

Ajit Kumar Rath vs State Of Orissa & Ors on 2 November, 1999

Equivalent citations: AIR 2000 SUPREME COURT 85, 1999 AIR SCW 4212, 1999 LAB. I. C. 3842, 1999 (9) SCC 596, 2000 (2) SERVLJ 108 SC, 2000 (2) LRI 163, 1999 (7) SCALE 22, (2000) 2 SERVLJ 108, (1999) 8 JT 578 (SC), (2000) 1 SERVLR 622, (2000) 1 ESC 13, (2000) 4 SCJ 606, (1999) 7 SCALE 22, (1999) 9 SUPREME 321, (2000) 1 CURLR 29, (2000) 2 LAB LN 879, (1999) 4 SCT 779, (2000) 2 CALLT 40, 2000 SCC (L&S) 192

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Bench: R.P.Sethi, S.Saghir Ahmad

PETITIONER:
AJIT KUMAR RATH

Vs.

RESPONDENT:
STATE OF ORISSA & ORS.

DATE OF JUDGMENT: 02/11/1999

BENCH:
R.P.Sethi, S.Saghir Ahmad

JUDGMENT:

S.SAGHIR AHMAD, J.

Appellant, who held a Degree in Engineering, was appointed as an Overseer on 23.3.1965 in the Subordinate Engineering Service which is governed and regulated by the Orissa Service of Engineer Rules, 1941 (for short, 'the Rules'). There were many other Overseers who were only Diploma-holders. On and from 1.5.1965, the appellant was redesignated as Junior Engineer to distinguish him from other members of the Subordinate Engineering Service who were only Diploma-holders. It was, according to him, merely a functional designation. In spite of this designation, he was still described and designated as Subordinate Asstt. Engineer in the order dated 12.5.1969 by which he was transferred. The Overseers in the State of Orissa, are, undisputedly, known as Subordinate Asstt. Engineer.

On 7.8.1972, appellant, along with a number of other officers, was promoted as Asstt. Engineer (Civil) on ad hoc basis. Since the posts of Asstt. Engineer (Civil) were within the purview of the

Orissa Public Service Commission, it was indicated in the order of promotion that the promotion was for a period of six months or till the receipt of concurrence of the Orissa Public Service Commission, whichever was earlier. The services of the appellant on the post of Asstt. Engineer (Civil) were regularised by order dated 17.7.1976 as concurrence of the Orissa Public Service Commission had, in the meantime, been received.

Respondents 2 to 11 (for short, 'the respondents') and other officers were directly recruited as Asstt. Engineers on various dates between 7.1.1972 and 12.9.1972.

Since there arose a dispute of seniority between the promotee officers, including the appellant, on the one hand, and the direct-recruits, namely, the respondents, on the other, the appellant, along with respondent No. 12, filed a Petition before the Orissa Administrative Tribunal by which they challenged the seniority list issued by the State Govt., as it was on the basis of this seniority list that some of the respondents had been promoted to the posts of Executive Engineers and Asstt. Executive Engineers. It was claimed in the Petition that since the appellant was promoted as Asstt. Engineer in 1972 and the respondents were also incidentally appointed, though by direct recruitment as Asstt. Engineers, in the same year, namely, in 1972, the appellant would rank senior to the respondents in the cadre of Asstt. Engineers on account of Rule 26 of the Rules which provided in specific and clear terms that if promotions and direct recruitment were made in the same calendar year, the promotee officers would rank senior to the direct-recruits.

The Tribunal, by its judgment dated 4.1.1993, allowed the Claim Petition with the finding that the appellant and respondent No. 12 having been promoted in 1972 would rank senior to the respondents who were appointed as Asstt. Engineers by direct recruitment in the same year. The respondent (State of Orissa) was directed to correct the seniority list and to consider the appellant and respondent No. 12 for promotion to the posts of Asstt. Executive Engineer and Executive Engineer from the dates their juniors, including the present respondents, were promoted to those posts.

The respondents, thereafter, filed a Review Petition before the Tribunal which was allowed on 31.8.1995 and the appellant as also respondent No. 12 were held to be juniors to the respondents and other directly recruited Asstt. Engineer of 1972. The Review Petition was allowed because of the judgment of the Orissa High Court relating to the same service which was followed by the Tribunal and the earlier judgment passed by it was set aside. It is this judgment of the Tribunal which is under challenge before us in this appeal.

Mr. P.P. Rao, learned Senior Counsel appearing on behalf of the appellant has contended that once the dispute of seniority was settled by the Tribunal on the basis of the Constitution Bench decision of this Court in Direct Recruit Class-II Engineering Officers Association & Ors. vs. State of Maharashtra & Ors. 1990(2) SCR 900 = (1990) 2 SCC 715 = AIR 1990 SC 1607, it was not open to the Tribunal to review its judgment merely because there was a judgment of Orissa High Court in which a contrary view was taken, which was not earlier noticed by the Tribunal. He contended that since the judgment passed by the Orissa High Court was in conflict with the Constitution Bench decision referred to above, it was of no binding value and, therefore, even if it was not noticed by the

Tribunal while delivering the main judgment, it would not make any difference as this judgment had, in any case, to be ignored in view of the subsequent judgment of the Constitution Bench. Mr. Rao further contended that the judgment passed on the Review Petition by the Tribunal is based on a misreading of the Rule of Seniority. It is contended that Rule 26, which deals with the seniority of promoted and directly recruited officers, had undergone two amendments; one in 1967 and the other in 1974. But the Tribunal, which had noticed the 1967 Amendment at the time of writing of the main judgment, ignored that Amendment while writing out the Review judgment. This, it is pointed out, is a mistake of the Tribunal which vitiates the whole judgment passed by it on the Review Petition. It is also contended that the Tribunal was wholly in error in distinguishing the judgment of this Court in Direct Recruit Class-II Engg. Officers Association's case (supra).

Learned counsel for the respondents has pointed out that the judgment originally passed by the Tribunal suffered from errors apparent on the face of the record and, therefore, the Tribunal allowed the Review Petition and passed a fresh judgment in which the correct legal position was laid down and the respondents were rightly held to be senior to the appellant. It is pointed out that the law laid down by this Court in Direct Recruit Class-II Engg. Officers Association's case (supra) would not be applicable to the facts of this case as in the instant case, seniority had to be determined only on the basis of Rule 26 and not on any other basis including the judgment of this Court. Since Rule 26, as it stood prior to its amendment in 1974, specifically provided that the seniority would be counted from the date of substantive appointment, the appellant and respondent No. 12, it is contended, were not entitled to count the period for which they had worked on ad hoc basis on the post of Asst. Engineer towards their seniority. The Tribunal was justified in reckoning their seniority from the date of substantive appointment and excluding the period for which they had worked on ad hoc basis on the post of Asstt. Engineer.

In order to appreciate the controversy between the parties, it would be relevant to reproduce Rule 26, as it originally stood as also the shape it adopted after amendments in 1967 and 1974. These are set out below:

Original Rule 26 "Seniority - Seniority in the rank of Executive and Asst. Engineers shall be determined by the date of officers substantive appointment to the category concerned irrespective of pay drawn by him. The seniority of the officers appointed at the same date shall be fixed by the Governor."

Rule 26 as amended in 1967:

"When officers are recruited by promotion and direct recruitment during the same year (calendar year) the promoted officers shall be considered senior to the officers directly recruited, irrespective of their date of joining the appointment."

Rule 26 as amended in 1974 (With retrospective effect from 1.1.1972):

"26. (1) When officers are recruited by promotion and by direct recruitment during the same year, the promoted officers shall be considered senior to the officers directly

recruited irrespective of their dates of joining the appointment.

(2) Between the two groups of promoted officers, those promoted from the rank of Sub-Assistant Engineers shall en block be senior to those promoted from the rank of Junior Engineers.

(3) Subject to provisions of Sub-rules (1) & (2) seniority of officers shall be determined in accordance with the order in which their name appear in the lists prepared by the Commission."

Before considering the implication of Rule 26, unamended and amended, we may point out that Review was sought by the respondents on the ground, inter alia, that the appellant being Junior Engineer was not eligible for promotion as Asstt. Engineer in 1972. It is pointed out that when a recommendation to the Orissa Public Service Commission for promotion of the appellant to the post of Asstt. Engineer, was made and concurrence of the Commission was sought, the latter, namely the Commission raised an objection that this would not be possible as there was no cadre like "Junior Engineer" in the cadre of Subordinate Engineering Service from which promotion could be made to the post of Asstt. Engineer. The Commission suggested an amendment in the Rules and consequently the State Govt. amended the Rule and provided that promotion could be made to the post of Asstt. Engineer from amongst the members of the Subordinate Engineering Service as also from amongst the Junior Engineers.

Rule 6 prior to its amendment provided that recruitment to the post of Asstt. Engineer would be made partly by direct recruitment and partly by promotion from two domestic sources, namely, old Upper Subordinate Engineering Establishment and the Subordinate Engineering Service. It was on the basis of this Rule that it was contended before the Tribunal, at the time of hearing of the Review Petition, that promotion could not be made to the post of Asstt. Engineer from amongst "Junior Engineers" as "Junior Engineers" were not indicated as a "source" or "feeder cadre" in the above Rule. Reliance, for this purpose, was placed on the decision of the Orissa High Court in the Writ Petitions (O.J.C. Nos. 921, 922 and 923 of 1980). It was contended that Rule 6 was amended in 1974 and "Junior Engineers" were included in the Rule to constitute one of the sources of promotion to the post of Asstt. Engineer. But the amendment was prospective in nature and, therefore, the appellant, it was pointed out, would become eligible for promotion to the post of Asstt. Engineer only with effect from 7.12.1974 when the Rule was amended, as was held by the Orissa High Court in the Writ Petitions referred to above.

The Tribunal, however, did not accept the contention and it came to the conclusion that Sub-Asstt. Engineers, who belonged to the Subordinate Engineering Service, were only Diploma-holders whereas the appellant, who held a Degree in Engineering was treated as Junior Engineer, and it would be preposterous to think that although Diploma-holders were eligible for promotion, persons holding Degree in Engineering were ineligible. The Tribunal found that the appellant was eligible for promotion to the post of Asstt. Engineer even in 1972. This was reiterated in the Review judgment also.

It was also contended on behalf of the respondents before the Tribunal, and is also reiterated here, that the respondents are entitled to reckon their seniority from 1970 and 1971 as they were appointed against the vacancies of those years. It is pointed out that the advertisement in 1970-71 for direct recruitment on the posts of Asstt. Engineer was issued by the Public Service Commission on 6.12.1971 and the result was thereafter published which indicated that all the respondents had been selected. They were also directed to appear before the Medical Board. The order of appointment was, however, passed on 3.1.1972. The respondents, therefore, claim seniority with effect from 1970 and 1971 on the ground that they were appointed against the vacancies of 1970 and 1971. They claim that their seniority may be ante-dated.

This plea is wholly unfounded and is liable to be rejected as without substance and merit. The law on this question has already been explained by this Court in Jagdish Ch. Patnaik & Ors. vs. State of Orissa & Ors. (1998) 4 SCC 456 = AIR 1998 SC 1926 and it was categorically held that the appointment does not relate back to the date of vacancy. The Court observed as under :

"The next question for consideration is whether the year in which the vacancy accrues can have any relevance for the purpose of determining the seniority irrespective of the fact when the persons are recruited? Mr. Banerjee's contention on this score is that since the appellant was recruited to the cadre of Assistant Engineer in respect of the vacancies that arose in the year 1978 though in fact the letter of appointment was issued only in March, 1980, he should be treated to be recruit of the year 1978 and as such would be senior to the promotees of the years 1979 and 1980 and would be junior to the promotees of the year 1978. According to the learned counsel since the process of recruitment takes a fairly long period as the Public Service Commission invites application, interviews and finally selects them whereupon the Government takes the final decision, it would be illogical to ignore the year in which the vacancy arose and against which the recruitment has been made. There is no dispute that there will be some time lag between the year when the vacancy accrues and the year when the final recruitment is made for complying with the procedure prescribed but that would not give a handle to the Court to include something which is not there in the rules of seniority under Rule 26. Under Rule 26 the year in which vacancy arose and against which vacancy the recruitment has been made is not at all to be looked into for determination of the inter se seniority between direct recruits and the promotees. It merely states that during the calendar year direct recruits to the cadre of Assistant Engineer would be junior to the promotee recruits to the said cadre. It is not possible for the Court to import something which is not there in Rule 26 and thereby legislate a new rule of seniority. We are, therefore, not in a position to agree with the submission of Mr. Banerjee, the learned Senior Counsel appearing for the appellants, on this score."

In view of the above, this plea has to be rejected, particularly as the judgment, of which a portion has been extracted above, related to the same Service Rules with which we are concerned in the present case. The only contention which was accepted by the Tribunal and on the basis of which it reviewed its earlier judgment was, that the appellant and respondent No. 12 were not entitled to reckon their

seniority with effect from the date on which they were promoted on ad hoc basis in 1972 as the amendment introduced in the Rules in 1974 was not retrospective in nature and the unamended Rule allowed seniority only with effect from the date of substantive appointment. The Tribunal found that since the appellant and respondent No. 12 were given substantive appointment on the concurrence of the Orissa Public Service Commission in 1976 they cannot reckon their seniority from 1972 and, therefore, would be junior to the respondents. It was on this basis that the Tribunal reviewed its earlier judgment and did not follow the Constitution Bench decision of this Court in Direct Recruit Class-II Engg. Officers Association's case (supra). We do not agree with the reasoning of the Tribunal.

Rule 26 in its unamended form, no doubt, provided for the reckoning of seniority with effect from the date of substantive appointment. But the Rule underwent an amendment in 1967 which specifically provided that if the posts of Asstt. Engineers were filled up in a particular year both by direct recruitment as also by promotion, those promoted would rank senior to those who were directly recruited. This amendment has been totally ignored by the Tribunal as there is no reference to 1967 amendment in the impugned judgment passed on Review. The Tribunal has referred only to the 1974 amendment and though this amendment was made with retrospective effect from 1.1.1972, the Tribunal held that it was prospective in nature and would not be effective from 1.1.1972. It consequently relied upon the unamended Rule 26 under which the seniority was to be counted from the date of substantive appointment. The appellant and respondent No. 12 were promoted to the post of Asstt. Engineer on ad hoc basis by order dated 7.8.1972 for a period of six months or till the concurrence of the Orissa Public Service Commission to their appointments was available, whichever was earlier. Their case was referred to the Public Service Commission which gave its concurrence to their appointments and consequently by order dated 17.7.1976, they were appointed on regular basis. In the same year, namely in 1972, the respondents were appointed as Asstt. Engineers by direct recruitment. But the Tribunal while determining the inter-se seniority of Promotees and Direct Recruits, applied the unamended Rule 26 and held that since appellant and respondent No. 12 were appointed only on ad hoc basis in 1972 and theirs was not a substantive appointment, they, in view of Rule 26, would be junior to the respondents who were directly recruited as Asstt. Engineers. The Tribunal held that they could reckon their seniority only from 1976 when they were substantively appointed as Asstt. Engineers.

The manner and method of recruitment by promotion on the post of Asstt. Engineer is contained in the Rules. Rule 16(a) provides that Chief Engineer of the concerned department would nominate Officers from the cadre of Junior Engineers and Subordinate Engineering Service separately for appointment to the Service in the vacancies to be filled up by promotion during the year. It is further provided in that Rule that basis of nomination by the Chief Engineer would be merit and suitability of the officer with due regard to seniority. According to the Proviso to Rule 16(a), a Junior Engineer who has not completed two years of service; or Sub-Asstt. Engineers, who are not Diploma- holders and have not completed ten years of service, would not be considered for promotion. The second Proviso says that if an examination was prescribed by the Govt. and such examination had not been passed by that person, he would not be considered for promotion.

The list of officers nominated by the Chief Engineer for promotion is required to be sent to the Govt. where the cases of individual officers are required to be scrutinised by the Departmental Committee on the basis of their service record and interview, if necessary. The Departmental Committee would then prepare a separate list of Junior Engineers and Sub-Asstt. Engineers considered by the Committee to be fit for promotion. Thereafter, the Govt. would send such list to the Public Service Commission along with complete record of all the officers who are proposed to be promoted. The Commission would then scrutinise the list and prepare two lists; one for Junior Engineers and the other for Sub-Asstt. Engineers, arranged in the order of their suitability for promotion and advise the Govt. accordingly. Under Rule 18, final selection of officers to be promoted is to be made by the Govt. after considering the recommendations made by the Commission.

It appears that on the basis of these Rules, the appellant as also respondent No. 12 were promoted to the post of Asstt. Engineer on ad hoc basis subject to the concurrence of the Public Service Commission. This was done on 8.2.1972. On receipt of the concurrence from the Orissa Public Service Commission, a fresh Notification was issued on 17th July, 1976, by which the appellant as also respondent No. 12 were appointed on regular basis as Asstt. Engineers.

The Tribunal, while disposing of the case by its main judgment, had noticed the counter affidavit filed by the State and it had observed that none of the opposite parties had come forward to say that the promotion of the appellant and respondent No. 12 was not as per their eligibility and was purely fortuitous in nature. It further observed :

"The counter filed by the State clearly discloses that both the petitioners were promoted in the year 1972 to fill up the permanent vacancies and as in most cases, where it is required to take the advice of the Public Service Commission, they were given ad hoc promotion subject to concurrence by the Commission. There was admittedly delay in receipt of concurrence from the Commission but both the petitioners uninterruptedly continued in the promotional post till the concurrence by the Commission was received by the State Government."

These facts clearly indicate that the promotion of the appellant was a regular, though provisional, promotion made against a permanent vacancy in accordance with the Service Rules. The Chief Engineer was the officer authorised under the Rules to make the selection on the basis of merit. In the instant case, such selection was made by the Chief Engineer and pending concurrence of the Commission, the selected persons were appointed by the Govt. on ad hoc basis. It has already been indicated above that the Govt. is the final authority in making the selection of officers for promotion to the post of Asstt. Engineer on the basis of the recommendations made by the Commission. There is no dispute that the appellant and respondent No. 12 were appointed as Asstt. Engineers by the Govt. in 1972 and four years later, that is to say, in 1976 they were appointed on a regular basis on the recommendation of the Orissa Public Service Commission.

It is thus clear that the appellant was promoted on a regular, though provisional, basis pending concurrence from the Orissa Public Service Commission. The promotion having been made in accordance with the Rules, the entire period of ad hoc service beginning from 1972 to 1976, when

the appellant was appointed on a regular basis on the concurrence of the Commission, would have to be counted towards the seniority of the appellant vis-a-vis the contesting respondents. The Tribunal, in these circumstances, had rightly invoked the principles laid down by this Court in Direct Recruit Class-II Engg. Officers Association's case (supra). There was no scope to deviate from this Rule as it has been clearly laid down by this Court in principles (A) and (B) set out therein as under :

"(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."

On these principles, the Tribunal had held, and in our opinion rightly, that appellant and respondent No. 12 were senior to the respondents.

In O.P. Singla vs. Union of India (1984) 4 SCC 450, even prior to the decision in Direct Recruit Class-II Engg. Officers Association's case, a Bench of 3 Judges had held that the seniority of direct recruits and promotees, if appointed under the Rules, has to be determined on the basis of the dates on which the direct recruits were appointed and the dates from which the promotees had been officiating continuously, either in the temporary posts or against substantive vacancies. It may be pointed out that the Constitution Bench decision in Direct Recruit Class-II Engg. Officers Association's case was considered by a 3-Judge Bench of this Court in State of West Bengal & Ors. vs. Aghore Nath Dey & Ors. (1993) 3 SCC 371 and principles (A) and (B) were explained as under :

"There can be no doubt that these two conclusions have to be read harmoniously, and conclusion (B) cannot cover cases which are expressly excluded by conclusion (A). We may, therefore, first refer to conclusion (A). It is clear from conclusion (A) that to enable seniority to be counted from the date of initial appointment and not according to the date of confirmation, the incumbent of the post has to be initially appointed 'according to rules'. The corollary set out in conclusion (A), then is, that 'where the initial appointment is only ad hoc and not according to rules and made as a stopgap arrangement, the officiation in such posts cannot be taken into account for considering the seniority'. Thus, the corollary in conclusion (A) expressly excludes the category of cases where the initial appointment is only ad hoc and not according to rules, being made only as a stopgap arrangement. The case of the writ petitioners squarely falls within this corollary in conclusion (A), which says that the officiation in such posts cannot be taken into account for counting the seniority."

It was also explained as under :

"The conclusion (B) was added to cover a different kind of situation, wherein the appointments are otherwise regular, except for the deficiency of certain procedural requirements laid down by the rules. This is clear from the opening words of the conclusion (B), namely, 'if the initial appointment is not made by following the procedure laid down by the 'rules' and the latter expression 'till the regularisation of his service in accordance with the rules'. We read conclusion (B), and it must be so read to reconcile with conclusion (A), to cover the cases where the initial appointment is made against an existing vacancy, not limited to a fixed period of time or purpose by the appointment order itself, and is made subject to the deficiency in the procedural requirements prescribed by the rules for adjudging suitability of the appointee for the post being cured at the time of regularisation, the appointee being eligible and qualified in every manner for a regular appointment on the date of initial appointment in such cases. Decision about the nature of the appointment, for determining whether it falls in this category, has to be made on the basis of the terms of the initial appointment itself and the provisions in the rules. In such cases, the deficiency in the procedural requirements laid down by the rule has to be cured at the first available opportunity, without any default of the employee, and the appointee must continue in the post uninterruptedly till the regularisation of his service, in accordance with the rules. In such cases, the appointee is not to blame for the deficiency in the procedural requirements under the rules at the time of his initial appointment, and the appointment not being limited to a fixed period of time is intended to be a regular appointment, subject to the remaining procedural requirements of the rules being fulfilled at the earliest."

The Constitution Bench decision was followed in *Keshav Dev & Anr. vs. State of U.P. & Ors.*, (1999) 1 SCC 280 as also in *Shri L. Chandrakishore Singh vs. State of Manipur & Ors.*, JT 1999 (7) SC 576.

In Review proceedings, the Tribunal deviated from the principles laid down above which, we must say, is wholly unjustified and exhibits a tendency to re-write a judgment by which the controversy had been finally decided. This, we are constrained to say, is not the scope of Review under Section 22 (3) (f) of the Act which provides as under :

"Section 22.

(1)

(2)

(3) A Tribunal shall have, for the purposes of discharging its functions under this Act, the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 (5 of 1908), while trying a suit, in respect of the following matters, namely ---

(a)

.....

(b)

- (c)
- (d) (e)
- (f) reviewing its decisions;
- (g) (h) (i)"

The provisions extracted above indicate that the power of review available to the Tribunal is the same as has been given to a court under Section 114 read with Order 47 CPC. The power is not absolute and is hedged in by the restrictions indicated in Order 47. The power can be exercised on the application of a person on the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the order was made. The power can also be exercised on account of some mistake or error apparent on the face of the record or for any other sufficient reason. A review cannot be claimed or asked for merely for a fresh hearing or arguments or correction of an erroneous view taken earlier, that is to say, the power of review can be exercised only for correction of a patent error of law or fact which stares in the face without any elaborate argument being needed for establishing it. It may be pointed out that the expression "any other sufficient reason" used in Order 47 Rule 1 means a reason sufficiently analogous to those specified in the rule.

Any other attempt, except an attempt to correct an apparent error or an attempt not based on any ground set out in Order 47, would amount to an abuse of the liberty given to the Tribunal under the Act to review its judgment.

Learned counsel for the respondents has referred to the judgment of the Orissa High Court passed in identical situation and relating to the same service on 12th March, 1985, by which the seniority was denied to certain promoted officers over those appointed by direct recruitment, on the ground that ad hoc promotion was contrary to rules. It is contended that a Special Leave Petition against that judgment was dismissed by this Court on 28.3.1998. A copy of the order by which the Special Leave Petition was dismissed has been placed on record which indicates that no reasons were given for dismissing the petition. This order, therefore, would not constitute a binding precedent. Moreover, the judgment of the Orissa High Court was delivered on 12th March, 1985, that is to say, many years earlier than the decision rendered by the Constitution Bench in the 1990 case of Direct Recruit Class-II Engg. Officers Association (supra). On the basis of the Constitution Bench decision as also the other decisions of this Court, the efficacy of the judgment passed by the Orissa High Court has altogether vanished and there was no occasion for the Tribunal to have relied upon that judgment in preference to the Constitution Bench decision while writing the Review judgment.

Learned counsel for the contesting respondents has cited a few decisions, namely, V. Srinivas Reddy & Ors. vs. Govt. of Andhra Pradesh & Ors. (1995) Supp.1 SCC 572; V.P. Shrivastava & Ors. vs. State of M.P. & Ors. (1996) 7 SCC 759 ; and Masood Akhtar Khan & Ors. vs. State of Madhya Pradesh & Ors. (1990) 4 SCC 24; but none of these decisions is applicable to the facts of the present case. The decision of this Court in BV Srinivas Reddy's case (supra) is clearly distinguishable as there was a

dispute between two direct recruits, one having been appointed in accordance with the Rules while the other de hors the Rules. So also, the decision of this Court in V.P. Shrivastava's case (supra) is distinguishable as the direct recruitment was made in accordance with the Rules while the promotion was made contrary to the Rules which was not approved by the Commission. In Masood Akhtar's case (supra), the direct recruitments made were held to be contrary to Rules.

Learned counsel for respondent Nos. 2 to 11 also referred to a decision of this Court in Anuradha Mukherjee & Ors. vs. Union of India & Ors. (1996) 9 SCC 59 for the proposition that the promotees cannot get seniority over the direct recruits merely by virtue of their ad hoc appointments even if they were subsequently selected and appointed in accordance with the Rules. This decision is also not applicable to the facts of this case as the learned counsel has omitted to notice the vital fact that the promotions were made de hors the Rules. It is obvious that if the promotions were made contrary to Rules, no advantage would accrue to those promoted and it will not be open to them to reckon the whole period of such promotion towards their seniority even if they were subsequently selected and promoted in accordance with the Rules.

Learned counsel for respondent Nos. 2 to 11 also contended that the appellant and respondent No. 12 had appeared before the Orissa Public Service Commission for direct recruitment on the posts of Asstt. Engineer along with respondent Nos. 2 to 17, but they were unsuccessful and as such they cannot be given a march over the respondents in the matter of seniority. We do not agree. Failure to get appointment by direct recruitment did not prohibit promotion of the appellant and respondent No. 12 on the posts of Asstt. Engineer in their own channel of promotion. They were eligible and were consequently selected by the Chief Engineer and later appointed as Asstt. Engineers by promotion by the State Govt.

Since it had already been found as a fact by the Tribunal while writing the main judgment that the appellant was promoted to the post of Asstt. Engineer in accordance with the Rules against a permanent vacancy and had been given ad hoc promotion pending concurrence of the Public Service Commission and since this finding has been upheld by us above, we have no hesitation in holding that in terms of Rule 26, the appellant, who was promoted in 1972, in which year direct recruitments of respondent Nos. 2 to 11 were also made, shall rank senior to respondent Nos. 2 to 11.

For the reasons stated above, the appeal is allowed, the judgment and order passed by the Tribunal on Review is set aside and the main judgment dated 4.1.1993 is restored, but without any order as to costs.