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R.K. MOBISANA SINGH  
v.  
KH. TEMBA SINGH & ORS.

DECEMBER 12, 2007

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[S.B SINHA AND HARJIT SINGH BEDI, JJ.]

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*Service Law—Seniority—Inter se seniority, direct recruits vis a vis promotees'—Ad hoc promotions granted to employees against vacancies in promotee quota—Regularization with retrospective effect—Grant of—Held: When promotion is given only in exigency of situation without following the Rules, period cannot be counted towards seniority—Retrospective regularization could be granted only when such Rule exists—Retrospective regularization though could confer other service benefits but cannot be of any help for reckoning seniority with retrospective effect—On facts, State being a competent authority to determine inter se seniority of parties in view of the principles enunciated by this Court.*

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The question which arose for consideration in these appeals was whether the *ad hoc* promotions granted to the employees from the post of Section Officer (Grade-I) to the post of Assistant Engineer in the Public Works Department of the State Government against vacancies in promotee quota, could have been directed to be regularized with retrospective effect so as to effect the *inter se* seniority between the direct recruits and the promotees.

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Appellants and the other promotee respondents *inter alia* contended that they having been promoted against vacancies arising in the year 1985 in the promotee quota and their services having been regularized with retrospective effect and not by way of stop gap employment, their seniority should be considered; that the recruitment rules did not contain any prohibition on grant of regularisation with retrospective effect and the same being permissible, the promotees were

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entitled to seniority with effect from the date from which their services were regularized with retrospective effect; and that the Single Judge of High Court, having directed examination of the matter by a fact finding body upon proper application of mind and determination of seniority having regard to the decisions of this court is to be affirmed. A

Direct recruits contended that the promotees were not entitled to seniority from the date of their *ad hoc* promotion since the *ad hoc* promotions were found to have been made in violation of the Recruitment Rules; that the procedure prescribed for grant of regular promotion had not been followed; that some of the promotees did not fulfil the requisite eligibility criteria prescribed by the rules; that the orders passed by the High Court directing regularisation with retrospective effect did not confer on them any consequential seniority; that some judgment of the High Court giving consequential seniority were reviewed in favour of the direct recruits; that there is no Rule which enables the Government to give seniority with retrospective effect to the promotees; and that the consequent orders of the Government regularizing the services specifically stated that the seniority shall be determined later was not challenged by the promotees. B C D

#### Disposing of the appeals, the Court E

**HELD:** 1.1. There did not exist any Rule for determination of *inter se* seniority. They were governed by some office memorandums. An Office Memorandum was issued on 22.12.1959 providing for general principles for determination of seniority in the general services. Although in terms of the office memorandum, no retrospective effect could be given to the order of regularisation passed in favour of the promotees, as in absence of any seniority Rules operating in the field, the State was required to evolve a policy. It for its own reason did not do so. F

[Paras 27 and 37] [455-H; 456-A; 463-D-E] G

1.2. The office memorandum of 1959 was applicable in a case of this nature. In some of the cases, promotion might have been given without following the Rules. When promotion is given only in the exigency of situation without following the Rules, the period cannot be counted towards seniority. [Para 38] [463-F] H

A 1.3. If they had been given regularisation with retrospective effect, the same by itself may not be a ground to apply the said order *ipso facto* for determining the inter se seniority. Seniority although is not a fundamental right but a civil right. Such a right of the direct recruits could not have been taken away without affording an opportunity of hearing to them. It was obligatory on the part of the official respondents to take into consideration that the retrospective regularization could be granted only when there exists such a Rule. If Rules were not followed at the time of grant of promotion, question of grant of regularization with retrospective effect would not arise. Retrospective regularization whether in terms of the directions of the High Court or otherwise, thus, although could confer other service benefits to the officer concerned, but the same cannot be held to be of any assistance for reckoning seniority with retrospective effect. It was for the DPC to recommend in regard thereto. In some of the cases, evidently the procedure has not been followed. Therefore, the question of their acquiring seniority over the direct recruits does not arise.

[Paras 39, 40, 41 and 42] [463-F-H; 464-A-C]

E 1.4. The matter requires a closer scrutiny by the State itself. As the function relating to determination of *inter se* seniority is that of the State, the constitution of a committee, as proposed by the Single Judge of High Court is not approved. However, it would be open to the State to do so, if it so desires. Therefore, the competent authority of the State is directed to determine the inter se seniority of the parties in view of the principles enunciated by this Court and apply the same to the fact of each case. [Para 43] [464-D-E]

G *Direct Recruit Class II Engineering Officers' Association v. State of Maharashtra and Ors.*, [1990] 2 SCC 715; *Suraj Prakash Gupta v. State of J & K and Ors.*, [2000] 7 SCC 561; *K. Siva Reddy v. State of A.P.*, [1988] Supp. SCC 225; *Ramendra Singh v. Jagdish Prasad*, [1984] Supp SCC 142; *M.K. Shanmugam and Anr. v. Union of India and Ors.*, [2000] 4 SCC 476; *Swapan Kumar Pal and Ors. v. Samitabhar Chakraborty and Ors.*, [2001] 5 SCC 581; *Md. Israil and Ors. v. State of W.B. and Ors.*, [2002] 2 SCC 306; *D.N. Agrawal and Anr. v. State of Madhya Pradesh and Ors.*, [1990] 2 SCC 553 and *Santosh Kumar v. G.R. Chawla*, [2003] 10 SCC H 513, relied on.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5837 of A  
2007.

From the Judgment and Order dated 24.08.2004 of the High Court  
of Gauhati, Imphal Bench in Writ Appeal No. 392 of 2003.

WITH B

C.A. No. 5838 & 5848 of 2007.

A. Sharan, ASG., V.N. Ganpule, Raju Ramachandran and L.N.  
Rao, S.K. Bhattacharya, L.K. Paonam, Niraj B. Paonam, Sapam Biswajit  
Meitei, Ashok Kumar Singh, Naresh Kumar Gaur, Aparna Bhat, P.  
Ramesh Kumar and Khwairakpam Nobin Singh for the appearing parties. C

The Judgment of the Court was delivered by

**S.B. SINHA, J.** 1. Leave granted.

2. These appeals involving similar questions of law and fact were D  
taken up for hearing together and are being disposed of by this common  
judgment. Appellant as also the private respondents hereto have been  
working as Assistant Engineers in the Public Works Department. The  
promotees are diploma holders, or degree holders in Engineering. They  
were holding the posts of S.O. Grade 1, whereas the direct recruits are E  
Graduates in Engineering. Recruitment to the post of Assistant Engineer  
and/or promotion thereto, although is governed by the Public Works  
Department, Manipur Assistant Engineer (Civil/Mech) Surveyor of Works  
Recruitment Rules of 1969, 1975 and 1984 made under the proviso  
appended to Article 309 of the Constitution of India; there does not exist F  
any Rule governing seniority and in particular *inter se* seniority amongst  
the direct recruits and the promotees.

3. In terms of the recruitment rules, whereas forty per cent of the  
posts are to be filled by direct recruitment from the open market, 60 per  
cent of the posts are to be filled up by promotion in the following sub- G  
quota:-

- i. 50% by selection from amongst the Engineering Degree holders  
who have rendered a minimum of 3 years regular service as  
S.O. Grade I as equivalent Post. H

A Provided that is sufficient number of Degree holders are not available, the vacancies may be filled up by Diploma holders with 8 years regular service as S.O. Grade-I.

B ii. 50% by selection from amongst the Engineering Diploma Holders of 3 years course with 8 years regular service as S.O. Grade I or non Degree/non Diploma holders with 15 years outstanding record as S.O. Grade I.

4. Before embarking on the questions involved in these matters, we may notice the fact of the matter.

C 5. The Government of Manipur informed the Manipur Public Service Commission in regard to existence of 39 vacancies in the posts of Assistant Engineer (AE) on or about 18.4.1977. A request was made to convene Departmental Promotion Committee for filling up the said vacant posts. Some of the promotees, who were either the Graduates in Engineering or were diploma holders in Engineering were working as Section Officers (Grade-I). We would come to their respective dates of appointment a little later, but, at this stage, it may be noticed that in terms of the Recruitment Rules, in order to become eligible for promotion, three years' experience for the Graduates in Engineering and eight years' experience for the diploma holders in the posts of Section Officer (Grade-I) was necessary. They had been promoted on an *ad hoc* basis without following the procedure laid down under the Recruitment Rules. On or about 6.3.1979, the Government of Manipur sent a revised proposal for appointment to the post of Assistant Engineer (Civil/Mechanical) by promotion on regular basis. However, yet again on 22.6.1981, the Government of Manipur directed the Commission for convening a regular Departmental Promotion Committee for consideration of promotion to the post of Assistant Engineer(Civil/Mechanical) in the following terms :

G "I am directed to send herewith a requisition in the MPSC Form No. 6 duly filled in for convening a regular DPC for consideration of promotion to the post of Assistant Engineer (Civil/Mech.). Required ACRs and Integrity certificates in respect of the eligible officers are being sent separately. You are requested kindly to examine the case for convening a DPC at an early date.

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Kindly acknowledge the receipt of this letter.

Yours faithfully

Encl : As above

(R. Marulung)

Under Secretary to the Govt. of Manipur"

6. Respondents were promoted as Assistant Engineers on an *ad hoc* basis. We may notice that the contesting respondent in SLP(C) No. 16901 of 2006 was promoted as Assistant Engineer on *ad hoc* basis against a permanent vacancy. He was appointed as Assistant Engineer on officiating basis with effect from the date of joining of the post on the recommendations of the Departmental Promotion Committee held on 18.7.1985 and 20.7.1985 in the 1985 vacancies, which was followed by an order dated 06.09.1986 regularizing his services from 20.09.1985.

7. Indisputably, a seniority list was published on 31.1.2000.

8. Ten writ petitions were filed by the promotees before the High Court raising a grievance that in the said seniority list, although they were shown as Assistant Engineers, having been appointed against the vacant posts in the promotee quota under clear vacancies which were available in 1981 itself, they were appointed on *ad hoc* basis. According to them, although they were promoted to the post of Junior Engineer on *ad hoc* basis in or about 1981, they had been shown as junior to direct recruits who were appointed in 1986.

9. A learned Single Judge of the High Court noticed that in some of the cases, regularization with retrospective effect had been directed to be given. It took note of the contention of the writ petitioners that they fulfilled the eligibility criteria for promotion, but since at the relevant time, the Commission became defunct, they were promoted on *ad hoc* basis against the available vacancies made for the promotees. The learned Single Judge recorded that the counsel appearing on behalf of the State was not in a position to inform the court in regard to the vacancy position as was obtaining then and furthermore the statements made in the writ application in regard to promotion in excess of quota or grant of promotion in absence of availability of any vacancy having not been controverted, the same

A should be accepted to be correct. It was furthermore noticed that the minutes of the Review Committee were not made available to the Court and, therefore, it arrived at a conclusion that the Review Committee failed to discharge its duties, as a result whereof the impugned seniority list failed to demonstrate the correct seniority position drawn in accordance with B law.

10. The learned Single Judge therefore, directed for preparation of a fresh seniority list. It was also directed that a Monitoring Committee be constituted to ascertain the availability of vacancies with reference to the years of appointment of the various promotees vis-à-vis, the direct recruits and to examine whether any of them encroached upon the quota meant for others. It was furthermore directed that in view of the failure on the part of the State Government to place the correct factual position to conduct a basic fact finding exercise in regard to availability of vacancies in respect of the quotas, if any, at the relevant point of time.

D It was directed :

“32. The Committee is to undertake the exercise having followed the following guidelines

- E a. The respective date of initial promotion on *ad hoc* basis of the petitioners be treated as substantive appointment as Assistant Engineer.
- F b. The Committee is to ascertain the availability of vacancy with reference to the year of appointment of the petitioners already done on *ad hoc* basis and also the appointment of private respondents and to examine whether any of them encroached the quota meant for others.
- G c. The promotees and direct recruits shall be fitted against the available vacancies within their respective quotas.
- H d. In case, any excess promotion/direct appointment are found to be there, he or they should be adjusted against the vacancy made available subsequently.
- e. In considering the availability of vacancy the Committee must

count the vacancy simplicitor be it temporary vacancy or substantive vacancy in the post of Assistant Engineer. A

- f. After exhausting the fitment exercise the intra seniority viz., the seniority of the promotee themselves and the seniority of the direct recruitees themselves should be prepared separately. B
- g. Thereafter, having maintained ratio of 3:2 *inter se* seniority list is to be prepared, first 3 promotees would be listed thereafter 2 direct recruitees would be listed followed by 3 promotees 2 direct and so on. In case in any year it is found that only some promotions are made out, no direct recruitment, the promotees should be shown enbloc senior vis-à-vis in case any particular year it is found that the only direct recruitments were made and no promotion, the direct recruitees be shown enbloc senior. C
- h. To remove any confusion and doubt a draft *inter se* seniority be published first inviting claims and objections and personal hearing of the objector/claimant if any, be allowed and, thereafter, the final *inter se* seniority list be published. The said exercise must be completed within a period of 3 months from this day. D

11. Eleven Writ Appeals were filed thereagainst; ten by the direct recruits and one by the State of Manipur which was marked as Writ Appeal No. 384 of 2003. It appears that the writ appeals came up before two Division Benches of the High Court in two batches. The judgment in the first batch was rendered by a Division Bench on 31.3.2004 in terms whereof the judgment of the learned Single Judge was affirmed. The Division Bench in those cases held that having regard to the fact that the orders of the High Court granting retrospective regularization to the promotees having not been challenged either by the direct recruits or by the State Government had attained finality. In the aforementioned premise, it was directed : E

“10. From the aforesaid, it is apparent to us, that for whatever reasons the orders passed by the High Court in the matter of regularization of the services of the promotee officers covered under H

A the writ appeals, were not challenged by the State Government  
and has attained finality. The appellants also choose not to file  
appeals against those orders moved applications for review of those  
no to file applications for review of those orders as has been done  
in other cases. In the aforesaid circumstances, the promotee  
B officers shall be taken to be regularly promoted from the date they  
have been regularized in the post of Assistant Engineers. In the  
matter of seniority, without there being any impediment under Rules,  
the seniority shall be counted in all circumstances from the date of  
regular appointment on the posts.”

C 12. Indisputably, the review petitions filed thereagainst were  
dismissed.

D 13. However, the four remaining appeals came up for consideration  
before another Division Bench, (although the senior Judge in both the  
batches of Writ Appeals was common). In the second judgment which  
was pronounced on 24.8.2004, the Division Bench while allowing the  
appeal in part, upholding the final seniority list, found the directions of the  
learned Single Judge in regard to constitution of three member Monitoring  
Committee to make necessary corrections in the final list dated 31.1.2000  
E in accordance with law and more particularly following the general  
guidelines for promotion of 1982 and for determining seniority of 1959  
and a proposition "A" of the decision of this Court in the case of direct  
recruitment; to be improper. Both the aforementioned judgments of the  
Division Bench are now under challenge before us at the instance of the  
F direct recruits and the post 1985 vacancies promotees respectively.

G 14. The question herein which arises for our consideration is as to  
whether the *ad hoc* promotions granted to the employees from the post  
of Section Officer (Grade-I) to the post of Assistant Engineer in the P.W.D.  
of Government of Manipur could have been directed to be regularized  
with retrospective effect so as to effect the *inter se* seniority between the  
direct recruits and the promotees. Two seniority lists were published; one  
in the year 1987 and another in 2000.

H 15. There are ten direct recruits before us. The details of their services  
are as under:-

"A. Direct Recruits					2000 List	87 List
1.	Temba Singh	Degree holder	Direct Recruit	Appointed in 1985	At serial no. 33	
2.	Rabindra Kumar Singh	--do--	--do--	--do--	At serial no. 38	
3.	Ch. Biren Singh	--do--	--do--	--do--	At serial no. 39	
4.	G.Lungalin	--do--	--do--	Appointed 5.1.83	At serial no. 83	At serial no. 30
5.	L. Ingochouba Singh	--do--	--do--	Appointed in 1985	At serial no. 48	
6.	M. Thaimon Singh	--do--	--do--	Appointed in 1980	At serial no. 45	At serial no. 8
7.	Ksh. Birendra Singh	--do--	--do--	--do--	At serial no. 49	At serial no. 10
8.	Kh. Irabot Singh	--do--	--do--	--do--	At serial no. 55	At serial no. 13
9.	Th. Thambalngou Singh	--do--	--do--	--do--	At serial no. 63	At serial no. 17
10.	Pradeep Mukherjee	--do--	--do--	Appointed 15.1.81"	At serial no. 77	At serial no. 26

A B C D E F G H

16. There are five promotee Assistant Engineers whose seniority has been determined by the High Court, the details whereof are as under:-

SL. No.	Name of the promotee	Date of appointment	Date of <i>Ad hoc</i> appointment	Date of regular/officiating appointment	Details of the High Court Order by which regularized	Government orders of regularization/Remarks
1.	Ch. Tiken Singh (Contesting Respondent No. 1 in SLP Arising out of W.A. No. 393/03) At serial no. 37 in the seniority list	26.7.1980 Section Officer Grade I DOB 1.9.57	15.10.1981 AE on regular basis on recommendation of DPC	20.9.1985 AE on regular basis on recommendation of DPC	Retrospective regularization from 26.7.1983 under the relevant R.R. vide order dated 5.4.1989 in C.R. No. 392 of 1988  No order as to retrospective seniority	Government order regularizing the services w.e.f. 26.7.1983 explicitly indicates seniority to be determined later
2.	I. Lokendra Singh (Contesting Respondent No. 1 in SLP Arising out of W.A. No. 255/01)	26.6.1980 Section Officer Grade I DOB 1.3.53.	15.10.1981 AE on <i>ad hoc</i> basis	20.09.1985 AE on Officiating basis on recommendation of DPC	Retrospective regularization from 26.6.1983 vide order dated 5.6.1990 in C.R. No. 160 of 1990  No order as to retrospective	Government order regularizing the services w.e.f. 26.6.1983 explicitly indicates seniority to be determined later

	At serial no. 60 in the seniority list				seniority.  The Hon'ble High Court relied on order passed in CR. No. 392 of 1988	
3.	L. Surchandra Singh (Contesting Respondent No. 1 in SLP Arising out of W.A. No. 387/03 & W.A. No. 384/03) At serial no. 32 in the seniority list	23.11.1976  Section Officer Grade I DOB 1.3.50	9.7.1979  AE on ad hoc basis	20.9.1985  AE on regular basis on recommendation of DPC	Retrospective regularization from date he became eligible vide order dated 13.9.1991 in C.R. No. 399 of 1991  No order as to retrospective seniority. The High Court relied on order passed in CR. No. 160 of 1991. The High Court in its order recorded that he	Government order regularizing the services w.e.f. 23.11.1979 explicitly indicates seniority to be determined later

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4.	<p>W. Chaoba Singh (Contesting Respondent No. 2 in SLP Arising out of W.A. No. 385/03)</p> <p>At serial no. 56 of the seniority list</p>	<p>06.01.1972</p> <p>Section Officer Grade I</p> <p>DOB 1.3.49</p>	<p>30.10.1976</p> <p>AE on ad hoc basis</p>	<p>20.9.1985</p> <p>AE on regular basis on recommendation of DPC</p>	<p>was not eligible for promotion to A.E.</p> <p>Retrospective regularization from 30.10.1976 vide order dated 17.12.1991 in C.R. No. 639 of 1991.</p> <p>No order as to retrospective seniority.</p> <p>The High Court relied on order passed in C.R. No. 132/1990 wherein the High Court had granted regularization along with seniority. This order was challenged in a review petition</p>	<p>Government order regularizing the services w.e.f. 30.10.1976 explicitly indicates seniority to be determined later.</p>		

					by the Direct Recruits and the order has been modified to be extent that the seniority will be determined according to rules.	
5.	S. Tejamani Singh (Contesting Respondent No. 1 in SLP Arising out of W.A. No. 386/03) At serial no. 35 of the seniority list	23.11.1976 Section Officer Grade I 1.11.47	9.7.1979 AE on <i>Ad hoc</i> basis	20.9.1985 AE on regular basis on recommendation of DPC	Retrospective regularization vide order dated 18.12.1991 in C.R. No. 639 of 1991.  No order as to retrospective seniority  The High Court relied on order passed in C.R. No. 132/1990 wherein the high court had	Government order regularizing the services w.e.f. 9.7.1979 explicitly indicates seniority to be determined later

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					<p>granted regularization along with seniority. This order was challenged in a review petition by the Direct Recruits and the order has been modified to the extent that the seniority will be determined according to rules.</p>	
6.	<p>Th. Rupachandra Singh (Contesting Respondent No. 1 in SLP Arising out of W.A. No. 385/03) At serial no. 59 of the seniority list</p>	<p>28.10.1971 Section Officer Grade I DOB 1.11.48</p>	<p>30.10.1976 AE on Ad hoc basis</p>	<p>20.9.1985 AE on regular basis on recommendation of DPC</p>	<p>Retrospective regularization from vide order dated 23.1.1992 in C.R. No. 2372 of 1990 No order as to retrospective seniority</p>	<p>Government order regularizing the services w.e.f. 30.10.1976 explicitly indicates seniority to be determined later.</p>

17. There are four promotees whose claim to seniority has been rejected by the High Court.

SL. No.	Name of the promotee	Date of appointment	Date of Ad hoc appointment	Date of regular/officiating appointment	High Court order by which regularized	Violations
1.	R.K. Mobisana (Degree holder) (Petitioner in SLP(C) No. 20724 of 2005)  At serial no. 64 in the seniority list	25.7.1980 Section Officer Grade I (DOB 1.3.56)	6.5.1983 AE on ad hoc basis	20.9.1985 AE on officiating basis on recommendation of DPC	Retrospective regularization w.e.f. 26.7.1983 under the relevant R.R. vide order dated 3.3.2000 in W.P.(C) No. 188 of 2000  High Court order specifically states his regularisation shall be counted for the purpose of retrieval or pensionary benefits and seniority to be determined	- Admittedly the promotion was de hors the R.R.s ; there was no selection process conducted by the DPC - Became eligible for promotion only after three years from the date of appointment i.e. on 25.7.1983 but was promoted on ad hoc basis on 6.5.1983, much earlier to his eligibility date.

R.K. MOBISANA SINGH v. KH. TEMBA SINGH  
[SINHA, J.]

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	<p>according to rules.</p> <p>Government order regularizing the services explicitly indicates it is for retrial and pensionary benefits. Seniority to be determined later</p>					
<p>- Admittedly the promotion was de hors the R.R.s.; there was no selection process conducted by the DPC</p>		<p>20.09.1985 AE on regular basis on recommendation of DPC</p>	<p>26.7.1983 AE on ad hoc basis</p>	<p>25.7.1980 Section Officer Grade I (DOB 1.3.53)</p>	<p>M. Hemantakumar (Degree holder) (Petitioner in SLP(C) No. 20725 of 2005) At serial number 45 in seniority</p>	<p>2.</p>

	list						
3.	Th. Shantikumar Singh (Degree holder)	25.7.1980 Section Officer Grade I	6.5.1983 A.E. on Ad hoc basis				<p>-Admittedly the promotion wasdehors the R.R.s; there was no selection process conducted by the DPC</p> <p>- Became eligible for promotion only after three years from the date of appointment i.e. on 25.7.1983 but was promoted on ad hoc basis on 6.5.1983, much earlier to his eligibility date</p>
4.	Mongjam Budhi Singh (Diploma Holder)	14.11.1969 Section Officer Grade I	25.2.1981 A.E. on <i>Ad hoc</i> basis				<p>- Admittedly the promotion was dehors the R.R.s; there was no selection process conducted by the DPC</p>

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A 18. Out of the aforementioned four persons, only R.K. Mobisana and N. Hemantakumar both of whom are degree holders are before us, but the other two promotees namely Th. Shantikumar Singh and Mongjam Budhi Singh have not filed any special leave petition.

B 19. Submissions of the aforementioned two appellants whose writ petitions have been dismissed and the other promotee respondents before us are as under :

C (i) They having been promoted against vacancies arising in the year 1985 in the promotee quota and their services having been regularized with retrospective effect and not by way of stop gap employment, their seniority should be considered in the light of the proposition 'B' contained in the judgment of this Court in *Direct Recruit Class II Engineering Officers' Association v. State of Maharashtra and Ors.*, [1990] 2 SCC 715].

D (ii) The recruitment rules having not contained any prohibition on grant of regularisation with retrospective effect and in any event the same being permissible *inter alia*, in terms of the decision of this Court in *Suraj Prakash Gupta and Ors. v. State of J&K and Ors.*, [2000] 7 SCC 561, the first judgment of the High Court should not be interfered therewith. The promotees were therefore, entitled to seniority with effect from 26.7.1983 i.e. from the date from which their services were regularized with retrospective effect by orders passed in their favour by the Gauhati High Court, Imphal Bench from time to time.

E (iii) So far as the second judgment of the Gauhati High Court is concerned, the same does not lay down the correct law being contrary to and inconsistent with the principles laid down by this Court in *Direct Recruit (supra)*, *State of West Bengal v. Aghore Nath Dey*, [1993] 3 SCC 371 and *Suraj Prakash (supra)*.

F (iv) The learned Single Judge, in any event, having directed examination of the matter by a fact finding body upon proper

application of mind and determination of seniority having regard A  
to the decisions of this Court, the same deserves to be  
affirmed.

20. Mr. L.N. Rao, learned counsel appearing on behalf of the direct B  
recruits, on the other hand, would submit that the promotees were not  
entitled to seniority from the date of their *ad hoc* promotion for the  
following reasons;

- (i) *Ad hoc* promotions were found to have been made in violation C  
of the Recruitment Rules.
- (ii) The procedure prescribed for grant of regular promotion had D  
not been followed.
- (iii) Some of the promotees did not fulfil the requisite eligibility  
criteria prescribed by the rules.
- (iv) The orders passed by the High Court directing regularisation E  
with retrospective effect did not confer on them any  
consequential seniority.
- (v) Some judgment of the High Court giving consequential seniority  
were reviewed in favour of the direct recruits.
- (vi) There is no rule which enables the Government to give seniority  
with retrospective effect to the promotees.
- (vii) The Direct Recruits cannot be found fault with for non  
questioning of the orders of regularization in favour of the  
promotees as they, in *stricto sensu*, did not have the *locus* F  
*standi* therefor, until the decision to confer consequential  
seniority which adversely affected their rights was taken by the  
competent authority.
- (viii) All High Court orders granting regularization were silent on G  
seniority.
- (ix) The consequent orders of the Government regularizing the  
services specifically stated that the seniority shall be determined  
later. This order was not challenged by the promotees.

A (x) In three cases where the High Court granted seniority, review petitions were filed by the Direct recruits and the order was modified stating that the seniority will be determined according to rules and as these review orders have become final, any sub mission made contrary thereto should not be permitted to be raised.

B (xi) Had there been any mention of seniority in any of the High Court orders referred to in the judgment of the Division Bench, the Direct recruits could have challenged the same.

C (xii) Their exists no rule which enabled the Government to grant seniority with retrospective effect.

21. These matters clearly demonstrate as to how complications arise in the matter of determination of *inter se* seniority because of absence of specific rules made in this behalf.

D 22. We may, however, at the outset notice that meeting of the Departmental Promotion Committee had not been convened in terms of the extant rules.

E 23. We have noticed hereinbefore that there are various recruitment Rules which are applicable in respect of recruitment or the promotions. We will take a brief survey of the said Rules which may be held to be applicable as orders of promotion have been passed on various days.

F 24. Under the Recruitment Rules, 1969, the method of recruitment prescribed for the post of A.E. is:

G “--50 % by direct recruitment from the open market and ;  
--50 % by promotion from amongst the Section Officers (Civil) who had rendered 2 years of regular service in the grade after appointment on regular basis in case of Degree holders and 5 years service in grade after appointment on regular basis in cases of Diploma holders.”

H 25. Under the Recruitment Rules, 1975 the method of recruitment prescribed is:

“-40% of the overall sanctioned strength by direct recruitment. A

-60% of the overall sanctioned strength by promotion. This is to be filled up in the sub-quota as under:

- (i) 50% sub-quota by selection from amongst the 3 years course Diploma holder (Civil/Mechanical) with 8 years regular service as S.O. Grade 1 or a post declared by the Government to be equivalent post. B
- (ii) 40% sub-quota by selection from amongst the graduate Engineer (Civil/Mechanical) who have rendered 3 years regular service as S.O. Grade I or in a post declared by the Government to be equivalent. C
- (iii) 10% sub-quota by selection from amongst non Graduate, non Diploma S.O. Grade I who has rendered 12 years continuous regular service.” D

26. Under the Recruitment Rules, 1984, the method of recruitment prescribed is;

“-40% by Direct recruitment from the open market.

-60% by promotion which is to be filled up under the following sub quota: E

- (i) 50% by selection from amongst the Engineering Degree holders who have rendered a minimum of 3 years regular service as S.O. Grade I as equivalent Post. F  
Provided that is sufficient number of Degree holders are not available, the vacancies may be filled up by Diploma holders with 8 years regular service as S.O. Grade-I.
- (ii) 50% by selection from amongst the Engineering Diploma Holders of 3 years course with 8 years regular service as S.O. Grade I or non Degree/non Diploma holders with 15 years outstanding record as S.O. Grade I. G

27. However, admittedly there does not exist any rule for determination of *inter se* seniority. H

A They were governed by some office memorandums. An Office Memorandum was issued on 22.12.1959 providing for general principles for determination of seniority in the general services wherein *inter alia* it was stated;

B “5. Promotees: (i) The relative seniority of persons promoted to the various grades shall be determined in the order of their selection for such promotions;

C Provided that where persons recruited initially on temporary basis are confirmed subsequently in an order different from the order of merit indicated at the time of their promotion, seniority shall follow the order of confirmation and not the original order of merit.

D (ii) Where promotion to a grade are made from more than one grade the eligible persons shall be arranged in separate lists in the order of their relative seniority in their respective grades. Thereafter, the Departmental Promotion Committee shall select the persons for promotion from each list upon the prescribed quota and arrange all the candidates selected from different lists in a consolidated order of merit which will determine the seniority of the persons on promotion to the higher grade.

E Note: If separate quotas for promotion have not already been prescribed in relevant recruitment rules, the Ministries/Departments may do so now, in consultation with the Commission wherever necessary.

F 6. Relative Seniority of Direct: Recruits and promotees. The relative seniority of direct recruits and of promotees 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 the Recruitment Rules.”

G 28. The legal principles governing determination of *inter se* seniority is no longer *res-integra*. The question came up for consideration before a Constitution Bench of this Court in the *Direct recruit* (*supra*) wherein

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the following criteria were laid down;

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

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

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

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

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

(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.

(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.”

29. *Inter se* seniority between the parties keeping in view the peculiar fact situation obtaining herein is required to be considered. Before applying

A the principles laid down therein to the fact of this case, we may notice a few other decisions of this Court.

30. In *Suraj Prakash Gupta v. State of J& K & Ors.*, [2000] 7 SCC 561, the Rule which was applicable therein was as under:-

B “53. Then comes the rule of “seniority”. Seniority is to be determined by the “date of first appointment” to such service, class or category or grade. It reads as follows:

C “24. Seniority – (1) The seniority of a person who is subject to these Rules has reference to the service, class, category and grade with reference to which the question has arisen. Such seniority shall be determined by the date of first appointment to such service, class, category or grade, as the case may be.

D Note 1. –

E *Interpretation* – The words ‘date of first appointment’ occurring in the above Rule will mean the date of first substantive appointment, meaning thereby the date of permanent appointment or the date of first appointment on probation on a clear vacancy, confirmation in the latter case being subject to good work and conduct and/or passing of any examination or examinations and/or tests:

F Provided that the *inter se* seniority of two or more persons appointed to the same service, class, category or grade simultaneously, will, notwithstanding the fact that they may assume the duties of their appointments on different dates by reason of being posted to different stations, be determined:

G (a) in the case of those promoted by their relative seniority in the lower service, class, category or grade;

H (b) in the case of those recruited direct (except those who do not join their duties when vacancies are offered to them) according to the positions attained by and assigned to them in order of merit at the time of competitive examinations or on the basis of merit

and ability and physical fitness etc., in case no such examination is held for the purpose of making selections;

(c) as between those promoted and recruited direct, by the order in which appointments have to be allocated for promotion and direct recruitment as prescribed by the Rules.

Note. - \* \* \*

It has to be noticed that the interpretation clause below Rule 24 is very wide and under that provision, seniority of a promotee depends on the date of the commencement of probation on a clear vacancy. Probation can be commenced in the case of a person promoted or recruited by transfer from the date of existence of a clear vacancy in the promotee/transfer quota and depending upon his eligibility, suitability based on ACRs."

Having regard to the said Rule in mind this Court surveyed the precedents one way or the other to hold;

"71. The direct recruits have strongly relied upon the decision in *V. Sreenivasa Reddy v. Govt. of A.P.* 12 But this decision cannot be of any help to them. In that case Rule 10 and Rule 23 of the Andhra Pradesh State and Subordinate Service Rules were referred to. It was pointed that the promotees' temporary service under Rule 10 (i.e. service rendered in a post to which the officer was not appointed according to rules), could not be counted on facts, because there was no order of retrospective regularisation. In fact, this Court accepted that if regularised under Rule 23 of the A.P. Rules, the temporary appointees could have been regularised from an anterior date. (This Court then referred to certain rulings which said that direct recruits could not count *ad hoc* service rendered by them before their regular selection.) On facts, this Court held that the Government had relaxed the Rule regarding PSC consultation but had placed the promotees below the direct recruits and this need not be interfered with. This case far from supporting the direct recruits, supports the promotees."

A Holding that *decision of K. Siva Reddy v. State of A.P.*, [1988] Supp. SCC 225 and *Ramendra Singh v. Jagdish Prasad*, [1984] Supp SCC 142 were not applicable to the fact of that case it was opined;

“75. These rulings cannot be applied to the case of the promotees.

B In fact the principle laid down in these cases is consistent with the principles in service jurisprudence so far as the *ad hoc* service rendered by direct recruits before the date of their regular selection is concerned. Their service counts only from the date of regular appointment according to rules and any *ad hoc*/stopgap service rendered before regular selection cannot count for seniority.”

C 31. The Court in paragraph 77 of the judgment noticed the decisions where promotees were held to be not entitled to seek regularisation of *ad hoc* services in certain situations. The Court summarized its finding in paragraph 79 in the following terms;

D “79. Summarising the position, we therefore hold that the *ad hoc*/stopgap service of the promotees cannot be treated as non est merely because PSC was not consulted in respect of continuance of the *ad hoc*/stopgap service beyond six months. Such service is capable of being regularised under Rule 23 of the J&K (CCA) Rules, 1956 and rectified with retrospective effect from the date of occurrence of a clear vacancy in the promotion quota, subject to eligibility, fitness and other relevant factors. There is no “rota” rule applicable. The “quota” rule has not broken down. Excess promotees occupying direct recruitment posts have to be pushed down and adjusted in later vacancies within their quota, after due regularisation. Such service outside the promotee quota cannot count for seniority. Service of the promotees which is regularised with retrospective effect from the date of vacancies within the quota counts for seniority. However, any part of such *ad hoc*/stopgap or even regular service rendered while occupying the direct recruitment quota cannot be counted. Seniority of the promotees or transferees is to be fixed as per quota and from the date of commencement of probation/regular appointment as stated above.

H Seniority of direct recruits is from the date of substantive

appointment. Seniority has to be worked out between direct recruits and promotees for each year. We decide Point 3 accordingly. A

Point 4

Direct recruits cannot claim appointment from date of vacancy in quota before their selection” B

32. In *M.K. Shanmugam and Anr. v. Union of India & Ors.*, [2000] 4 SCC 476, direct recruitment and *ad hoc* appointment was distinguished stating : C

“...If the *ad hoc* selection is followed by regular selection, then the benefit of *ad hoc* service is not admissible if *ad hoc* appointment is in violation of the rules. If the *ad hoc* appointment has been made as a stopgap arrangement and where there was a procedural irregularity in making appointments according to rules and that irregularity was subsequently rectified, the principle to be applied in that case was stated once again. There is difficulty in the way of the appellants to fight out their case for seniority should be reckoned by reason of the length of the service whether *ad hoc* or otherwise inasmuch as they had not been recruited regularly. As stated earlier, the appellants were regularly found fit for promotion only in the year 1977 and if that period is reckoned their cases could not be considered as found by the Tribunal.” D E

It was furthermore observed; F

“It is only in those cases where initially they had been recruited even though they have been appointed *ad hoc* the recruitment was subject to the same process as it had been done in the case of regular appointment and that the same was not a stopgap arrangement. That is not the position in the present cases at all. Therefore, we are of the view that the conclusions reached by the Tribunal appear to us to be correct and call for no interference. However, we make it clear, as noticed earlier, that while amending the Rules of Recruitment in 1984 all those who are already in G H

A service will be borne in mind in adjusting the seniority amongst the promotees *inter se* and suitable adjustments could be made and so far as the direct recruits are concerned, their cases will go by their quota rule and the view taken by the Tribunal in this regard cannot be taken exception of.”

B 33. *Suraj Prakash Gupta* (supra) has been distinguished by this Court in *Swapan Kumar Pal and Ors v. Samitabhar Chakraborty and Ors.*, [2001] 5 SCC 581 stating;

C “8. ...The next case relied upon by Mr. Rao is the case of *Suraj Prakash Gupta v. State of J&K*. In the aforesaid case, on consideration of the relevant rules governing the service conditions of the Assistant Engineers of the Jammu and Kashmir Government, the Court had observed that *ad hoc* or temporary service of a person, appointed by transfer as an Assistant Engineer or by promotion as an Assistant Executive Engineer can be regularized through the Public Service Commission and Departmental Promotion Committee from an anterior date in a clear vacancy in his quota, if he is eligible and found suitable for such transfer or promotion, as the case may be, and his seniority will count from that date. The aforesaid conclusion was drawn because of the provisions of Rule 23 and Rule 15 of the Jammu and Kashmir Rules but in the case in hand, there is no provision, which has been brought to our notice, which enables the appointing authority to regularise a promotion from an anterior date, though the suitability test is held at a later date. *In the absence of any such provision in the Rules in question, the ratio of the aforesaid decision, on interpretation of the relevant rules of the Jammu and Kashmir Engineering Rules will have no application.* (emphasis supplied)

G 34. To the similar effect is the decision of this Court in *Md. Israil and Ors. v. State of W.B. and Ors.*, [2002] 2 SCC 306, noticing *Suraj Prakash Gupta* (supra) and *Shanmugam* (Supra) wherein it was opined that those decisions were rendered having regard to the peculiar rules which were governing the service conditions of the employees;

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35. We may furthermore notice that this Court in *D.N. Agrawal and Anr. v. State of Madhya Pradesh and Ors.*, [1990] 2 SCC 553 has categorically held that *ad hoc* promotion without following the Recruitment Rules would not lead to any right for computation of seniority. A

36. In *Santosh Kumar v. G.R. Chawla*, [2003] 10 SCC 513, this Court opined : B

“17. It was contended by the learned counsel for the appellants that in view of Rule 4, the appellants are required to be regularised first and thereafter, newly appointed direct recruits are required to be appointed/confirmed. This contention has no force. This contention has to be negatived in view of the specific finding by the High Court that direct recruits were appointed either on 16-9-1982/17-9-1982 and the services of the appellants were regularised only on 22-9-1982.” C

37. Applying the principles of the aforementioned decisions to the facts of this case, we are of the opinion that although in terms of the office memorandum, no retrospective effect could be given to the order of regularisation passed in favour of the promotees, as in absence of any seniority rules operating in the field, the State was required to evolve a policy. It for its own reason did not do so. D E

38. The office memorandum of 1959 was applicable in a case of this nature. In some of the cases, promotion might have been given without following the rules. When promotion is given only in the exigency of situation without following the Rules, the period cannot be counted towards seniority. F

39. If they had been given regularisation with retrospective effect, the same by itself may not be a ground to apply the said order ipso facto for determining the *inter se* seniority. Seniority although is not a fundamental right but a civil right. Such a right of the direct recruits could not have been taken away without affording an opportunity of hearing to them. G

40. It was obligatory on the part of the official respondents to take into consideration that the retrospective regularization could be granted H

- A only when there exists such a rule. If rules were not followed at the time of grant of promotion, question of grant of regularization with retrospective effect would not arise. Retrospective regularization whether in terms of the directions of the High Court or otherwise, thus, although could confer other service benefits to the officer concerned, but the same cannot be
- B held to be of any assistance for reckoning seniority with retrospective effect.

41. It was for the DPC to recommend in regard thereto.

42. In some of the cases, evidently the procedure has not been
- C followed. Therefore, the question of their acquiring seniority over the direct recruits does not arise.

43. The matter, therefore, requires a closer scrutiny by the State itself. As the function relating to determination of *inter se* seniority is that of the State, we do not approve constitution of a committee, as has been
- D proposed by the learned Single Judge. It would, however, be open to the State to do so, if it so desires. The competent authority of the State is, therefore, directed to determine the *inter se* seniority of the parties in view of the principles enunciated hereinbefore and apply the same to the
- E fact of each case. Such an exercise should be completed within a period of three months. These appeals are, therefore, disposed of with the aforementioned observations and directions with no order as to costs.

N.J.

Appeals disposed of.