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AJAY KUMAR SHUKLA AND OTHERS

v.

ARVIND RAI AND OTHERS

(Civil Appeal No(s). 5966 of 2021)

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DECEMBER 08, 2021

**[DR. D.Y. CHANDRACHUD, VIKRAM NATH AND
B.V. NAGARATHNA, JJ.]**

C *Service Law: Seniority list – Appellants working as Junior Engineers belonging to Mechanical and Civil Streams whereas respondents from agricultural stream – Plea of the appellants that in the seniority list, the department had placed the candidates of the three lists- Agricultural, Mechanical and Civil in the same sequence as they were received with their inter se seniority in their respective lists, the agricultural stream on the top, thereafter*
D *mechanical and lastly the civil stream – Writ petition by the appellant challenging the seniority list – Single Judge quashed the seniority lists and directed the department to draw a fresh seniority list in accordance with Rules 1991– However, the Division Bench set aside the order – On appeal, held: Seniority list was prepared by the*
E *Department in contravention to the statutory provision laid down in Rules 1991 – Appointing Authority would be bound by the statutory rules and any violation or disregard to the statutory rules would vitiate the seniority list – It would be arbitrary, de hors the rules and in conflict with Arts 14 and 16 – Appointing authority ought to have prepared a combined merit list based upon the*
F *performance or the proficiency on the basis of the marks received in the selection test as prepared by the Commission – Otherwise, it would amount to denial of the right of consideration for promotion to a more meritorious candidate – Appointing Authority erred in the manner in which the seniority list was prepared by placing the three*
G *select lists forwarded by the Commission on different dates one after the other en bloc as per the date of receipt of three select lists – Furthermore, the delay of three to four years in filing the matter satisfactory explained; and the non-joining of all the affected junior engineers not fatal – Thus, the order passed by the Single Judge of the High Court upheld – Uttar Pradesh Government Servants*

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Seniority Rules, 1991 – rr. 5, 8 – Uttar Pradesh Minor Irrigation Department Subordinate Engineering Service Rules, 2009 – Constitution of India – Arts. 14 and 16(1). A

Service Law: Promotion – Right to promotion – Held: Is not considered to be a fundamental right but consideration for promotion has now evolved as a fundamental right – Constitution of India – Art. 14 and 16(1). B

Jurisprudence: Service jurisprudence – Impleadment of parties – Held: It is not essential to implead each and every one who could be affected but if a section of such affected employees is impleaded then the interest of all is represented and protected – Impleadment of a few of the affected employees would be sufficient compliance of the principle of joinder of parties and they could defend the interest of all affected persons in their representative capacity – Non-joining of all the parties not fatal. C

Allowing the appeals, the Court D

HELD: 1.1 There was one selection for the three streams i.e. Agricultural, Mechanical and Civil. There is one cadre of Junior Engineers in the Minor Irrigation Department and therefore, there has to be one seniority list of Junior Engineers. [Para 18][1201-B-C] E

1.2 The Appointing Authority, in fact, committed an error in the manner in which the seniority list was prepared by placing the three select lists forwarded by the Commission on different dates one after the other en bloc as per the date of receipt of three select lists. It is not the case either of the private respondents, State or the Commission that appointment letters have been issued separately as and when the select lists were received. In fact, the appointment letters of all the three streams were issued in October 2001, after about 10 to 11 months of the receipt of the third list i.e. of the Civil stream in November 2000. Apparently by an oversight, the Appointing Authority failed to prepare the combined seniority list as required under the Uttar Pradesh Government Servants Seniority Rules, 1991, be it Rule 5 or Rule 8 with respect to the selection of the appellants and private-respondents. [Para 20][1203-C-E] F
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A **1.3 In October, 2001, when the appointment letters were issued it carried a stipulation that the seniority would be determined later on as per rules. It is an admitted position that before 2006, the seniority list of the appellants was not notified. In March, 2006, when the tentative list was published, it did not mention about the three select lists nor was this fact mentioned**
B **when the final seniority list was published on 05.09.2006. Rather, it clearly mentioned that the seniority list had been prepared on the basis of merit. This was in fact an incorrect statement. The seniority list had not been prepared on the basis of merit but on the basis of receipt of the three separate select lists one after the other. As the Agricultural list was received first on 28.09.1999,**
C **all the selected candidates of agricultural stream were en bloc placed on the top, thereafter the Mechanical list was received on 06.01.2000, they were placed below the Agricultural stream and lastly, the Civil stream list was received on 07.11.2000, they were placed at the end. [Para 25][1205-A-D]**
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1.4 Rules 5 and 8 of Rules 1991 clearly mention that there shall be one list for one selection of direct recruits. Creating three separate lists for one selection was contrary to the provisions contained in Rules 5 and 8 of Rules 1991. Rules 2009 clearly mention that seniority would be determined and prepared
E **as per 1991 Rules. Rule 5 of Rules 1991, dealt with the selections made only through direct recruitment whereas Rule 8 thereof dealt with the situation where seniority list is to be prepared of both the direct recruits and the promotees. However, the principles underlined in both these Rules are the same that there**
F **has to be one list for one selection, as is clear from Rule 8(2)(a) and Rule 5 of Rules 1991. [Para 26][1205-D-F]**

1.5 Once it is established that the seniority list was prepared in contravention to the statutory provisions laid down in Rules 1991, the seniority list could be interfered with. The Appointing
G **Authority would be bound by the statutory rules and any violation or disregard to the statutory rules would vitiate the seniority list. The same would be arbitrary, de hors the rules and in conflict with Articles 14 and 16 of the Constitution. The only exception would be where there is unreasonable delay which is unexplained. [Para 27][1205-F-G]**
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1.6 In the facts of the instant case, it is found from the final seniority list of 05.09.2006 that it nowhere mentioned that there were three separate lists of separate streams and that they were received on different dates. On the contrary, there was a recital therein and specific averment to the effect that the list had been prepared on the basis of merit. Thus, it cannot be said that the appellants were aware of the three separate select lists dispatched by the Commission on three different dates at the time of publication of final list dated 05.09.2006. [Para 28][1206-A-C]

1.7 The appellants had no occasion to know about the three separate lists either at the time they were dispatched by the Commission or at any time thereafter as the appointment letters of all selected candidates of all the three streams were issued simultaneously under Office Order dated 08.10.2001. The order finalizing the seniority list of 05.09.2006 also nowhere mentioned that three separate lists of three streams were received from the Commission and placed en bloc as received one after the other. [Para 29][1206-C-D]

1.8 At the time of notifying the tentative list on 29.12.2009, it was not stated anywhere that there were three separate lists received on three different dates. As such it could not be alleged that the appellants even at that stage did not file objections regarding preparation of common seniority list. It was only when the final seniority list was published on 05.03.2010 and in the order finalizing the list, it was mentioned by the department that there were three separate lists received on three separate dates and in that sequence the combined seniority was prepared. Thus, it is for the first-time that appellants came to know of the error on publication of the final seniority list on 05.03.2010. [Paras 30][1206-E-F]

1.9 The respondents have not been able to show any material which could clearly indicate that the appellants had knowledge of three separate lists and the preparation of the seniority list on its basis. [Para 31][1206-F-G]

1.10 After coming of Rules 2009, fresh exercise was undertaken for preparation of seniority list. A tentative list was notified by the Office Order dated 29.12.2009. This Office Order mentions that the seniority list has to be prepared according to

- A 1991 Rules. While dealing with the finalization of this tentative list, vide office order dated 05.03.2010, there is reference to disposal of an objection by MC and MK in which they had apparently sought clarification regarding the requisition send to the Commission and other related aspects. In paragraph 11 of the Office Order, it is mentioned that the Commission had
- B forwarded the three lists of the Agriculture, Mechanical and Civil streams separately on 06.01.2000, 27.01.2000 and 07.11.2000 respectively. It further mentioned that it was in that sequence i.e. the date of receiving that the combined seniority was assessed. Thus, again the seniority list was finalized in the same sequence
- C as the three lists have been received and in that order. It is thereafter that the representations were made that the seniority list of the direct recruits of 2001 was wrongly prepared contrary to the Rules, however, when no action was taken, RN and fourteen others approached the High Court which was within a period of
- D two to two and half years and till such time they had been pursuing their representation after office order dated 05.03.2010. Thus, it is clear that in the first contingency or in the second contingency, the appellants cannot be found at fault. The Division Bench committed an error in holding that the claim lodged by the appellant suffered from delay and laches. [Para 34][1208-A-E]
- E 1.11 The plea to defend the seniority list prepared contrary to the statutory provisions on the ground of delay would be a difficult proposition. Apart from the submission of the appellants that there is no delay as they came to know of the three separate lists only in March, 2010, even if it is assumed that there was
- F some delay and a fresh seniority list was being prepared in 2009-2010 again contrary to the provisions of statutory rules, such seniority list cannot be sustained or defended on the ground of delay of five years. [Para 35][1208-F-G]
- G 1.12 The next promotion of Junior Engineers in the higher grade is to the post of Assistant Engineer. In the cadre of Assistant Engineer, there are no separate streams but only one cadre of Assistant Engineers. It is the seniority list of the cadre of Junior Engineers which would be the feeder cadre for the post of Assistant Engineers. The Junior Engineers of Agricultural stream of the selection of the year 2001, would have direct march over
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the Junior Engineers selected in the same selection of the Mechanical and Civil streams, even though the overall merit of some or many of Agricultural stream Junior Engineers could be lower than some or many of the Engineers of the Mechanical and Civil streams. The appointing authority ought to have prepared a combined merit list based upon the performance or the proficiency on the basis of the marks received in the selection test as prepared by the Commission. Otherwise, it would amount to denial of the right of consideration for promotion to a more meritorious candidate as against a candidate having lesser merit. Right to promotion is not considered to be a fundamental right but consideration for promotion has now been evolved as a fundamental right. [Para 36][1208-G-H; 1209-A-C]

Director, Lift Irrigation Corporation Ltd. and Others vs. Pravat Kiran Mohanty and Others (1991) 2 SCC 295:[1991] 1 SCR 341; Ajit Singh vs. State of Punjab (1999) 7 SCC 209:[1999] 2 Suppl. SCR 521; Major General H.M. Singh, VSM vs. UOI and Another (2014) 3 SCC 670:[2014] 1 SCR 270 – referred to.

1.13 If the seniority list is allowed to be sustained then the engineers who are more meritorious in the Mechanical and Civil streams than the Junior Engineers of the Agricultural stream would be deprived of their right of being considered for promotion and in fact their right would accrue only after all the Junior Engineers of the Agricultural stream selected in the same selection are granted promotion. For these reasons also the seniority list in question must go. [Para 40][1212-C-D]

1.14 The instant case is a case of preparation of seniority list and that too in a situation where the appellants (original writ petitioners) did not even know the marks obtained by them or their proficiency in the examination conducted by the Commission. The challenge was on the ground that the Rules on the preparation of seniority list had not been followed. There were 18 private respondents arrayed to the writ petition. The original petitioners could not have known who all would be affected. They had thus broadly impleaded 18 of such Junior

A **Engineers who could be adversely affected. In matters relating to service jurisprudence, time and again it has been held that it is not essential to implead each and every one who could be affected but if a section of such affected employees is impleaded then the interest of all is represented and protected. In view thereof, impleadment of a few of the affected employees would be sufficient compliance of the principle of joinder of parties and they could defend the interest of all affected persons in their representative capacity. Non-joining of all the parties cannot be held to be fatal. [Para 47][1214-G-H; 1215-A-C]**

C *Ranjan Kumar and Others vs. State of Bihar and Others* (2014) 16 SCC 187 – distinguished.

D *Prabodh Verma and others vs. State of Uttar Pradesh and others* (1984) 4 SCC 251:[1985] 1 SCR 216; *State of Uttaranchal vs. Madan Mohan Joshi and others* (2008) 6 SCC 797:[2008] 8 SCR 591; *Indu Shekhar Singh and others vs. State of U.P. and others* (2006) 8 SCC 129:[2006] 1 Suppl. SCR 497; *Tridip Kumar Dingal and others vs. State of West Bengal and others* (2009) 1 SCC 768:[2008] 15 SCR 194; *Mukul Kumar Tyagi and Ors. vs. The State of Uttar Pradesh and Ors.* (2020) 4 SCC 86:[2019] 16 SCR 1145 – referred to.

F **1.15 The Division Bench also dealt with an issue which was totally irrelevant and alien to the adjudication of the present appeals. In the judgment of the Division Bench there is a reference to an issue where a party takes calculated chances of participating in selection/appointment process and later turns around after being unsuccessful would be hit by doctrine of estoppel. This issue was not at all relevant. The said issue does not arise in the present case. The appellants/original writ petitioners had never challenged the selection process. The challenge was only to preparation of the seniority list. [Para 48][1215-C-E]**

H **1.16 The Division Bench in a generalized and vague manner recorded that the authorities relied upon by the Single Judge were rendered in a different fact situation and were not applicable. The Division Bench did not consider the judgments relied upon**

by the Single Judge but only made this passing remarks. The authorities relied upon by the Single Judge were relevant and correctly applied. [Para 49][1215-E-G] A

1.17 The Division Bench proceeded to deal with the delay stating it to be 11 years, the basis for calculation of 11 years was that the seniority list of 2006 was challenged by way of amendment by the appellants in the year 2017 and therefore there was a delay of 11 years. This discussion by Division Bench also cannot be sustained. The first seniority list was prepared in 2006. It was not disclosed as to how the seniority list has been prepared by treating the three separate lists independently on their merits but not as a result of combined merit of the three lists. It was only in 2010 that the appellants came to know of the fallacy and soon thereafter they challenged the seniority list of 2010. Even if, they did not challenge the seniority list of 2006, 2010 seniority list could always be revisited, reviewed and prepared afresh, if the same was quashed. The appellants could not have been at any loss even if they had not challenged the 2006 seniority list. [Para 50][1215-G-H; 1216-A-B] B C D

1.18 The reasoning given regarding issue of single selection is also not sustainable in view of Rules 1991 as also Rules 2009. [Para 51][1216-B-C] E

1.19 The seniority inter se of direct recruits to one selection has to be one combined list based on the performance and the marks awarded in the examination prepared either by the Commission or the Committee, as the case may be. True, the Single Judge, in the operative portion mentioned that a fresh seniority list be prepared in accordance with Rule 5 and apparently did not consider the effect of Rule 8, would not vitiate the judgment inasmuch as the basis for preparation of the seniority list of direct recruits was the same in both the Rules. There is no lis inter se between direct recruits and promotees. [Para 52][1216-D-E] F G

1.20 The Single Judge was right in setting aside the final seniority list and directing the appointing authority for preparation of fresh seniority list in accordance with Rules 1991, be it Rule 5 or Rule 8 thereof. The impugned judgment of the Division Bench H

A of the High Court is set aside and that of the Single Judge is maintained. [Paras 53, 54][1216-F-G]

Shiba Shankar Mohapatra vs. State of Orissa (2010) 12 SCC 471:[2009] 15 SCR 866; Dayaram Asanand Gursahani vs. State of Maharashtra and others (1984) 3 SCC 36:[1984] 2 SCR 703; B.S. Bajwa and another vs. State of Punjab and others (1998) 2 SCC 523:[1997] 6 Suppl. SCR 451; Malcom Lawrence Cecil D'Souza vs. Union of India and others (1976) 1 SCC 599:[1975] 0 Suppl. SCR 409; R.S. Makashi and others vs. I.M. Menon and others (1982) 1 SCC 379:[1982] 2 SCR 69 – referred to.

Case Law Reference

	[2009] 15 SCR 866	referred to	Para 4(b)
	[1984] 2 SCR 703	referred to	Para 22
D	[1997] 6 Suppl. SCR 451	referred to	Para 22
	[1975] 0 Suppl. SCR 409	referred to	Para 22
	[1982] 2 SCR 69	referred to	Para 22
E	[1991] 1 SCR 341	referred to	Para 37
	[1999] 2 Suppl. SCR 521	referred to	Para 38
	[2014] 1 SCR 270	referred to	Para 39
	(2014) 16 SCC 187	distinguished	Para 41
F	[1985] 1 SCR 216	referred to	Para 42
	[2008] 8 SCR 591	referred to	Para 43
	[2006] 1 Suppl. SCR 497	referred to	Para 44
	[2008] 15 SCR 194	referred to	Para 45
G	[2019] 16 SCR 1145	referred to	Para 46

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5966 of 2021.

From the Judgment and Order dated 04.12.2019 of the High Court of Judicature at Allahabad in Special Appeal No. 897 of 2019.

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AJAY KUMAR SHUKLA AND OTHERS v. ARVIND RAI AND OTHERS 1187

With A

C.A. Nos. 5969, 5967, 5968 of 2021

Siddhartha Dave, Sr. Adv., Ashok Kumar Singh, Shantwanu Singh, Ms. Pragya Singh, Abhishek Khare, Ms. Preetika Dwivedi, Utkarsh Srivastava, Mrs. Revathy Raghavan Advs. for the Appellants.

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Gopal Sankaranarayanan, Sr. Adv., Rohit Amit Sthalekar, Sankalp Narain, Ms. Ishita, Parmanand Pandey, Ajay Kumar Singh, Utkarsh Pandey, Utkarsh Srivastava, Ms. Ila Shikhar Sheel, Mrs. Nanita Sharma, Siddharth, Amit Kumar Agrawal, Ashish Choudhury, Navin Kumar Sehrawat, Vishnu Kant, Advs. for the Respondents.

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The Judgment of the Court was delivered by

VIKRAM NATH, J.

1. The present set of appeals preferred by the original writ petitioners (before the High Court) assails the correctness of the judgement and order dated 04.12.2019 passed by Division Bench of the Allahabad High Court in Special Appeal No. 819 of 2019, in between **Rajesh Kumar Singh and Another vs. Rajeev Nain Upadhyay and 24 Others** whereby the Division Bench allowed the appeal, set aside the judgment and order of the learned Single Judge and dismissed the writ petition.

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Background:

2. The appellants, who were working as Junior Engineers in the Department of Minor Irrigation, State of Uttar Pradesh, aggrieved by the final seniority list dated 05.03.2010 challenged the same by way of Writ Petition No. 53123 of 2012, being **Rajeev Nain Upadhyay and Others vs. State of Uttar Pradesh and Others**. The appellants (Original Writ Petitioners) belong to the Mechanical and Civil Streams whereas Private Respondents are from the Agriculture Stream.

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3. Originally when the petition was filed, challenge was only to the seniority list published on 05.03.2010. However, during the pendency of the petition by way of amendment, challenge was also made to the earlier seniority list published on 05.09.2006. The said amendment was allowed. Thus, the reliefs claimed post amendment, read as follows:

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“Prayer

Original prayer in the writ petition before the high court:

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A It is, therefore, most respectfully prayed that this Hon'ble court may be pleased to issue:

i. A writ, order or direction in the nature of certiorari quashing the office order dated 05.03.2010 issued by the Chief Engineer (Minor Irrigation), U.P. Lucknow and the seniority list appended thereto (Annexure 12 to the writ petition).

B ii. A writ, order or direction of a suitable nature commanding the respondents to prepare and publish a revised seniority list in conformity with UP Government Servant Seniority Rule 1998 within a period to be specified by this Hon'ble court.

C iii. A writ, order or direction of a suitable nature restraining the respondents from taking any action on the basis of impugned office order.

D iv. A writ, order or direction in the nature of which this Hon'ble court may deem fit and proper under the circumstances of the case.

v. Award cost to the humble petitioner throughout of the present writ petition.

E Prayer added subsequently to the original prayer in writ petition before the High Court:

That the following prayers may be added after prayer no (i) as prayer no. i-a) & i-b)

i-a) Certiorari quashing for the record to quash the seniority list dated 5.9.2006.

F i-b) mandamus restraining the respondents from giving any benefits to the respondents on the basis of the seniority list dated 5.9.2006."

G 4. The learned Single Judge, vide judgement and order dated 14.05.2019, allowed the writ petition, quashed the seniority lists dated 05.09.2006 and 05.03.2010 and further issued a writ of mandamus directing the respondents to draw a fresh seniority list in accordance with Rule 5 of the **Uttar Pradesh Government Servants Seniority Rules, 1991** (for short "Rules 1991"). It was also provided that any promotions made during the pendency of the writ petitions would not be interfered with but would remain subject to the fresh seniority list to be

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prepared in accordance with Rule 5 of Rules 1991. Learned Single Judge recorded the following findings to arrive at the above conclusions:

a) After examining the relevant rules and also the scheme of determination of the seniority, it was recorded that the existing seniority list would not only be prejudicial to the interest of junior engineers belonging to civil and mechanical branch but would also affect their chances of promotion. It would also be generating heart burn, adversely affecting the administration and working of the entire department. Paragraph 21 of the judgment of learned Single Judge is reproduced below:

“21. The scenario noticed above would not only be prejudicial to the interests of Junior Engineers belonging to Civil and Mechanical Engineering Stream as it would affect their chances of promotion and generate heart-burning but would adversely affect the requirement of work to be managed by the department also.”

b) The objection taken by the respondents to the original writ petition regarding the petition suffering from delay and laches, was elaborately dealt with. The law on the point was dealt with in abundance and thereafter it was recorded that a delay of three to four years, in a matter relating to seniority dispute would not be fatal. Reliance was placed upon the judgment of **Shiba Shankar Mohapatra vs. State of Orissa**¹. It was held that in the present case, there was no delay or laches.

c) It was also recorded that once there was a serious challenge to the determination of seniority on the ground that the seniority list had been prepared *de hors* the rules, writ petition was required to be considered on merits.

d) Three different lists were forwarded by the Commission relating to the same selection and therefore, a common *inter se* merit of the candidates from the three lists ought to have been prepared and accordingly seniority ought to have been fixed.

e) The Competent Authority and the State committed a serious error of law in determining the seniority list merely on the basis of the date of receipt of the three select lists arising out of the same selection. Such an action could neither be supported in law or on

¹ (2010) 12 SCC 471

A facts nor the task of determining seniority be left to such a fortuitous circumstance.

B f) The date of dispatch of select list, by no stretch of imagination could be a determining factor for preparing the seniority list. The Competent Authority and the State have acted contrary to the specific provisions contained in Rules 1991. As such their action is arbitrary and also against the constitutional spirit of equal opportunity in matters of public employment.

C 5. The judgment of the learned Single Judge was assailed by way of intra court appeal registered as Special Appeal No. 819 of 2019. The Division Bench, vide judgment and order dated 04.12.2019, allowed the appeal, set aside the judgment of the learned Single Judge and dismissed the writ petition. This judgment has given rise to the present set of appeals. The Division Bench recorded the following findings to arrive at the above conclusions:

D a) There was extraordinary delay on the part of the original writ petitioners in approaching the Court inasmuch as the seniority list of 2006 which had formed the basis of the 2009 seniority list, was not challenged within a reasonable time.

E b) The original writ petitioners having not challenged the final seniority list dated 05.09.2006 principally accepted the same as such their claim would be barred by principle of acquiescence.

c) All the affected Junior Engineers having not been impleaded would be fatal on the principle of non-joinder of necessary parties.

F d) The appellants having participated in selection/appointment process, later on, cannot challenge the process as such action would be hit by doctrine of estoppel and acquiescence.

G e) The learned Single Judge was not right in directing for preparation of the seniority list in accordance with Rule 5 of Rules 1991 as it would be Rule 8 which would be applicable and not Rule 5.

Facts:

6. The factual matrix relevant for adjudication of this set of appeals are:

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a) The Chief Engineer, Department of Minor Irrigation send a requisition dated 18.06.1998 to the Uttar Pradesh Public Service Commission (for short “the Commission”) requesting for recruitment of 206 posts of Junior Engineers in the Department of Minor Irrigation. These posts were further divided *inter se* between agriculture, mechanical and civil streams in the ratio of 50:30:20 respectively. A
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b) The Commission issued an Advertisement No. 3 of 1998-1999, inviting applications for the post of Junior Engineers. The examination process was in two tiers; a screening test which was held on 18.10.1998 and after qualifying this screening test, there was an interview to be conducted by the Commission. The result of the screening test was declared on 06.01.1999 and thereafter, interviews were conducted by the Commission from 07.06.1999 to 26.06.1999 with respect to candidates who were holding a Diploma in Agricultural Engineering. Insofar as candidates holding Diploma in Mechanical Engineering were concerned, their interviews were held between 24.06.1999 to 02.07.1999 and lastly for candidates holding Diploma in Civil Engineering, their interviews were held between 07.07.1999 to 22.12.1999. After finalising the results, the Commission forwarded three separate select lists to the Minor Irrigation Department of the State Government, as follows: C
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i) On 28.09.1999, the select list of candidates pertaining to Agricultural Engineering;

ii) On 06.01.2000, the select list of candidates pertaining to Mechanical Engineering and, F

iii) Lastly on 07.11.2000, the select list of candidates pertaining to Civil Engineering.

Note: There is some discrepancy regarding the dates of the three lists being forwarded to the department. The Commission, in its affidavits filed, has given different dates. However, the fact remains that the sequence of sending the lists of three different streams remains the same i.e. Agriculture, Mechanical and Civil in that order. In one of the affidavits, the three dates are 06.01.2000, 27.01.2000 and 07.11.2000 for Agriculture, Mechanical and Civil Junior Engineers. In another affidavit it is G
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- A 28.09.1999, 06.01.2000 and 07.11.2000 in the same order. Hereinafter we have dealt these dates as 28.09.1999, 06.01.2000 and 07.11.2000 respectively.
- B c) Based upon the above three select lists forwarded by the Commission, appointment letters were issued on 08.10.2001. The appointment letter clearly indicated that the issue regarding seniority would be decided later on. Pursuant to the appointment letters dated 08.10.2001, the petitioner and private respondents joined.
- C d) In 2006, a tentative seniority list was published vide office order dated 17.03.2006 with respect to all the Junior Engineers appointed after 01.01.1989. Later on, vide office order dated 05.09.2006, a final seniority list was published. The last sentence of the said office order reads that the seniority of the candidates selected by the Commission has been kept in their serial of merit.
- D e) The department took a fresh exercise of preparing the seniority list in 2009 as for the first time Rules relating to Junior Engineers of the Minor Irrigation Department were framed. Reference to these Rules would be made a little later.
- E f) Accordingly, a provisional seniority list was published vide office order dated 29.12.2009 inviting objections. The objections received were considered and vide office order dated 05.03.2010, a final seniority list was published. In the latter part of paragraph 11 of the office order dated 05.03.2010, reference was made that the Commission had sent three separate lists i.e. of Agricultural stream on 28.09.1999, Mechanical stream on 06.01.2000 and Civil stream on 07.11.2000. The department had placed the candidates of the
- F three lists in the same sequence as they were received with their *inter se* seniority in their respective lists. For example, if there were 30 candidates in the Agricultural stream, all those candidates were placed on top at serial nos. 1 to 30 in the same order as it was received, if 20 candidates were in the Mechanical list then
- G they were placed *en bloc* in the same serial as received from the Commission from serial nos. 31 to 50 and, if there were 50 in the Civil stream, they were placed below Mechanical with serial numbers 51 to 100 again in the same sequence as forwarded by the Commission.
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g) The appellants came to know of this mode of preparation of the seniority list only after the publication of the final list on 05.03.2010 as prior to it they were under the bona fide belief that department had prepared seniority list *inter se* between all three streams as per the selection and result conveyed by the Commission. They were thus compelled to make representations to correct the seniority list by considering the *inter se* merit of all the three streams i.e. Agricultural, Mechanical and Civil on the basis of the marks obtained in their examinations and forwarded by the Commission rather than preparing the seniority list in the order of receipt of the select list of the three streams. When no heed was paid to their representations, the appellants approached the High Court by way of Writ Petition No. 53123 of 2012.

h) As already recorded above, the Single Judge allowed the writ petition whereas the Division Bench dismissed the writ petition giving rise to the present set of appeals.

Statutory Provisions: Rules

7. Before we proceed further, a broad outline of the relevant rules applicable for preparation of seniority may be referred to. First and foremost and most relevant is Rules 1991 framed under Article 309 of the Constitution. This was in existence at the time when the selection of the appellants and respondents was made in 1998-1999. Part II of the said Rules deals with the determination of the seniority. Rule 5 thereof provides for seniority where appointments are made only by direct recruitment. The said Rule is reproduced hereunder:

“5. Seniority where appointments by direct recruitment only. - Where according to the service rules appointments are to be made only by the direct recruitment the seniority inter se of the persons appointed on the result of any one selection, shall be the same as it is shown in the merit list prepared by the Commission or the Committee, as the case may be :

Provided that a candidate recruited directly may lose his seniority, if he fails to join without valid reasons when vacancy is offered to him, the decision of the appointing authority as to the validity of reasons, shall be final :

A *Provided further that the persons appointed on the result of a subsequent selection shall be junior to the persons appointed on the result of a previous selection.*

B *Explanation. - Where in the same year, separate selections for regular and emergency recruitment, are made, the selection for regular recruitment shall be deemed to be the previous selection."*

C 8. A plain reading of the above provision stipulates that *inter se* seniority of the persons appointed as a result of **ONE SELECTION** would be on the basis of the merit list prepared by the Commission or the Committee, as the case may be. The Commission means the Uttar Pradesh Public Service Commission and the Committee means the Committee constituted to make selections for appointment. In the present case, it was the Commission which had made the selections.

D 9. Rule 8 of Rules 1991 provides for preparation of seniority list where appointments were made both by promotion and direct recruitment. The said Rule reads as under:

E *"8. Seniority where appointments by promotion and direct recruitment. - (1) Where according to the service rules appointments are made both by promotion and by direct recruitment, the seniority of persons appointed shall, subject to the provisions of the following sub-rules, be determined from the date of the order of their substantive appointments, and if two or more persons are appointed together, in the order in which their names are arranged in the appointment order:*

F *Provided that if the appointment order specifies a particular back date, with effect from which a person is substantively appointed, that date will be deemed to be the date of order of substantive appointment and, in other cases, it will mean of issuance of the order:*

G *Provided further that a candidate recruited directly may lose his seniority, if he fails to join without valid reasons, when vacancy is offered to him the decision of the appointing authority as to the validity of reasons, shall be final.*

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(2) The seniority inter se of persons appointed on the result of any one selection- A

(a) *through direct recruitment, shall be the same as it is shown in the merit list prepared by the Commission or by the Committee, as the case may be;*

(b) *by promotion, shall be as determined in accordance with the principles laid down in Rule 6 or Rule 7, as the case may be, according as the promotion are to be made from a single feeding cadre or several feeding cadres.* B

(3) *Where appointments are made both by promotion and direct recruitment on the result of any one selection the seniority of promotees vis-a-vis direct recruits shall be determined in a cyclic order (the first being a promotee) so far as may be, in accordance with the quota prescribed for the two sources.* C

Illustrations D

(1) *Where the quota of promotees and direct recruits is in the proportion of 1 : 1 the seniority shall be in the following order-*

First	...	Promotee	E
Second	...	Direct recruits	

and so on.

(2) *Where the said quota is in the proportion of 1 : 3 the seniority shall be in the following order-*

First	...	Promotee	F
Second to Fourth	...	Direct recruits	
Fifth	...	Promotee	
Sixth to eight	...	Direct recruits	G

and so on:

Provided that-

(i) *where appointment from any source are made in excess of the prescribed quota, the persons appointed in excess of quota* H

A *shall be pushed down, for seniority, to subsequent year or years in which there are vacancies in accordance with the quota;*

B *(ii) where appointments from any source fall short of the prescribed quota and appointment against such unfilled vacancies are made in subsequent year or years, the persons so appointed shall not get seniority of any earlier year but shall get the seniority of the year in which their appointments, are made, so however, that their names shall be placed at the top followed by the names, in the cyclic order of the other appointees;*

C *(iii) where, in accordance with the service rules the unfilled vacancies from any source could, in the circumstances mentioned in the relevant service rules be filled from the other source and appointment in excess of quota are so made, the persons so appointed shall get the seniority of that very year as if they are appointed against the vacancies of their quota.”*

D 10. The above Rule is pressed into service where a combined list of direct recruits and promotees is to be prepared. However, even this Rule clearly provides in sub-Rule 2(a) that the seniority *inter se* of persons appointed on the result of any **ONE SELECTION** through direct recruitment shall be the same as it is shown in the merit list prepared by the Commission or by the Committee, as the case may be. The language used and the manner provided is identical to Rule 5 where only seniority list of direct recruits is dealt with.

E 11. Part III of Rules 1991 deals with the preparation of seniority list. According to Rule 9, as soon as after the appointments are made, the appointing authority shall prepare a tentative seniority list, the same would be circulated amongst the persons concerned inviting objections. The appointing authority, after disposing of the objections, would prepare final seniority list. Rule 9 is reproduced hereunder:

G “9. *Preparation of seniority list. –*

(1) *As soon as may be after appointments are made to a service, the appointing authority shall prepare a tentative seniority list of the persons appointed substantively to the service in accordance with the provisions of these rules.*

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- (2) *The tentative seniority list shall be circulated amongst the persons concerned inviting objections by a notice of reasonable period, which shall not be less than seven days from the date of circulation of the tentative seniority* A
- (3) *No objections against the vires or validity of these rules shall be entertainable.* B
- (4) *The appointing authority shall after disposing off the objection, by a reasoned order, issue a final seniority list.*
- (5) *It shall not be necessary to prepare a seniority list of the cadre to which appointments are made only by promotion from a single feedings cadre.”* C

12. In the year 2009, **the Uttar Pradesh Minor Irrigation Department Subordinate Engineering Service Rules, 2009** (for short “Rules 2009”) came into force on 16.10.2009 again framed under Article 309 of the Constitution. Part V of Rules 2009 provided for the procedure for recruitment which comprised of Rules 14 to 17. Rule 15(4) provided that the Commission would prepare a list of candidates in order of their proficiency as disclosed by the aggregate of marks obtained by each candidate in the written examination as well as interview and accordingly recommend such number of candidates as they consider fit for appointment. After preparation of the said list, the Commission would forward it to the Appointing Authority. Sub-Rule (5) of the Rule 15 further provides that if recruitment was being made for more than one branch of Engineering then in such case, the Commission would prepare a combined select list of candidates in order of their proficiency as disclosed by the aggregate of marks obtained by the candidates in the written examination and interviews accordingly and shall also forward the same list to the Appointing Authority in addition to the list forwarded under Rule 15(4). Rules 14-17 of Rules 2009 are reproduced below: -

“Rule 14 Determination of vacancies

The appointing authority shall determine and intimate to the Commission the number of vacancies to be filled during the course of the year of recruitment as also the number of vacancies to be reserved for candidates belonging to the Scheduled Castes, Scheduled Tribes and other categories under rule 6.

A Rule 15 Procedure for Direct Recruitment

(1) Applications for permission to appear in the competitive exam shall be called by the Commission in the prescribed form published in the advertisement issued by the Commission.

B (2) No candidate shall be admitted to the examination unless he holds a certificate of admission, issued by the Commission.

C (3) After the results of the written examination have been received and tabulated, the Commission shall, having regard to the need for securing due representation of the candidates belonging to the Scheduled Castes, Scheduled Tribes and other categories in accordance with rule 6, summon for interview such number of candidates as have come up to standard fixed by the Commission in this respect. The marks awarded to each candidate at the interview shall be added to the marks obtained by him in the written examination.

D (4) The Commission shall prepare a list of candidates in order of their proficiency as disclosed by the aggregate of marks obtained by each candidate at the written examinations and interview and recommend such number of candidates as they consider fit for appointment. If two or more candidates obtain equal marks in the aggregate, the name of the candidate obtaining higher marks in the written examinations shall be placed higher in the list. If two or more Candidates obtain equal marks in the written examination also, the name of the candidate a senior in age shall be placed higher in the list. The Commission shall forward the list to the appointing authority.

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F (5) If the recruitment is being made in more than one branch of Engineering as specified in clause (1) of rule 5, then in such the Commission shall also prepare a combined list of candidates in order of the proficiency as disclosed by the aggregate of marks obtained by each candidate in written examination and interview and shall also forward the same to the appointing authority along with the list under sub rule (4)

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Rule 16 Procedure for recruitment by promotion

Recruitment by promotion shall be made on the basis of seniority subject to the rejection of unfit in accordance with the Uttar

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Pradesh Promotion by Selection in Consultation with the Public Service Commission (Procedure) Rules, 1970, as amended from time to time. A

Rule 17 Combined Select list

If, in any year of recruitment, appointments are made both by direct recruitment and by promotion, a combined select list shall be prepared by taking the names of the candidates from the relevant lists, in such manner that prescribed percentage is maintained, the first name in the list being of the person appointed by promotion.”Rule 21 Seniority B

Seniority of the persons substantively appointed in any category of posts in the service shall be determined in accordance with the Uttar Pradesh Government Servants Seniority Rules 1991, as amended from time to time. C

13. Apart from the above, Rule 21 thereof clearly provided that the seniority of all persons substantively appointed shall be determined as per Rules 1991. Another relevant aspect of the said Rules 2009 was that all the three branches i.e. Agriculture, Civil and Mechanical would together constitute one cadre of Subordinate Engineering Service. Rule 21 is reproduced hereunder: D

Rule 21 Seniority E

Seniority of the persons substantively appointed in any category of posts in the service shall be determined in accordance with the Uttar Pradesh Government Servants Seniority Rules 1991, as amended from time to time.

14. Before Rules 2009 of the Minor Irrigation Department, there was another set of Rules framed in 1991 called the **Uttar Pradesh Engineering Service (Minor Irrigation Department) Rules, 1991**. These Rules dealt with the recruitment of Assistant, Executive, Superintendent and Chief Engineer of the department but not of Junior Engineer. As reference to these Rules has been made in the petition they have been mentioned, but may not be of much relevance. F G

15. On behalf of the appellants Shri Siddarth Dave, learned senior counsel and Ms Preetika Dwivedi, learned counsel have made submissions. On behalf of the private respondents Shri Gopal Sankaranarayanan, learned senior counsel and Shri Rohit Sthalekar, H

A learned counsel have addressed the Court. Learned counsel for the State of Uttar Pradesh and learned counsel for the Commission have also made their respective submissions.

Appellants' case:

B 16. On behalf of the appellants, broadly the submissions made are given below:

a) There is no delay on the part of the appellants in approaching the Court, as they learnt for the first time in 2010 when the final seniority list was published on 05.03.2010 that there were three separate select lists forwarded by the Commission and based upon the date of the receipt of such select list, the seniority list has been prepared, which was contrary to the statutory rules.

b) As the challenge was to the decision-making process in making the seniority list contrary to the 1991 Seniority Rules and Rules 2009, it was submitted that it was not necessary to implead all the affected Engineers. In fact 18 of such affected Engineers were already impleaded in the writ petition and therefore, for all the affected Junior Engineers, their interests were already represented.

c) The second seniority list of 2009-2010 had to be prepared as Rules 2009 had come into force which required drawing up of a fresh seniority list. A fresh seniority list having been published, the earlier seniority list would lose its significance. The challenge to the subsequent seniority list was within reasonable period. As such, the plea of delay raised by the respondents, would not have any substance.

F **Respondents' Case:**

17. On behalf of the respondents, the submission of learned counsel are:

(a) that the original writ petitioners i.e. appellants had approached the Court with extraordinary delay and therefore, their claim was not entitled to be entertained and the Division Bench of the High Court rightly upheld the said submission.

(b) they sought to justify the judgment of the Division Bench for the same reasons as recorded by the Division Bench;

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(c) on merits it is submitted that the seniority list had been prepared in accordance with Rules 1991 and Rules 2009. A

(d) there is no violation of any statutory provision in preparation of the seniority lists either of 2006 or 2010.

Discussion:

18. It is an admitted position that there was one selection for the three streams i.e. Agricultural, Mechanical and Civil. It is also an admitted fact that there is one cadre of Junior Engineers in the Minor Irrigation Department and therefore, there has to be one seniority list of Junior Engineers. The written examination conducted by the Commission comprised of two papers, one compulsory for all streams and the second paper of the specific stream of Engineering whether Agricultural, Mechanical or Civil. So, in effect, there was one examination. Thereafter, interviews were conducted. The Commission, in its affidavits dated 07.04.2019 and 13.05.2019 filed before the High Court, had clearly stated that there was one selection for one examination. However, on account of some litigation and stay granted by the High Court the list of the stream of the Civil Engineering was sent much later after about 10 to 11 months. Commission also admitted in its supplementary counter affidavit before the High Court that it had not prepared a combined merit list of all the three streams but had left it for the Appointing Authority to prepare the same. For sake of accuracy, paragraphs 6, 8, 9 and 10 of the supplementary counter affidavit dated 07.04.2019 filed on behalf of the Commission are reproduced below: B
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“6. That it is noteworthy to state that during the selection process against the vacancies available in the Civil Branch, stay order dated 01.03.2000 was passed by the Lucknow bench of this Hon’ble Court in a writ petition no. 1066 of 2000, Siyaram and others versus State of U.P. and others and therefore in compliance of order dated 01.03.2000, recommendation was (sent to the department at a belated stage i.e. on 07 .11.2000. F

xxx xxx xxx G

8. That since the required educational qualification was different for all three branches, therefore the recruitment was done separately and thereafter the lists/recommendations were sent separately to the department in respect of selected candidates. H

A 9. That it is further submitted that recruitment on the post of junior engineer is done from two main sources i.e. direct recruitment and departmental promotion therefore the inter-se seniority list shall be finalized in accordance with rule 8 of U.P. Government Servant Seniority Rules 1991. Therefore, the seniority list of the petitioners shall be finalized by the minor irrigation department only and there is no role of the answering respondent in preparation of seniority list by the minor irrigation department.

B 10. That it is further submitted that the preparation and publication of the seniority list of the junior engineers is the job of the concerned department and if any discrepancy occurs, the concerned department can clarify the same.”

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19. Further paragraphs 3 to 7 of the second supplementary counter affidavit dated 13.05.2019 filed by the Commission read as under:

D “3. That it may be submitted before this Hon’ble Court that on the basis of requisition for recruitment of junior engineers for three branches i.e. Agriculture, civil and Mechanical in ratio of 50:30:20, made by the minor irrigation department, the answering respondent issued advertisement No. 3/1998-99, whereby applications were invited from those candidates having requisite qualification in the relevant trade.

E 4. That it is categorically mentioned that the process of ‘election for all the three trades i.e. Civil, Mechanical and Agricultural was the same. There was a screening test conducted on 18. 10. 1998 and thereafter the qualified candidates were called for interview as per the rules and regulations.

F 5. That for the candidates who were called for interview in respect of Agriculture, Civil and Mechanical branch; the recruitment process was proceeded with, an interview was conducted respectively and out of said three branches, candidates were selected against the vacancies which were available in Agricultural and Mechanical Branch and select lists were sent to the department on 28.09. 1999 and 06.01.2000 respectively.

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6. That it is noteworthy that during the selection process against the vacancies available in the Civil Branch, stay order date 1.03.2000 was passed by the Lucknow bench of this Hon’ble

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Court in Writ Petition no. 1066 of 2000, Siyaram and others versus A
State of U.P. and others and therefore in compliance of order -
dated 01.03.2000 recommendation was sent to the department at
a belated stage i.e. on 07.11.2000.

7. That further, the Commission has been able to trace the records B
of the selection process for all three branches i.e. Original Mark
Sheet, Merit list etc. and the Commission is in a position to produce
the same before the Hon'ble Court, as and when directed."

20. The Appointing Authority, in fact, committed an error in the
manner in which the seniority list was prepared by placing the three
select lists forwarded by the Commission on different dates one after C
the other *en bloc* as per the date of receipt of three select lists. It is not
the case either of the private respondents, State or the Commission that
appointment letters have been issued separately as and when the select
lists were received. In fact, the appointment letters of all the three
streams were issued in October 2001, after about 10 to 11 months of the D
receipt of the third list i.e. of the Civil stream in November 2000.
Apparently by an oversight, the Appointing Authority failed to prepare
the combined seniority list as required under 1991 Seniority Rules, be it
Rule 5 or Rule 8 with respect to the selection of the appellants and
private-respondents.

21. We may now discuss the law on the point regarding delay in E
approaching the court and in particular challenge to a seniority list. The
learned Single Judge had placed reliance on a judgment of this Court in
the case of *Shiba Shankar Mohapatra vs. State of Orissa (supra)*.
Dr. B.S. Chauhan, J., after considering the question of entertaining the
petition despite long standing seniority filed at a belated stage discussed F
more than a dozen cases on the point including Constitution Bench
judgments and ultimately in paragraph 30 observed that a seniority list
which remains in existence for more than three to four years unchallenged
should not be disturbed. It is also recorded in paragraph 30 that in case
someone agitates the issue of seniority beyond period of three to four G
years he has to explain the delay and laches in approaching the
adjudicatory forum by furnishing satisfactory explanation. Paragraph 30
is reproduced below: -

"30. Thus in view of the above, the settled legal proposition that
emerges is that once the seniority had been fixed and it remains in

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A existence for a reasonable period, any challenge to the same should not be entertained. In K.R. Mudgal, this Court has laid down, in crystal clear words that a seniority list which remains in existence for 3 to 4 years unchallenged, should not be disturbed. Thus, 3-4 years is a reasonable period for challenging the seniority and in case someone agitates the issue of seniority beyond this period, he has to explain the delay and laches in approaching the adjudicatory forum, by furnishing satisfactory explanation.”

B 22. On the other hand, the Division Bench while shutting out the appellants on the ground of delay relied upon following judgments of this Court.

- C
- **Dayaram Asanand Gursahani vs. State of Maharashtra and others**²
 - **B.S. Bajwa and another vs. State of Punjab and others**³
- D
- **Malcom Lawrence Cecil D’Souza vs. Union of India and others**⁴
 - **R.S. Makashi and others vs. I.M. Menon and others**⁵

E 23. In the case of **Dayaram Asanand Gursahani** (supra), there was a delay of 9 years. In the case of **B.S. Bajwa** (supra), there was a delay of more than a decade. In **Malcom Lawrence Cecil D’Souza** (supra), the delay was of 15 years and in **R.S. Makashi** (supra) there was a delay of 8 years. In all these cases, this court has recorded that the delay has not been explained. **Shiba Shankar Mohapatra** (Supra) is a judgment of 2010, which has laid down that, three to four years would be a reasonable period to challenge a seniority list and also that any challenge beyond the aforesaid period would require satisfactory explanation.

G 24. In view of the above legal proposition, we now examine the facts of the present case, firstly, as to whether there was delay of more than three to four years and secondly, if there was delay of more than three to four years, whether the same has been satisfactorily explained.

² (1984) 3 SCC 36

³ (1998) 2 SCC 523

⁴ (1976) 1 SCC 599

H ⁵ (1982) 1 SCC 379

25. In October, 2001, when the appointment letters were issued it carried a stipulation that the seniority would be determined later on as per rules. It is an admitted position that before 2006, the seniority list of the appellants was not notified. In March, 2006, when the tentative list was published, it did not mention about the three select lists nor was this fact mentioned when the final seniority list was published on 05.09.2006. Rather, it clearly mentioned that the seniority list had been prepared on the basis of merit. This was in fact an incorrect statement. The seniority list had not been prepared on the basis of merit but on the basis of receipt of the three separate select lists one after the other. As the Agricultural list was received first on 28.09.1999, all the selected candidates of agricultural stream were *en bloc* placed on the top, thereafter the Mechanical list was received on 06.01.2000, they were placed below the Agricultural stream and lastly, the Civil stream list was received on 07.11.2000, they were placed at the end.

26. Rules 5 and 8 of Rules 1991 clearly mention that there shall be one list for one selection of direct recruits. Creating three separate lists for one selection was contrary to the provisions contained in Rules 5 and 8 of Rules 1991. Rules 2009 clearly mention that seniority would be determined and prepared as per 1991 Rules. Rule 5 of Rules 1991, dealt with the selections made only through direct recruitment whereas Rule 8 thereof dealt with the situation where seniority list is to be prepared of both the direct recruits and the promotees. However, the principles underlined in both these Rules are the same that there has to be one list for one selection, as is clear from Rule 8(2)(a) and Rule 5 of Rules 1991.

27. Once it is established that the seniority list was prepared in contravention to the statutory provisions laid down in Rules 1991, the seniority list could be interfered with. The Appointing Authority would be bound by the statutory rules and any violation or disregard to the statutory rules would vitiate the seniority list. The same would be arbitrary, *de hors* the rules and in conflict with Articles 14 and 16 of the Constitution. The only exception to the above would be where there is unreasonable delay which is unexplained.

28. In the present case, if we accept the submission of the appellants then the delay at best could be a few months or a year however, if we accept the contentions of the private respondents then the delay could be of five years. In the first contingency, no explanation would be

A required. However, in the second contingency, if the appellants are successful in satisfactorily explaining the delay, then even this hurdle could be overcome. In the facts of the present case what we find from the final seniority list of 05.09.2006 is that it nowhere mentioned that there were three separate lists of separate streams and that they were received on different dates. On the contrary, there was a recital therein and specific averment to the effect that the list had been prepared on the basis of merit. Thus, it cannot be said that the appellants were aware of the three separate select lists dispatched by the Commission on three different dates at the time of publication of final list dated 05.09.2006.

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C 29. It would also be worthwhile to mention here that the appellants had no occasion to know about the three separate lists either at the time they were dispatched by the Commission or at any time thereafter as the appointment letters of all selected candidates of all the three streams were issued simultaneously under Office Order dated 08.10.2001. It would also be relevant to mention that the order finalizing the seniority
D list of 05.09.2006 also nowhere mentioned that three separate lists of three streams were received from the Commission and placed *en bloc* as received one after the other.

E 30. At the time of notifying the tentative list on 29.12.2009, it was not stated anywhere that there were three separate lists received on three different dates. As such it could not be alleged that the appellants even at that stage did not file objections regarding preparation of common seniority list. It was only when the final seniority list was published on 05.03.2010 and in the order finalizing the list, it was mentioned by the department that there were three separate lists received on three separate dates and in that sequence the combined seniority was prepared. Thus,
F it is for the first-time that appellants came to know of the error on publication of the final seniority list on 05.03.2010.

G 31. The respondents have not been able to show any material which could clearly indicate that the appellants had knowledge of three separate lists and the preparation of the seniority list on its basis. A frail attempt has been made by the respondents referring to office order dated 17.03.2006 Annexure-P-30 to the Appeal @ SLP(C) No.5435 of 2020 which is the order notifying the tentative seniority list. Paragraph 3 thereof mentions that the sequence whereunder the selection list of Junior Engineers selected by the Commission has been received, the seniority
H has been given in that sequence. Paragraph 3 reads as under:

“3: The sequence, where under the selection list of the Junior Engineers selected by the Commission has been received, in that sequence, the Seniority has been given in accordance with Seniority detailed therein.” A

32. A reading of the above paragraph does not refer to any details either of any stream, the year of selection, the selection being made on the basis of which advertisement or the dates on which separate lists were received. It is a general statement. This submission of the respondents stands completely diluted in view of the facts recorded in paragraph 5 and last sentence as contained in paragraph 25 of the same office order dated 05.09.2006. We will analyse the same but before that they are reproduced hereunder: B C

“5. Shri Vinod Kumar Singh has requested to enter his Name in the Seniority List and requested to grant Seniority in ratio of 50:30:20 to the Agriculture/ Mechanical/ Civil Engineering. In this regard, it is clear that the above ratio is only for recruitment. From Commission, on 6.01.2000, on 27.01.2000 and on 07.11.2000 list was sent. Therefore, in this sequence, on the basis of merit, the Seniority has already been assessed. Name of Shri Vinay Kumar has been entered at the required place in the Seniority List as his Name was left to be entered therein and as requested to increase and enter his Name in this Seniority List. D E

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25. “...The Seniority of the candidates selected from the Public Service Commission have been kept in their Serial of merit.”

33. Reading of paragraph 5, it is again mentioned that three lists were received by the Commission and in that sequence, on the basis of merit, the seniority has been assessed. Paragraph 5 was dealing with objection of one Vinod Kumar Singh requesting to enter his name in the seniority list and further requesting to grant seniority in the ratio of 50:30:20. The competent authority allowed the request finding that the name of Vinod Kumar Singh was left to be entered and accordingly it was incorporated at the required place. Further, the last sentence of this office order clearly mentions that the seniority of the candidates selected from the Commission has been kept in their serial of merit. It does not refer to any separate merit being considered for preparing the seniority list of the three separate streams. F G H

- A 34. After coming of Rules 2009, fresh exercise was undertaken for preparation of seniority list. A tentative list was notified by the Office Order dated 29.12.2009. This Office Order mentions that the seniority list has to be prepared according to 1991 Rules. While dealing with the finalization of this tentative list, vide office order dated 05.03.2010, we find reference to disposal of an objection by Mahesh Chand Bagani and
- B Mahesh Kumar in which they had apparently sought clarification regarding the requisition sent to the Commission and other related aspects. In paragraph 11 of the Office Order, it is mentioned that the Commission had forwarded the three lists of the Agriculture, Mechanical and Civil streams separately on 06.01.2000, 27.01.2000 and 07.11.2000 respectively.
- C It further mentioned that it was in that sequence i.e. the date of receiving that the combined seniority was assessed. Thus, again the seniority list was finalized in the same sequence as the three lists have been received and in that order. It is thereafter that the representations were made that the seniority list of the direct recruits of 2001 was wrongly prepared
- D contrary to the Rules, however, when no action was taken, Rajiv Nain Upadhyay and fourteen others approached the High Court by way of W.P. No.53123 of 2012 in October 2012 which was within a period of two to two and half years and till such time they had been pursuing their representation after office order dated 05.03.2010. From the above facts, it is clear that in the first contingency or in the second contingency, the
- E appellants cannot be found at fault. The Division Bench committed an error in holding that the claim lodged by the appellant suffered from delay and laches.

35. The plea to defend the seniority list prepared contrary to the statutory provisions on the ground of delay would be a difficult proposition.
- F Apart from the submission of the appellants that there is no delay as they came to know of the three separate lists only in March, 2010, even if it is assumed that there was some delay and a fresh seniority list was being prepared in 2009-2010 again contrary to the provisions of statutory rules, such seniority list cannot be sustained or defended on the ground of delay of five years.

- G 36. It is also admitted by the parties that the next promotion of Junior Engineers in the higher grade is to the post of Assistant Engineer. In the cadre of Assistant Engineer, there are no separate streams but only one cadre of Assistant Engineers. It is the seniority list of the cadre of Junior Engineers which would be the feeder cadre for the post of

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Assistant Engineers. The Junior Engineers of Agricultural stream of the selection of the year 2001, would have direct march over the Junior Engineers selected in the same selection of the Mechanical and Civil streams, even though the overall merit of some or many of Agricultural stream Junior Engineers could be lower than some or many of the Engineers of the Mechanical and Civil streams. The appointing authority ought to have prepared a combined merit list based upon the performance or the proficiency on the basis of the marks received in the selection test as prepared by the Commission. Otherwise, it would amount to denial of the right of consideration for promotion to a more meritorious candidate as against a candidate having lesser merit. Right to promotion is not considered to be a fundamental right but consideration for promotion has now been evolved as a fundamental right.

37. This Court, time and again, has laid emphasis on right to be considered for promotion to be a fundamental right, as was held by **K. Ramaswamy, J.**, in the case of **Director, Lift Irrigation Corporation Ltd. and Others vs. Pravat Kiran Mohanty and Others**⁶ in paragraph 4 of the report which is reproduced below:

“4... There is no fundamental right to promotion, but an employee has only right to be considered for promotion, when it arises, in accordance with relevant rules. From this perspective in our view the conclusion of the High Court that the gradation list prepared by the corporation is in violation of the right of respondent/writ petitioner to equality enshrined under Article 14 read with Article 16 of the Constitution, and the respondent/writ petitioner was unjustly denied of the same is obviously unjustified.”

38. A Constitution Bench in case of **Ajit Singh vs. State of Punjab**⁷, laying emphasis on Article 14 and Article 16(1) of the Constitution of India held that if a person who satisfies the eligibility and the criteria for promotion but still is not considered for promotion, then there will be clear violation of his/her's fundamental right. **Jagannadha Rao, J.** speaking for himself and **Anand, CJI., Venkataswami, Pattanaik, Kurdukar, JJ.**, observed the same as follows in paragraphs 21 and 22 and 27:

⁶(1991) 2 SCC 295

⁷(1999) 7 SCC 209

A *“21: Articles 14 and 16(1): is right to be considered for promotion a fundamental right*

22: Article 14 and Article 16(1) are closely connected. They deal with individual rights of the person. Article 14 demands that the “State shall not deny to any person equality before the law or the equal protection of the laws”. Article 16(1) issues a positive command that “there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State”.

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C *It has been held repeatedly by this Court that clause (1) of Article 16 is a facet of Article 14 and that it takes its roots from Article 14. The said clause particularises the generality in Article 14 and identifies, in a constitutional sense “equality of opportunity in matters of employment and appointment to any office under the State. The word “employment” being wider, there is no dispute that it takes within its fold, the aspect of promotions to posts above the stage of initial level of recruitment. Article 16(1) provides to every employee otherwise eligible for promotion or who comes within the zone of consideration, a fundamental right to be “considered” for promotion. Equal opportunity here means the right to be “considered” for promotion. If a person satisfies the eligibility and zone criteria but is not considered for promotion, then there will be a clear infraction of his fundamental right to be “considered” for promotion, which is his personal right.*

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F *“Promotion based on equal opportunity and seniority attached to such promotion are facets of fundamental right under Article 16(1)*

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G *27. In our opinion, the above view expressed in Ashok Kumar Gupta and followed in Jagdish Lal and other cases, if it is intended to lay down that the right guarantee to employees for being “considered” for promotion according to relevant rules of recruitment by promotion (i.e. whether on the basis of seniority or merit) is only a statutory right and not a fundamental right, we cannot accept the proposition. We have already stated earlier that the right to equal opportunity in*

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the matter of promotion in the sense of a right to be “considered” for promotion is indeed a fundamental right guaranteed under Article 16(1) and this has never been doubted in any other case before Ashok Kumar Gupta right from 1950.” A

39. This Court in **Major General H.M. Singh, VSM vs. UOI and Another**⁸, again reiterated the legal position, i.e. right to be considered for promotion as a fundamental right enshrined under Article 14 and Article 16 of the Constitution of India. The relevant extract from paragraph 28 is reproduced below: B

“28. The question that arises for consideration is, whether the non-consideration of the claim of the appellant would violate the fundamental rights vested in him under Articles 14 and 16 of the Constitution of India. The answer to the aforesaid query would be in the affirmative, subject to the condition that the respondents were desirous of filling the vacancy of Lieutenant-General, when it became available on 1-1-2007. The factual position depicted in the counter-affidavit reveals that the respondents indeed were desirous of filling up the said vacancy. In the above view of the matter, if the appellant was the senior most serving Major-General eligible for consideration (which he undoubtedly was), he most definitely had the fundamental right of being considered against the above vacancy, and also the fundamental right of being promoted if he was adjudged suitable. Failing which, he would be deprived of his fundamental right of equality before the law, and equal protection of the laws, extended by Article 14 of the Constitution of India. We are of the view that it was in order to extend the benefit of the fundamental right enshrined under Article 14 of the Constitution of India, that he was allowed extension in service on two occasions, firstly by the Presidential Order dated 29-2-2008, and thereafter, by a further Presidential Order dated 30-5-2008. The above orders clearly depict that the aforesaid extension in service was granted to the appellant for a period of three months (and for a further period of one month), or till the approval of the ACC, whichever is earlier. By the aforesaid orders, the C
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⁸ (2014) 3 SCC 670

A *respondents desired to treat the appellant justly, so as to enable him to acquire the honour of promotion to the rank of Lieutenant-General (in case the recommendation made in his favour by the Selection Board was approved by the Appointments Committee of the Cabinet, stands affirmed). The action of the authorities in depriving the appellant due consideration for promotion to the rank of the Lieutenant-General would have resulted in violation of his fundamental right under Article 14 of the Constitution of India. Such an action at the hands of the respondents would unquestionably have been arbitrary.”*

C 40. If the seniority list is allowed to be sustained then the engineers who are more meritorious in the Mechanical and Civil streams than the Junior Engineers of the Agricultural stream would be deprived of their right of being considered for promotion and in fact their right would accrue only after all the Junior Engineers of the Agricultural stream selected in the same selection are granted promotion. For these reasons also the seniority list in question must go.

E 41. The other ground taken by the High Court for non-suiting the appellants were that they had not impleaded all the affected Junior Engineers. For the said proposition, the Division Bench of the High Court has placed reliance upon judgment of this Court in the case of **Ranjan Kumar and Others vs. State of Bihar and Others**⁹. The above case was in respect of selection and appointment on the ground that the same had been made only on the basis of interview without holding any written test. The High Court had quashed such selection and appointments even of those appointees who were not even parties to the petition. It was in these circumstances that this Court held that the appointments of non-parties could not be quashed. Facts of the said case are clearly distinguishable.

G 42. The Division Bench of the High Court also relied upon another judgment of this Court in **Prabodh Verma and others vs. State of Uttar Pradesh and others**¹⁰. This case again related to challenge to appointments and in the said case there was no impleadment even in the representative capacity. In such circumstances, this Court said that the petition was liable to be dismissed for non-joinder of necessary parties.

⁹ (2014) 16 SCC 187

H ¹⁰ (1984) 4 SCC 251

In fact, this judgment helps the appellants. Paragraph 50 thereof is reproduced below: A

“50 (1): A High Court ought not to hear and dispose of a writ petition under Article 226 of the Constitution without the persons who would be vitally affected by its judgment being before it as respondents or at least some of them being before it as respondents in a representative capacity if their number is too large to join them as respondents individually, and, if the petitioners refuse to so join them, the High Court ought to dismiss the petition for non-joinder of necessary parties.” B

43. The third case relied upon by the Division Bench for the above proposition namely **State of Uttaranchal vs. Madan Mohan Joshi and others**¹¹ was again a case where none of the affected parties were impleaded not even in the representative capacity. In such circumstances, this Court remanded the matter to the High Court leaving it open to the original petitioners therein to move an appropriate application for impleading some of the affected teachers in their representative capacity. D

44. The fourth case relied upon by Division Bench on the above proposition is **Indu Shekhar Singh and others vs. State of U.P. and others**¹². In this case also, the affected parties were not impleaded and this Court relied upon the judgment of this Court in **Prabodh Verma** (supra). E

45. In the case of **Tridip Kumar Dingal and others vs. State of West Bengal and others**¹³, **C.K. Thakker, J.**, held that the case falls within the ambit of non-joinder of necessary parties as none of the 66 candidates against whom the complaint was made, were made parties. It further held that some of the respondents should have been arrayed in representative capacity. Paragraph 41 is reproduced below: F

“41: Regarding protection granted to 66 candidates, from the record it is clear that their names were sponsored by the employment exchange and they were selected and appointed in 1998-1999. The candidates who were unable to get themselves selected and who raised a grievance and made a complaint before the Tribunal by filing applications ought to G

¹¹ (2008) 6 SCC 797

¹² (2006) 8 SCC 129

¹³ (2009) 1 SCC 768

A *have joined them (selected candidates) as respondents in the original application, which was not done. In any case, some of them ought to have been arrayed as respondents in a “representative capacity”. That was also not done. The Tribunal was, therefore, wholly right in holding that in absence*
B *of selected and appointed candidates and without affording opportunity of hearing to them, their selection could not be set aside.”*

46. In the recent case of **Mukul Kumar Tyagi and Ors. vs. The State of Uttar Pradesh and Ors.**,¹⁴ **Ashok Bhushan, J.**, laid emphasis that when there is a long list of candidates against whom the case is proceeded, then it becomes unnecessary and irrelevant to implead each and every candidate. If some of the candidates are impleaded then they will be said to be representing the interest of rest of the candidates as well. The relevant portion of paragraph 75 from the judgment is reproduced below:

D *“75..... We may further notice that Division Bench also noticed the above argument of non-impleadment of all the selected candidates in the writ petition but Division Bench has not based its judgment on the above argument. When the inclusion in the select list of large number of candidates is on*
E *the basis of an arbitrary or illegal process, the aggrieved parties can complain and in such cases necessity of impleadment of each and every person cannot be insisted. Furthermore, when select list contained names of 2211 candidates, it becomes unnecessary to implead every candidate in view of the nature of the challenge, which was levelled in the writ petition. Moreover, few selected candidates*
F *were also impleaded in the writ petitions in representative capacity.”*

47. The present case is a case of preparation of seniority list and that too in a situation where the appellants (original writ petitioners) did not even know the marks obtained by them or their proficiency in the examination conducted by the Commission. The challenge was on the ground that the Rules on the preparation of seniority list had not been followed. There were 18 private respondents arrayed to the writ petition.

H ¹⁴ (2020) 4 SCC 86

The original petitioners could not have known who all would be affected. They had thus broadly impleaded 18 of such Junior Engineers who could be adversely affected. In matters relating to service jurisprudence, time and again it has been held that it is not essential to implead each and every one who could be affected but if a section of such affected employees is impleaded then the interest of all is represented and protected. In view of the above, it is well settled that impleadment of a few of the affected employees would be sufficient compliance of the principle of joinder of parties and they could defend the interest of all affected persons in their representative capacity. Non-joining of all the parties cannot be held to be fatal.

48. The Division Bench has also dealt with an issue which according to us was totally irrelevant and alien to the adjudication of the present appeals. In paragraph 45 of the judgment of the Division Bench there is a reference to an issue where a party takes calculated chances of participating in selection/appointment process and later turns around after being unsuccessful would be hit by doctrine of estoppel. For the said proposition, the Division Bench made detailed discussions in paragraphs 46, 47, 48 and 49 of the judgment and relied upon a number of case laws. In our considered view, this issue was not at all relevant. The said issue does not arise in the present case. The appellants/original writ petitioners had never challenged the selection process. The challenge was only to preparation of the seniority list. As such, this discussion by the Division Bench is totally irrelevant.

49. The Division Bench further in paragraph 51 had in a generalized and vague manner recorded that the authorities relied upon by the learned single Judge were rendered in a different fact situation and were not applicable. The Division Bench did not consider the judgments relied upon by the learned Single Judge but only made this passing remarks. What we find is that the authorities relied upon by the learned Single Judge were relevant and correctly applied.

50. Further, the Division Bench in paragraphs 51, 52, 53 proceeded to deal with the delay stating it to be 11 years, the basis for calculation of 11 years was that the seniority list of 2006 was challenged by way of amendment by the appellants in the year 2017 and therefore there was a delay of 11 years. This discussion by Division Bench also cannot be sustained. The first seniority list was prepared in 2006. It was not disclosed as to how the seniority list has been prepared by treating the three separate

- A lists independently on their merits but not as a result of combined merit of the three lists. It was only in 2010 that the appellants came to know of the fallacy and soon thereafter they challenged the seniority list of 2010. Even if, they did not challenge the seniority list of 2006, 2010 seniority list could always be revisited, reviewed and prepared afresh, if the same was quashed. The appellants could not have been at any loss even if
- B they had not challenged the 2006 seniority list.

51. The reasoning given in paragraphs 54, 55, 56 regarding issue of single selection is also not sustainable in view of Rules 1991 as also Rules 2009.

- C 52. Lastly, paragraph 57 of the judgment of the Division Bench which deals with Rule 5 and 8 of 1991 Rules, we may only reiterate that, whether it was Rule 5 which was applicable or Rule 8 which was applicable, the seniority *inter se* of direct recruits to one selection has to be one combined list based on the performance and the marks awarded in the examination prepared either by the Commission or the Committee,
- D as the case may be. True, the learned Single Judge, in the operative portion mentioned that a fresh seniority list be prepared in accordance with Rule 5 and apparently did not consider the effect of Rule 8, would not vitiate the judgment inasmuch as the basis for preparation of the seniority list of direct recruits was the same in both the Rules. It may be
- E noted that there is no *lis inter se* between direct recruits and promotees.

53. For all the reasons recorded above, we find that the Division Bench fell in error in allowing the appeal and dismissing the writ petition. The learned Single Judge was right in his view in setting aside the final seniority list and directing the appointing authority for preparation of
- F fresh seniority list in accordance with Rules 1991, be it Rule 5 or Rule 8 thereof.

54. The appeals are, accordingly, allowed. The impugned judgment of the Division Bench of the High Court dated 04.12.2019 is set aside and that of the Single Judge dated 14.05.2019 is maintained.

- G 55. There shall be no order as to costs.

56. Pending application(s), if any, is/are also disposed of accordingly.