineering Services of the Governments of Maharashtra and Gujarat, belonged to the same Class so that they may be treated with an even hand or whether they belonged to different Classes or categories and can justifiably be treated unequally. The Hon'ble Supreme Court observed that concededly, they were being treated unequally in the matter of Seniority because whereas, Promotees rank for Seniority from the date of their confirmation, the Seniority of Direct Recruits is reckoned from the date of their initial appointment. That, a Promotee ranks below the Direct Recruit even if he has officiated continuously as a Deputy Engineer for years before the appointment of the Direct Recruit is made and even if he, the Promotee, could have been confirmed in an available Substantive vacancy before the appointment of the Direct Recruit. After due consideration of the



relevant Rules, the Hon'ble Supreme Court was pleased to opine *inter alia* as follows;

"39. If officiating Deputy Engineers belong to Class II cadre as much as direct recruits do and if the quota system cannot operate upon their respective confirmation in that cadre, is there any valid basis for applying different standards to the members of the two groups for determining their seniority? Though drawn from two different sources, the direct recruits and promotees constitute in the instant case a single integrated cadre. They discharge identical functions, bear similar responsibilities and acquire an equal amount of experience in their respective assignments. And yet clause (iii) of Rule 8 provides that probationers recruited during any year shall in a bunch be treated as senior to promotees confirmed in that year. The plain arithmetic of this formula is that a direct recruit appointed on probation, say in 1966, is to be regarded as senior to a promotee who was appointed as an officiating Deputy Engineer, say in 1956, but was confirmed in 1966 after continuous officiation till then. This formula gives to the direct recruit even the benefit of his one year's period of training and another year's period of probation for the purposes of seniority and denies to promotees the benefit of their long and valuable experience. If there was some intelligible ground for this differentiation bearing nexus with efficiency in public services, it might perhaps have been possible to sustain such a classification. .... It is on the record of these writ petitions that officiating Deputy Engineers were not confirmed even though substantive vacancies were available in which they could have been confirmed. It shows that confirmation does not have to conform to any set rules and whether an employee should be confirmed or not depends on the sweet will and pleasure of the government.

.....  
43. Rule 8(ii) in the instant case adopts the seniority-cum-merit test for preparing the statewide Select List of seniority. And yet clause (iii) rejects the test of merit altogether. The vice of that clause is that it leaves the valuable right of seniority to depend upon the mere accident of confirmation. That, under Articles 14 and 16 of the Constitution, is impermissible and therefore we must strike down Rule 8 (iii) as being unconstitutional.

.....  
48. Rules 33, insofar as it makes seniority dependent upon the fortuitous circumstance of confirmation, is open to the same objection as Rule 8(iii) of the 1960 Rules and must be struck down for identical reasons.

.....  
51. We are not unmindful of the administrative difficulties in evolving a code of seniority which will satisfy all conflicting claims. But care ought to be taken to avoid a clear transgression of the equality clauses of the Constitution. .... **We however hope that the Government will bear in mind the basic principle that if a cadre consists of both permanent and**



temporary employees, the accident of confirmation cannot be an intelligible criterion for determining seniority as between direct recruits and promotees. All other factors being equal, continuous officiation in a non-fortuitous vacancy ought to receive due recognition in determining rules of seniority as between persons recruited from different sources, so long as they belong to the same cadre, discharge similar functions and bear similar responsibilities.  
....."

(emphasis supplied)

(ii) In *Direct Recruit Class II Engineering Officers’ Association (supra)*, a Constitution Bench of the Hon’ble Supreme Court was in agreement with the *Patwardhan* case (*supra*), and held *inter alia* therein as follows;

"13. When the cases were taken up for hearing before us, it was faintly suggested that the principle laid down in *Patwardhan* case [(1977) 3 SCC 399: 1977 SCC (L&S) 391: (1977) 3 SCR 775] was unsound and fit to be overruled, but no attempt was made to substantiate the plea. We were taken through the judgment by the learned counsel for the parties more than once and **we are in complete agreement with the ratio decidendi, that the period of continuous officiation by a government servant, after his appointment by following the rules applicable for substantive appointments, has to be taken into account for determining his seniority; and seniority cannot be determined on the sole test of confirmation, for, as was pointed out, confirmation is one of the inglorious uncertainties of government service depending neither on efficiency of the incumbent nor on the availability of substantive vacancies.** The principle for deciding inter se seniority has to conform to the principles of equality spelt out by Articles 14 and 16. If an appointment is made by way of stop-gap arrangement, without considering the claims of all the eligible available persons and without following the rules of appointment, the experience on such appointment cannot be equated with the experience of a regular appointee, because of the qualitative difference in the appointment. To equate the two would be to treat two unequals as equal which would violate the equality clause. **But if the appointment is made after considering the claims of all eligible candidates and the appointee continues in the post uninterruptedly till the regularisation of his service in accordance with the rules made for regular substantive appointments, there is no reason to exclude the officiating service for the purpose of seniority. Same will be the position if the initial appointment itself is made in accordance with the rules applicable to substantive appointments as in the present case. To hold otherwise will be discriminatory and arbitrary.**  
.....

16. ....We are not in a position to agree with the learned counsel that the rules indicate that the officiating posts were not included in the cadre of the Deputy Engineers. It is true that the use of



word “promotions” in Rule 8(i) of the 1960 Rules is not quite appropriate, but that by itself cannot lead to the conclusion that the officiating Deputy Engineers formed a class inferior to that of the permanent Engineers. ....

17. This question was considered in *Patwardhan case* [(1977) 3 SCC 399: 1977 SCC (L&S) 391: (1977) 3 SCR 775] at considerable length, and a categorical finding against the direct recruits was arrived at, which has been followed for the last more than a decade, in many cases arising between members of Maharashtra and Gujarat Engineering Services. The question is of vital importance affecting a very large number of officers in the departments concerned and many disputes have been settled by following the judgment in *Patwardhan case* [(1977) 3 SCC 399: 1977 SCC (L&S) 391: (1977) 3 SCR 775]. In such a situation it is not expedient to depart from the decision lightly. It is highly desirable that a decision, which concerns a large number of government servants in a particular Service and which has been given after careful consideration of the rival contentions, is respected rather than scrutinised for finding out any possible error. **It is not in the interest of the Service to unsettle a settled position every now and then.** .....

(emphasis supplied)

In sum and substance, the Hon’ble Supreme Court summarized the points as follows;

“47. To sum up, we hold that:

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

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

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

(C) When appointments are made from more than one source, it is permissible to fix the ratio for recruitment from the different sources, and if rules are framed in this regard they must ordinarily be followed strictly.

(D) If it becomes impossible to adhere to the existing quota rule, it should be substituted by an appropriate quota rule to meet the needs of the situation. In case, however, the quota rule is not followed continuously for a number of years because it was impossible to do so the inference is irresistible that the quota rule had broken down.





(E) Where the quota rule has broken down and the appointments are made from one source in excess of the quota, but are made after following the procedure prescribed by the rules for the appointment, the appointees should not be pushed down below the appointees from the other source inducted in the service at a later date.

(F) Where the rules permit the authorities to relax the provisions relating to the quota, ordinarily a presumption should be raised that there was such relaxation when there is a deviation from the quota rule.

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

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

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

(J) The decision dealing with important questions concerning a particular service given after careful consideration should be respected rather than scrutinised for finding out any possible error. It is not in the interest of Service to unsettle a settled position.

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

(K) That a dispute raised by an application under Article 32 of the Constitution must be held to be barred by principles of res judicata including the rule of constructive res judicata if the same has been earlier decided by a competent court by a judgment which became final.”

(emphasis supplied)

**21.(i)** Admittedly, the Promotion of the Petitioners was not made by following the procedure prescribed but they did fulfill the criteria mandated by the Rules. Being thus eligible under the said Rules, they could well have been considered for Promotion on completion of required period in the posts of Senior Accountants but for the passivity of the State-Respondents. Now, would the term “*ad hoc*” as emanates in the **corollary** of proposition “A” of the ratio in ***Direct Recruit Class II Engineering Officers’ Association (supra)***, be applicable to the case of the Petitioners. In ***Rudra Kumar Sain (supra)***, a Constitution Bench of the Hon’ble Supreme Court



was considering the question of *inter se* Seniority between Direct Recruits and Promotees in the Delhi Higher Judicial Service and while examining the term "*ad hoc*" held *inter alia* as follows;

"16. ....In *Black's Law Dictionary*, the expression "fortuitous" means "occurring by chance", "a fortuitous event may be highly unfortunate". It thus, indicates that it occurs only by chance or accident, which could not have been reasonably foreseen. The expression "ad hoc" in *Black's Law Dictionary*, means "something which is formed for a particular purpose". The expression "stopgap" as per *Oxford Dictionary*, means "a temporary way of dealing with a problem or satisfying a need".

17. In *Oxford Dictionary*, the word "ad hoc" means for a particular purpose; specially. In the same dictionary, the word "fortuitous" means happening by accident or chance rather than design.

18. In *P. Ramanatha Aiyar's Law Lexicon* (2nd Edn.) the word "ad hoc" is described as: "For particular purpose. Made, established, acting or concerned with a particular (*sic*) and or purpose." The meaning of word "fortuitous event" is given as "an event which happens by a cause which we cannot resist; one which is unforeseen and caused by superior force, which it is impossible to resist; a term synonymous with Act of God".

19. ....If the appointment order itself indicates that the post is created to meet a particular temporary contingency and for a period specified in the order, then the appointment to such a post can be aptly described as "ad hoc" or "stopgap". If a post is created to meet a situation which has suddenly arisen on account of happening of some event of a temporary nature then the appointment of such a post can aptly be described as "fortuitous" in nature. ...."

(ii) The Officiating Orders of the Petitioners do not indicate that the posts were created to meet a particular temporary contingency and for a period specified nor is it the case of the State-Respondents that the post was created to meet a situation which had suddenly arisen on account of the happening of some event of a temporary nature to describe the appointment of the Petitioners as fortuitous. The Petitioners were in the posts of Accounts Officers from 08.05.2008 till their confirmation on 16.03.2013 and therefore cannot be said to be for a short period intended to meet emergent or unforeseen circumstances. In fact,



only two whimsical conditions have been inserted in the Officiating Order, which also do not lay down that they would be reverted to their posts of Senior Accountants nor are the conditions fortified by any Rules. No conditions were attached to their Officiating Promotion regarding obtainment of qualification at a later date or reversion to the earlier posts, except the two conditions as already extracted hereinabove sans explanation as to whether there were Substantive vacancies or not. The appointment does not specify that it was made in the exigencies of service or on *ad hoc* or stop gap to meet a sudden temporary situation requiring *en masse* Promotions to define it as fortuitous. It is settled law that where the initial appointment is only *ad hoc* and not according to Rules and made as a stop gap arrangement, the period of Officiation to the said post cannot be taken into account for considering Seniority. In the instant case, however, the well-settled principle of law as propounded by the ratio in ***Direct Recruit Class II Engineering Officers' Association (supra)*** is applicable viz., that an employee appointed to a post according to Rules would be entitled to get his Seniority reckoned from the date of his appointment and not from the date of its confirmation. It is but trite to remark that without State action in terms of the prescribed procedure, the Petitioners could not have volunteered to take the Limited Departmental Competitive Examination.

**(iii)** In ***Vireshwar Singh and Others vs. Municipal Corporation of Delhi and Others***<sup>27</sup>, the Hon'ble Supreme Court observed *inter alia* as follows;

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<sup>27</sup> (2014) 10 SCC 360



"15. It is the view expressed in *Narender Chadha* [*Narender Chadha v. Union of India*, (1986) 2 SCC 157 : 1986 SCC (L&S) 226] which would require a close look as *Keshav Chandra Joshi* [1992 Supp (1) SCC 272 : 1993 SCC (L&S) 694 : (1993) 24 ATC 545] is a mere reiteration of the said view. In *Narender Chadha* [*Narender Chadha v. Union of India*, (1986) 2 SCC 157 : 1986 SCC (L&S) 226] the lis between the parties was the one relating to counting of ad hoc service rendered by the promotees for the purpose of computation of seniority qua the direct recruits. The basis of the decision to count long years of ad hoc service for the purpose of seniority is to be found more in the peculiar facts of the case as noted in para 20 of the Report than on any principle of law of general application. However, in paras 15-19 of the Report a deemed relaxation of the rules of appointment and the wide sweep of the power to relax the provisions of the rules, as it existed at the relevant point of time, appears to be the basis for counting of the ad hoc service for the purpose of seniority.

16. The principle laid down in *Narender Chadha* [*Narender Chadha v. Union of India*, (1986) 2 SCC 157 : 1986 SCC (L&S) 226] was approved by the Constitution Bench in *Direct Recruit Class II* [*Direct Recruit Class II Engg. Officers' Assn. v. State of Maharashtra*, (1990) 2 SCC 715 : 1990 SCC (L&S) 339 : (1990) 13 ATC 348] as the promotion of the officers on ad hoc basis was found to be "without following the procedure laid down under the Rules". That apart, what was approved in *Direct Recruit Class II* [*Direct Recruit Class II Engg. Officers' Assn. v. State of Maharashtra*, (1990) 2 SCC 715 : 1990 SCC (L&S) 339 : (1990) 13 ATC 348] is in the following terms: (SCC p. 726, para 13)

"13. ... We, therefore, confirm the principle of counting towards seniority the period of continuous officiation *following an appointment made in accordance with the rules prescribed* for regular substantive appointments in the service."  
....."

The law on the point of Seniority *qua* the appointments made in excess to the Quotas and the principle of computing the Seniority is thus clearly laid down, further, as expressed in the ratio of ***Direct Recruit Class II Engineering Officers' Association*** (*supra*), it is not in the interest of the Service to unsettle a settled position now and then.

(iv) We may, therefore now look at the propositions put forth in ***Direct Recruits*** case *supra*. Learned Senior Counsel for Respondents No.7 to 17 relied on proposition "(A)" while Learned Senior Counsel for the Petitioners relied on proposition "(B)". From the discussions made hereinabove, it can be culled out that the



Petitioners continued in the posts until regularization of their Service in accordance with the Rules. Thus, the case of the Petitioners squarely falls under proposition "(B)" enunciated in ***Direct Recruit Class II Engineering Officers' Association supra***. At the same time, it is worth noticing propositions "(D)" and "(F)" of the same ratio wherein at "(D)" it was held that if it becomes impossible to adhere to the existing Quota Rule, it should be substituted by an appropriate Rule to meet the needs of the situation. In case, however, the Quota Rule is not followed continuously for a number of years because it was **impossible** to do so, the inference is irresistible that the Quota Rule had broken down. It may be explained here that the word "**impossible**" has to be construed in this context in terms of the decision of the Hon'ble Supreme Court in ***N.K. Chauhan*** and ***Suraj Parkash Gupta (supra)***. No effort of the State-Respondents to recruit directly is established herein as already discussed. Proposition "F" of ***Direct Recruit Class II Engineering Officers' Association 1990 (2) SCC 715 supra*** provides that where the Rules permit the authorities to relax the provisions relating to the Quota, ordinarily a presumption should be raised that there was such relaxation when there is a deviation from the Quota Rule. The Relaxation Clause at Rule 28 of the Rules is assumed to have been invoked when deviation from the Quota Rule was made.

**22.** In conclusion, it must be remarked that no case fits with mathematical or clockwork precision to a previously decided case. The facts of each case are peculiar in their own details. Thus, it is only reasonable that the Courts apply the principles laid down by the Hon'ble Supreme Court, similar to those requiring



determination before them. It is worth remarking at this juncture that the Petitioners had also agitated the point that the Direct Recruits appointed in January, 2009 were promoted on Officiating basis as Senior Accounts Officers even before completion of the qualifying years of Service as Accounts Officers, and that 12 (twelve) posts of Senior Accounts Officers to that of Accounts Officers were downgraded for the alleged purposes of Direct Recruitments which were subsequently then filled by Promotions. No light has been shed on these circumstances by the State-Respondents.

**23.** So far as the grievance of the Petitioners against the Respondents No.4, 5 and 6 are concerned, in the first instance, they had appeared in the Departmental Examination in the year 1997 for Promotion from the posts of Accountants to Senior Accountants and were ranked in the first, second and third place amongst 19 (nineteen) candidates in the Panel prepared for such Promotion. In such circumstances, in my considered opinion, nothing irregular emanates on their selection and consequent Promotions.

**24.** The foregoing detailed discussions thus soundly answers the question that fell for consideration before this Court.

**25.** So far as the question of delay is concerned, the Petitioners are employees of the State-Respondents and bound by official discipline. In the absence of any Confirmation List pertaining to Seniority, it was not for the Petitioners to have run to the Court at the drop of a hat. In my considered opinion, there is no negligence or inaction on the part of the Petitioners or want of *bona fides*. The expectation of the Petitioners was that the State-



Respondents would treat them fairly and when such action was not forthcoming, the Petitioners were constrained to seek redressal from the Court. The Courts cannot always take a pedantic and hyper technical view on the point of delay, which ought not to be an obstacle in the exercise of the Courts' discretion to mete out even handed justice to all concerned.

**26.** While on the issue of waiver and acquiescence, I am inclined to agree with the submissions of Learned Counsel for the Petitioners that the ratio of **P.S. Gopinathan** and **M.P. Palanisamy** (*supra*) relied on by Learned Counsel for Respondents No.7 to 17, are distinguishable from the instant case. In **P.S. Gopinathan** (*supra*), the relief was not granted to the Appellant as the position therein was that the Appellant was well aware of the "**35.....mistaken belief of the High Court in appointing and posting him as a temporary employee. ...**" to which he raised no objection and did so only subsequently. In **M.P. Palanisamy** (*supra*), the contention of the Appellants was that they had all the qualifications for holding the posts of Post Graduate Assistants when they were appointed under the relevant Rules and there was no break in Service to which they were ultimately regularized in 1988. They were placed below in Seniority to those who were selected in 1986. It was found *inter alia* as follows;

"**29. ....**however, it must be borne in mind that though the appellants herein had the necessary qualifications at the time of their initial appointment under Rule 10(a)(i)(1) and though they were subsequently regularised also, the regularisation was conditional regularisation, which was done way back in 1988. The condition regarding the seniority was explicit in the said regularisation, which is clear from a mere reading of GOMs No. 1813. ...."



The Appellants therein raised the issue in 1994 and thereafter when the Seniority prayed for by them was refused, they bore it in silence and raised the matter again only in 2003. That apart, it is worth considering that in **N.K. Chauhan** (*supra*), the Hon'ble Supreme Court had also observed *inter alia* as follows;

"36. ....But we should not forget that seniority is the manifestation of official experience, — the process of metabolism of service, over the years, of civil servants, by the administration — and, therefore, it is appropriate that as far as possible he who has actually served longer benefits better in the future. ...."

**27.** The Rule of law cannot be anathema to the State-Respondents, it demands obedience and exists to check arbitrary exercise of power which otherwise conceives chaos, as exhibited in the facts and circumstances herein. The fate of the Petitioners have been left to the vagaries of executive indecisions leading to violation of Articles 14 and 16 of the Constitution of India.

**28.** Considering the entirety of the facts and circumstances and for the reasons discussed *supra* and in terms of the well settled position of law in the ratiocinations relied upon, it is hereby ordered as follows:

- (i) The Petitioners shall be accorded Seniority with effect from the date of their Officiating Promotion i.e. 08.05.2008 as Accounts Officers with all benefits of Service;
- (ii) The consequent Seniority of the Petitioners in their subsequent senior posts shall be computed in terms of the directions *supra*;
- (iii) A Seniority List shall be prepared by the State-Respondents on the above basis, to rule out





prejudice to the Petitioners and ensure equity to all, thereby, toeing the line of Articles 14 and 16 of the Constitution and thus satisfying the test of constitutionality;

- (iv) The Petitioners No.2 and 3 who have retired during the pendency of the instant Writ Petition are entitled to receive the same benefits as granted to the Petitioners herein, during their time in Service, for the purposes of their retirement benefits.
- (v) No Orders need be issued with regard to Respondents No.4, 5 and 6 in view of the foregoing discussions pertaining to their Promotions, they are at liberty to approach the State-Respondents for redressal of any grievances.

**29.** The Writ Petition stands disposed of with the above directions.

**30.** No order as to costs.

**( Meenakshi Madan Rai )**

**Judge**  
25.01.2021