

KESHAV DEO AND ANR.
v.
STATE OF U.P. AND ORS.

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OCTOBER 16, 1998

[SUJATA V. MANOHAR AND M. SRINIVASAN, JJ.]

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Service Law:

U.P. Services of Engineers (Building and Roads Branch), Class-II Rules, 1936—Rules 5, 6, 12 and 23(d) (as amended in 1969 and 1971)

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Seniority—Promotees vis-a-vis Direct recruits—Determination—Ad hoc appointment—Made after following prescribed procedure—Officiating or ad hoc basis—Consideration of—Held, Seniority of promotees has to be counted from the date of promotion whether on officiating or ad hoc basis—Hence, promotees are entitled to benefit of their service in officiating capacity.

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The appellants were promoted to the post of Assistant Engineers on ad hoc basis. The said promotions were made within the quota of posts reserved for the promotees according to the relevant Service Rules by the Departmental Promotion Committee. Since then, the appellants have been working uninterruptedly on the post of Assistant Engineers. Subsequently, the State Service Commission confirmed the appellant as Assistant Engineers.

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In the meanwhile, an ad hoc promotee Assistant Engineer like the appellant filed a writ petition before the High Court (*Saksena's case*) claiming seniority in the post of Assistant Engineer from the date of initial appointment and officiation on the said post. The High Court allowed the writ petition.

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A similar controversy arose (*Yadav's case*) before the High Court where also another Division Bench of the High Court took the same view.

Pursuant to the aforesaid judgment in *Saksena's case* and *Yadav's case* the appellant-State gave benefit of seniority to the promotees. A seniority list was also published. Aggrieved by the said list respondent No. 3 and 4 filed a writ petition before the High Court. The High Court quashed the seniority list on the ground that it was against the decision of this Court in *P. D. Aggarwal's case*. The Division Bench also held that the judgment in *Saksena's case* and *Yadav's case* were also contrary to the said decision of this Court

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A and not good law. The Division Bench further held that the period of service rendered by the promotee-Assistant Engineers before the appointment in accordance with the Rules, i. e. appointment with the consultation of the Commission, could not be counted for the purpose of determining the seniority. Hence this appeal.

B In the appeal before this Court the following question arose:—

Whether in the facts and circumstances of the case the appellants are entitled to seniority on the post of Assistant Engineers from the date they have been officiating as such or from the date they were selected and approved by the Commission?

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Allowing the appeal, this Court

HELD : 1.1. From the U. P. Services of Engineers (Buildings and Roads Branch), Class-II Rules, 1936 (as amended in 1969 and 1971) the following position emerges:

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(a) The number of vacancies for each year has to be determined.

(b) They have to be filled from the sources mentioned in the Rules in the proportion specified.

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(c) Selection of candidates from each source to be made in the prescribed manner.

(d) In the case of promotions from Subordinate Engineering Service, 25 per cent of the vacancies are reserved for them.

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(e) Such of the candidates who are recommended by the commission after following the prescribed procedure will be appointed to fill up the vacancies for the specified year.

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(f) If anybody is appointed with affect from a back date, that date will be deemed to be the date of substantive appointment.

(g) Seniority of such person has to be counted from that date whether he was working on that post on officiating or ad hoc basis.

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(h) It follows as a corollary that any person appointed subsequent to the said date will be junior to him. [350-D-E-F-G-H; 351-A]

1.2. Undisputedly, the appellants possessed the requisite qualifications for the post of Assistant Engineer. Their promotions were within the quota prescribed for them as there were sufficient number of vacancies reserved for promotees. They were selected by the Departmental Promotion Committee even for their ad hoc promotion. They were recommended by the State Public Service Commission after some years. After such recommendation, their promotions were confirmed. The impugned seniority list was prepared on that basis after the issue of directions by the High Court in *Saksena's case* and *Yadav's case*. It goes without saying that the said seniority list is in accordance with the Rules and cannot be disturbed. The High Court erred in upsetting that list on the ground that it violates the Rule in *P. D. Aggarwal's case*. [351-A-B-C]

Direct Recruit Class II Engineering Officers' Association v. State of Maharashtra, [1990] 2 SCC 715, following.

P. D. Aggarwal v. State of U.P., [1987] 3 SCC 622, held inapplicable.

G. P. Doval v. Chief Secretary, Govt. of U.P., [1984] 4 SCC 329; *O.P. Singla v. Union of India*, [1984] 4 SCC 450; *D.N. Aggarwal v. State of M.P.*, [1990] 2 SCC 553; *Masood Akhtar Khan*, case [1990] 4 SCC 24; *State of Bihar v. Akhouri Sachindranath*, [1991] Suppl. 1 SCC 334; *Keshav Chandra Joshi v. Union of India*, [1992] Suppl. 1 SCC 272; '*Aghore Nath Dey*', [1993] 3 SCC 371; *V. Srinivasa Reddy v. Govt. of A.P.*, [1995] Suppl. 1 SCC 572; *V.P. Shrivastava v. State of M.P.*, [1996] 7 SCC 759; *U.P. Secretariat*, case J.T. (1997) SC 461; '*Jagdish Ch Patnaik*' J.T. (1998) 3 SC 105 and '*Mohd. Sadar Ali*' J.T. (1998) 5 SC 627, referred to.

2. Therefore, it has to be held that the impugned seniority list prepared by the Government pursuant to the directions contained in *Saksena's case* and *Yadav's case* is in accordance with the Rules and cannot be interfered with on the ground that the promotees have been given the benefit of their service in officiating capacity. [351-B-C]

D.N. Saksena v. State of U. P. (ALL), (W P No. 1536 of 1981 decided on 4-7-1989) and *V.K. Yadav v. State of U. P., (ALL)* (W. P. No. 8966 of 1989 decided on 17-1-1990), approved.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1647 of 1997.

From the Judgment and Order dated 22.1.97 of the Allahabad High Court

A in W.P. No. 684 of 1995.

Rakesh Dwivedi, Kavin Gulati, Tarun Gulati and Mrs. Nandini Gore for the Appellants.

A.B. Rohtagi, K. Misra and R.B. Misra for the State of U. P.

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Amit Bose, N.A. Chinnasamy, for the Respondent No. 3 Vishnu Sharma, (Tripurari Ray) and Vineet Kumar for the Respondent No. 4

The Judgment of the Court was delivered by

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SRINIVASAN, J. The first appellant was appointed as an Overseer (re-designated as Junior Engineer) on adhoc basis in Public Works Department (for short P.W.D), State of U.P. on 17.7.1970 and was approved by the Public Service Commission, U.P. (for short the Commission) on 30.6.1973. The second appellant was directly appointed as overseer substantively in the said department through the Commission on the same day. Both the appellants

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were holders of Diploma in Civil Engineering. In May, 1978 they passed an examination known as Associate Member of Institution of Engineer (India), Section A and B, equivalent to B.E. Degree. On 30.5.1979 the appellants were promoted to the post of Assistant Engineers on adhoc basis. The said promotions were made within the quota of posts reserved for the promotees

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according to the relevant Service Rules by the Departmental Promotion Committee consisting of Secretary, P.W.D., Chief Engineer, P.W.D. and Chief Engineer Irrigation Department. The appointment orders stated that the promotion was being made to cope up with the work load in the Department since Assistant Engineers approved by the Commission were not available and that the promotions were only for a period of one year. Since then, the

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appellants have been working uninterruptedly on the post of Assistant Engineers.

2. Respondents 3 & 4 were selected through the Commission and appointed directly as Assistant Engineers in the P.W.D. by order dated 9.8.1979.

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The commission held in the year 1980, an interview of some of the promotees to be considered for the post of Assistant Engineers. The appellants have a grievance that though their juniors were called for interview, they were not considered without any reason therefor. However that grievance is outside the scope of the present controversy. In the interview held in the year 1984, the appellants were also called and they were duly approved and selected by

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the Commission. Consequently, they were confirmed as Assistant Engineers.

3. In the meanwhile, one D.N. Saksena, who was an adhoc promotee as Assistant Engineer in the year 1970 just like the appellants and approved by the commission in the year 1980, filed a Writ Petition in the High Court namely W.P. No. 1536 of 1981, claiming seniority in the post of Assistant Engineer from the date of initial appointment and officiation on the said post. That Writ Petition was treated to be one in representative capacity and notice was given to all concerned through the newspapers. A Division Bench of the High Court upheld on 4.7.1989 the claim made by the petitioner in the said writ petition and held that the promotees would be assigned seniority from the date of continuous officiation and not from the date of approval by the Commission.

4. A similar controversy *inter-se* the promotees and direct recruits arose in another writ Petition No. 8966 of 1989 which was decided on 17.1.1990. There also the same view was taken by another Division Bench which was challenged in S.L.P. (c) No. 4878 of 1990, *V.K.Yadav v. State of U.P.* in this Court. The S.L.P. was dismissed on 19.11.1990.

5. The judgment in the case of Saksena referred to earlier was assailed in this Court in S.L.P. (C) No. 9343 of 1990, *C.P. Sharma Versus State of Uttar Pradesh and others*. The appellant therein placed reliance on the judgment of this Court in *P.D. Aggarwal v. State of U.P. and Ors.*, [1987] 3 SCC 622. By judgment dated 1.2.1991, the S.L.P. was dismissed by this Court.

6. Pursuant to the aforesaid judgments the State Government gave benefit of seniority to the promotees. A seniority list was published, vide letter dated 3.12.1984 issued by the Secretary, Govt. of U.P. inviting objections against the same. After considering the objections filed by the direct recruits, a final seniority list was prepared and published, vide notification dated 11.7.1995. The first appellant was placed at Serial No. 566 and second appellant at Serial No. 567. Respondents 3 & 4 were placed at Serial Nos. 712 and 722 respectively. Aggrieved by the said list, respondents 3 & 4 filed Writ Petition No. 684 (SB) of 1995 in the High Court. The main ground of attack was that the counting of the period of continuous officiation of the promotees from the date of *ad hoc* appointment was against the decision of this Court in *P.D. Aggarwal v. State of U.P.*, [1987] 3 SCC 622. No promotee was impleaded as a party to the Writ Petition. The application filed by the appellants for impleading them as parties was also dismissed by the High Court. However, the appellants were permitted to advance arguments through their counsel at the time of hearing. The State Govt. in its counter affidavit justified the seniority list as one based on the rulings in D.N. Saksena and V.K.Yadav.

A 7. The Division Bench of the High Court has quashed the seniority list on the ground that it was against the decision of this Court in P.D. Aggarwal. The Division Bench also held that the judgments in Saksena and Yadav were also contrary to the said decision of this Court and not good law. The Division Bench held that the period of service rendered by the promotee -
B Assistant Engineer before the appointment in accordance with the rules, that is appointment with the consultation of the Commission, can not be counted for the purpose of determining the seniority.

8. That is the judgment which is challenged in this appeal. Three questions were posed by the appellants for consideration:

C 1. Whether in the facts and circumstances of the case the appellants are entitled to seniority on the post of Assistant Engineers from the date they have been officiating as such or from the date they were selected and approved by the Commission?

D II. Whether the appellants can be deprived of the benefits of their officiating service prior to the approval of the Commission for the purpose of seniority in view of the fact that the delay in granting approval for making them regular on the post of Assistant Engineer was attributable to the State Government and the Commission, as the appellants were fully qualified to be appointed and approved as Assistant Engineers even on the date, they were
E appointed to officiate as such?

III. Whether the High Court was right in reopening the issues which have been decided in favour of the promotees by three different Division Benches of the same Court without referring the matter to a larger Bench?

F 9. We do not propose to consider the third question as an answer in the negative would only lead to a remand to the High Court for fresh consideration of the matter. As the dispute between the promotees and direct recruits has been pending for a long time, a remand will only prolong the agony of the parties and the matter may have to come again to this Court for
G decision. Hence, we propose to decide the appeal on merits.

10. We are also of the opinion that it is not proper to decide the second of the above questions. In this case the appellants or other promotees were not parties to the writ petition and the High Court has decided only the general principle applicable in the dispute between the promotees and direct
H recruits in the matter of seniority and not considered the individual grievances

if any, against the seniority list dated 11.7.1995. Any individual grievance against the said seniority list is a matter for agitation before the appropriate forum. We leave that question open. A

11. What remains to be considered is only the first question set out above. The Service Rules applicable in this case are the U.P. Services of Engineers (Buildings and Roads Branch), Class-II Rules, 1936 as amended in 1969 and 1971 hereinafter referred to as Rules. Rule 5 provides that recruitment to the post of Assistant Engineer shall be made by direct recruitment as well as promotion. Rule 6 says that the Governor shall decide the number of appointments to be made at each selection in each kind of post from the sources mentioned in Rule 5. The provisos to the rule specify the proportion from each source. According to the provisos twenty five percent of the vacancies shall be filled by promotion of members of the P.W.D. Subordinate Engineering Service and P.W.D. Computers' Services. As per Rule 12, recruitment by promotion shall be made by selection on merit. The Secretary shall consider the cases of all eligible candidates and draw up, in order of merit a list of candidates considered suitable for promotion. A supplementary list of candidates whom the Secretary considers suitable for officiating or temporary appointments shall also be drawn and both lists should be sent to the Commission along with Character Rolls, etc. The Commission after examining the rolls may add to the lists as they may like and return them to the Govt. Thereafter the candidates will be interviewed by a Selection Committee presided over by a representative of the Commission. The Committee shall thereafter prepare two lists and place them before the Commission. The Commission shall make their final recommendations to the Govt. Appointments will be made on the basis of such recommendations. Rule 23 provides for seniority and sub rule (d) is very relevant in this case and it reads thus: B
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Rule 23(d):

“As and when vacancies are allocated in any year according to the promotion specified in the first proviso to rule 6, the inter-se seniority of those referred to in clauses (a), (b) and (c) above will be determined by framing a cycle of 4 according to the following formula :- G

1. P.

2. T. H

A 3. D.

4. D.

Repeat

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Note (1) in the Rule reads as follows :-

"Note :-1.

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Where the appointment order specifies a particular back date with effect from which a person is to be appointed substantively (on probation against a clear vacancy on a permanent post) that date will be deemed to be the date of order of substantive appointment. In other cases it will mean the date of issue of the order."

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12. From the Rules applicable to the parties, the following position emerges:

(a) The number of vacancies for each year has to be determined.

E (b) They have to be filled from the sources mentioned in the rules in the proportion specified.

(c) Selection of candidates from each source to be made in the prescribed manner.

F (d) In the case of promotions from Subordinate Engineering service, 25 per cent of the vacancies are reserved for them.

(e) Such of the candidates who are recommended by the Commission after following the prescribed procedure will be appointed to fill up the vacancies for the specified year.

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(f) If anybody is appointed with effect from a back date, that date will be deemed to be the date of substantive appointment.

H (g) Seniority of such person has to be counted from that date whether he was working on that post on officiating or ad hoc basis.

(h) It follows as a Corollary that any person appointed subsequent to the said date will be junior to him. A

13. Bearing the above principles in mind the facts of the case may be analysed. Undisputedly, the appellants possessed the requisite qualifications for the post of Assistant Engineer. Their promotions were within the quota prescribed for them as there were sufficient number of vacancies reserved for promotees. They were selected by the Departmental Promotion Committee even for their ad hoc promotion. They were recommended by the Commission after some years but with reference to 1979. After such recommendation their promotions were confirmed with effect from 30.5.1979. The impugned seniority list was prepared on that basis after the issue of directions by the High court in D.N. Saksena and V.K. Yadav. It goes without saying that the said seniority list is in accordance with the Rules and can not be disturbed. But unfortunately the High Court has upset that list on the ground that it violates the rule in 'P.D. Aggarwal.' B C

14. We shall now advert to 'P.D. Aggarwal' and all the other rulings cited by counsel on both sides in the chronological order, In *G.P. Doval and Ors. v. Chief Secretary, Govt. of U.P. and Ors.*, [1984] 4 S.C.C. 329, it was held that subsequent approval by Public Service Commission to temporary appointments already made will relate back to the date of initial appointment for the purpose of reckoning seniority on the basis of the general rule of continuous officiation in the absence of any particular rule framed in that regard. That case related however to a dispute between two sets of direct recruits. D E

15. In *O.P. Singla v. Union of India*, [1984] 4 S.C.C. 450 the contest was between promotees and direct recruits. A Bench of Three Judges held that the seniority of direct recruits and promotees appointed under the Rules must be determined according to the dates on which direct recruits were appointed to their respective posts and the dates from which the promotees have been officiating continuously either in temporary posts created in the Service or in substantive vacancies to which they were appointed in a temporary capacity. F

16. In *P.D. Aggarwal and Ors. v. State of U.P.*, [1987] 3 S.C.C. 622 the dispute was between two sets of direct recruits. Whatever observation was made in that case must be taken along with the context. The respondents in that case were directly recruited as Asstt. Civil Engineers in substantive capacity against temporary vacancies in consultation with the Public service Commission under Rules, 1936. The appellants were also similarly recruited G H

A but later on the basis of the competitive examination conducted by the Commission they were appointed directly on probation against permanent vacancies. Both categories of Assistant Engineers were graduates in Engineering and were performing the same nature of work. In December 1961, the Govt. issued an O.M. Laying down principles for recruitment to permanent and temporary vacancies and pursuant thereto the Rules were amended in

B 1969 and 1971. The effect of the amendments was that the Assistant Engineers who had become members of service under the 1936 Rules would no longer be members of service and required to wait till selection and appointment as Assistant Engineers under Rule 5 (a)(ii) against quota fixed by Rule 6 of 1969 Amendment Rules. Consequently the Assistant Engineers appointed several

C years ago to the temporary posts had to wait until their selection and appointment to permanent posts against the prescribed quota whereas the Assistant Engineers recruited to permanent posts several years after would supersede the former in the matter of determination of seniority from the date of their appointment against the permanent vacancies. This Court quashed the amended rules as well as the seniority lists. In the course of the judgment,

D this Court said that the period of service rendered by the ad hoc appointees before their service had been duly regularised in accordance with the regularisation rules, cannot be taken into account in reckoning their seniority in service and that their seniority will be counted only from the date when such ad hoc appointees after regularisation in accordance with concerned

E rules had become members of the service. The Bench had no occasion to consider a situation similar to the one which has arisen in this case. Unfortunately, the High Court has without understanding the ruling correctly observed repeatedly that the decisions in D.N. Saksena and V.K. Yadav and the seniority list prepared in 1995 in accordance with the same are contrary thereto.

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17. In *D.N. Aggarwal and Anr. v. State of M.P. and Ors.*, [1990] 2 SCC 553 ad hoc promotions were made when the persons concerned were not eligible and had not completed qualifying period of service. Though they were later selected by D.P.C. on regular basis and appointed as such to the promotion post on their completing the qualifying period of service, it was

G held that their ad hoc period of service cannot be counted for the purposes of their seniority.

18. In *Direct Recruit Class II Engineering Officers Association v. State of Maharashtra and Ors.*, [1990] 2 SCC 715, the Constitution Bench held that

H 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 Bench summed up the law in the form of eleven propositions. It is sufficient to refer to the first two propositions which are in the following terms :

“(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.”

19. *Masood Akhtar Khan* case, [1990] 4 SCC 24 has no bearing in this case as the initial appointments of the appellants therein who were direct recruits were not according to the Rules.

20. In *State of Bihar v. Akhoury Sachindranath and Ors.*, [1991] Supp. 1 SCC 334, it was held that no person can be promoted with retrospective effect from a date when he was not born in the cadre so as to adversely affect others. The respondents 1 to 5 in that case were directly appointed as Asstt. Engineers on the recommendation of the Public Service Commission in 1961. Respondents 6 to 13 were promoted to the post in 1964 and the appellants were promoted in 1969. The promotees were shown as juniors to the direct recruits in the seniority list. On the representation of the promotees, an order was passed by the Govt. on 21.7.75 changing the date of promotion of the promotees to a prior date in 1961. Subsequently other orders were passed pushing back the dates of promotion still further to December 1958 for respondents 6 & 7 and February 1961 for respondents 14 to 23. Those orders were challenged by respondents 1 to 5 who were direct recruits and the orders were quashed. That ruling has no relevance in the present case.

21. In *Keshav Chandra Joshi v. Union of India*, [1992] Supp. 1 SCC 272 promotion was made in excess of the quota on ad hoc basis as a stop-gap arrangement as direct recruits were not available. Such appointment by

A promotion being contrary to rules, the Bench held that the promotees could not claim the benefit of their officiation in the promoted post before the date of the vacancy within the quota as such service was fortuitous.

22. In '*Aghore Nath Dey*', [1993] 3 SCC. 371, this Court explained the scope of applicability of corollary to Conclusion (A) and Conclusion (B) in Direct Recruit Class II Engg. Officers' Association case (*supra*) and reiterated that the benefit of ad hoc service is not admissible if appointment was in violation of Rules. In *V. Srinivasa Reddy v. Govt. of A.P.*, [1995] Supp. 1 SCC 572 the contest was only between two sets of direct recruits and the decision turned on an interpretation of the relevant Service Rules.

23. In *V.P. Shrivastava and Ors. v. State of M.P.*, [1996] 7 SCC, 759 the promotees who were appointed de hors the rules and not approved by the Public Service Commission, were held to be juniors to direct recruits regularly appointed after selection through Public Service Commission in spite of their longer service.

24. In *U.P. Secretariat* case J.T., (1997) 2 SC 461 the promotees were appointed in officiating capacity against vacancies reserved for direct recruitment as no direct recruitment had taken Place. This Court affirmed the judgment of the High Court holding that direct recruit was to be treated from the date on which he actually joined the service and the promotee was to be fitted into the service from the date when he was entitled to figure in accordance with quota and rota prescribed under the Rules.

25. The ruling in '*Jagdish Ch. Patnaik*', J.T. (1998) 3 S C 105 has no application in this case. It is wholly unnecessary to invoke the principle stated in *Mohd. Sadar Ali*, J.T. (1998) 5 SC 627 that the earlier judgment cannot be reconsidered after a lapse of nine years.

26. We have no hesitation to hold that the impugned seniority list of 1995 prepared by the Govt. pursuant to the directions contained in *D.N. Saksena and V.K. Yadav*, is in accordance with the Rules and cannot be interfered with on the ground that promotees have been given the benefit of their service in officiating capacity. The question is answered in favour of the appellants. As stated already individual grievances against their placement in the list have to be agitated in appropriate forum. The judgment of the High Court is unsustainable and it is set aside. The Writ Petition filed by respondents 3 & 4 is dismissed. The parties will bear their respective costs.

27. Before parting with the case, we wish to place on record our strong

disapproval of the stand taken by the State Government in this appeal. In the High Court, Government stood by the seniority list and justified it. When the High Court allowed the writ petition, the Govt. ought to have filed an appeal in this Court particularly because the promotees were not made parties to the writ petition. Not only did the Govt. fail to do so but in this Court it actively supported the case of the writ petitioners. The conduct of the Govt. is highly reprehensible. It is only because of such attitude, the disputes between direct recruits on the one hand and promotees on the other became perennial. It is high time the Govt. realised that if the employees are made to live through endless litigations, administration cannot be carried on properly.

V.S.S.

Appeal allowed.