

Bimlesh Tanwar vs State Of Haryana And Ors on 10 March, 2003

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Bench: Chief Justice, S.B. Sinha, A.R. Lakshmanan

CASE NO.:

Appeal (civil) 879 of 2000

PETITIONER:

Bimlesh Tanwar

RESPONDENT:

State of Haryana and Ors.

DATE OF JUDGMENT: 10/03/2003

BENCH:

CJI, S.B. Sinha & A.R. Lakshmanan.

JUDGMENT:

J U D G M E N T S.B. SINHA, J :

Criteria for determining inter se seniority amongst the officers of Haryana Judicial Service; whether on the basis of merit in terms of the merit list or the date of joining, is the core question involved in this appeal which arises out of a Judgment and Order dated 18.8.1999 passed by the Punjab & Haryana High Court in C.W.P. No. 3713 of 1998 filed by the appellant herein.

The basic fact of the matter is not in dispute. Haryana Public Service Commission, respondent No. 3 herein issued an advertisement notifying 24 vacancies of Haryana Civil Services (Judicial Branch) on or about 16.8.1988. The break up of the said posts is as under :

(i) Vacancies for General Category : 9

(ii) Vacancies reserved for scheduled castes : 10 (including five vacancies which remained unfilled on account of non-

availability of candidates belonging to SC Category in the competitive exam.

Held in 1985-86) (Advertised 3rd time).

(iii) Vacancies reserved for ESM : 3

(iv) Vacancies reserved for Backward Classes : 2 A competitive examination was held in December, 1986. By a Memo dated 6.2.1989, the first respondent herein sent requisition for anticipated vacancies upto 31.12.1990; the break up of which is as under:

1.

General Category : 2

2. Scheduled Castes : 1

3. Backward Classes : 1 By order dated 27th July, 1989, the Commission recommended 21 names for 28 vacancies, the break up of which is as under:

1.

General Category : 11

2. Scheduled Castes : 5

3. Backward Classes : 3

4. Ex-Service men : 2 The result of the said examination for recruitment of the HCS(Judicial) Branch was published in the Haryana Gazette on or about 15.9.1989; from a perusal whereof, it would appear that the appellant herein was placed at serial No. 33 whereas the respondent Nos. 8 to 11 were placed at serial Nos. 14, 15, 16 and 18 respectively. It is not in dispute that on or about 6.2.1989 it was notified that existing and notified vacancies would be increased by 4; as a result whereof a further reservation being one for Scheduled Castes candidate and 1 for Backward Class candidate and 2 for general candidates was made, the break up whereof is :

1.

Scheduled Castes : 1

2. Backward Classes : 1

3. General category : 2 The break up of all the 28 vacancies was as follows:

1.

General category : 11

2. Scheduled Castes : 11

3. Backward classes : 3

4. Ex-service men : 3 In the result published by the Haryana Public Service Commission, 42 candidates were declared qualified in terms of the provisions of the 'Rules Relating to the Appointment of Subordinate Judges in the Haryana Civil Service (Judicial Branch), 1951' (hereinafter referred to as 'the Rules'). Out of the successful candidates, three persons, namely, Mr. Baljeet Singh, Mr. Gulab Singh and Mr. Chaman Lal Mohal whose names figured at serial Nos. 27, 39 and 42 belonged to the Backward Classes. Five persons including the appellant herein, namely, Mr. Ram Singh, Mrs. Bimlesh Tanwar, Mr. Krishan Kumar, Mr. Ram Niwas Bharti and Mr. Jagdish Rai Duggal who were at serial Nos. 30, 33, 38, 40 and 41 of the Select List respectively belonged to Scheduled Castes and two persons, namely, Mr. Man Mohan Dhonchak and Mr. Chander Bhan were selected from the category of Ex-servicemen. 10 posts were, therefore, available for 17 posts reserved for different categories. According to the High Court, seven vacancies reserved for the members of Scheduled Castes and one for Ex-servicemen could be filled up from amongst the candidates belonging to the general category raising the number of posts available therefor to 18. However, despite the fact that 18 posts were available for members of the general category, for reasons best known to the State, only 8 persons belonging to the general category were appointed by an order dated 9.12.1989.

Respondents Nos. 9 and 10 thereafter with three other candidates who despite the fact that their names appeared in the merit list but were not appointed, filed a writ petition in the High Court contending inter alia therein that their names should have been entered in the register maintained therefor as envisaged by Rule 1 of Part- D of the Rules and to fill up the existing vacancies and also the vacancies, which are anticipated to arise during the period of 2 years from the date of publication of the result of the examination, i.e., up to December, 1991. The said writ petition was allowed by order dated 5.2.1991 holding:

"In terms of the law laid down by the Supreme Court in Neelima Shangla's case, 1986 (4) SCC 268, we direct the State of Haryana to forward the list of 42 candidates, who qualified in the examination (32 general and 10 reserved) held in December, 1988 and the High Court would forthwith enter the names of such number of candidates as would be necessary in terms of Rule 8 of Part- D of the Rules in the Register in order of merit. The names of the candidates of the reserved categories would also be brought on the Register in the same manner. The High Court would then consider to

fill up the remaining vacancies and would forward the names of the requisite number of candidates to the State Government for appointment as per Rule 7(1) of Part D of the Rules as Subordinate Judges under Article 234 of the Constitution. While doing so it will be open to the High Court in the interests of higher standard not to recommend the names of all the candidates, who obtained 55 per cent marks and the appointment can be restricted to such number of candidates, who obtained higher percentage than 55 per cent as may be decided by the High Court and agreed to by the Government."

It is not in dispute that this Court in *Neelima Shangla vs. State of Haryana & Ors.* (1986) 4 SCC 268 directed that she be assigned seniority with the 1984 Batch. The High Court's direction was made in the light of the observations of this Court in *Neelima Shangla*.

The High Court, on its administrative side thereafter by a letter dated 20.8.1991 requested the State to comply with the order passed by it on its judicial side and issue order for appointment in respect of Ms. Ritu Jhanji, S/Shri A.S. Narang and Kamal Kant, whose names as noticed hereinbefore, figured at serial Nos. 14, 15 and 16 of the merit list. The appointment letters of Mr. A.S. Narang and Kamal Kant were issued on 18.11.1991 whereas the appointment letter of Ms. Ritu was issued on 21.1.1992. As in the meantime, two more candidates, namely, Ms. Archana Soni (serial No. 13) and Mr. Kali Kishore Sharma (serial No. 17) expressed their unwillingness to join the said post, the State Government was requested for the appointment of Ms. Sarita Gupta (serial No. 18). A similar request was made by letter dated 14.10.1992 for appointment of Mrs. Manisha Chopra (now Manisha Batra), and S/Shri Satish Kumar Garg and Rajiv Tyagi whose names appeared at serial Nos. 19, 20 and 21 of merit list but the State refused to accede to the said recommendations. Aggrieved the said candidates filed writ petitions before the High Court which was marked as CWP Nos. 963/93, 5400/93, 5602/93 and 637/93. The writ petitions of Mr. Rajiv Tyagi and Ms. Manisha Chopra was allowed whereas the writ petition of Mr. Pramod Kumar was disposed of with a direction to the High Court to recommend his name under the Rules with a further direction that thereafter the State Government would appoint him forthwith. However, other two writ petitions were dismissed. On an appeal preferred against the said judgment by the 1st respondent herein in relation to the writ petition filed by Ms. Manisha Chopra, although special leave was granted by this Court but ultimately having regard to the undisputed factual position that there has been an existing vacancy, the said appeal was dismissed. However, the appeals in relation to Mr. Rajiv Tyagi and Mr. Pramod Kumar being Civil Appeal Nos. 4426 and 4428 of 1994 were allowed. Pursuant to and in furtherance of the order of this Court, an offer of appointment was issued in favour of Ms. Manisha Batra on 7.11.1994.

Representations were made by the judicial officers for determination of their inter se seniority in the aforementioned premise and the matter was considered by a Sub-committee appointed by the High Court. The Sub-committee upon giving opportunities of hearing to all parties and/or their lawyers opined that having regard to the consistent practice followed by the High Court that seniority be determined as per merit, the same rule should be made applicable and thus negated the contention raised on behalf of the appellant and persons similarly situated that inter se seniority be determined on the basis of the respective dates of appointments of the candidates. While arriving at

the said decision, the Sub- committee found that the cases of the concerned candidate is similar to that of Neelima Shangla.

The said recommendations of the Sub-committee were accepted by the Full Court of the High Court by adopting a resolution in that behalf on or about 17.7.1997. Aggrieved thereby, a writ petition was filed by the appellant herein which by reason of the impugned judgment was dismissed.

Before the High Court, only two contentions were raised on behalf of the appellant, namely : (1) that the vacancies, which remained unfilled because of non-availability of the candidates from the reserved category, i.e., Scheduled Castes category, could not have been diverted to general category candidates as the same could not have been dereserved and factually these very vacancies of the year 1989 which remained unfilled from the Scheduled Castes category were actually advertised in the year 1992 and, therefore, there were no posts vacant for the private respondents, who have been given appointment in the batch of year 1989 because of non-existancy of posts in the general category; and (2) that even though the petitioner, who belongs to Scheduled Castes category may have been below the general category candidate in the merit list, yet the seniority is to be determined as per the roster points and not according to merit. Both the said contentions did not find favour with the High Court Dr. Krishan Singh Chauhan, learned counsel appearing for the appellant has raised a number of contentions in support of this appeal. The learned counsel contends that as nine posts were advertised for general categories, appointment of 18 persons thereagainst was illegal. Reliance in this behalf has been placed on Ashok Kumar and Ors. vs. Chairman, Banking Service Recruitment Board and Ors. [1996 (1) SCC 283].

The learned counsel contended that the appellant herein would not question the legality or validity of the appointments of respondents Nos. 8 to 11 but submitted that no candidate from the waiting list appointed subsequently could be appointed from a back date. A person appointed pursuant to the order of the High Court, urged Dr. Chauhan, shall be deemed to be in service from the date he joins and not prior thereto. It was contended that having regard to the fact that vacancies in the reserved categories had to be filled up in accordance with the roster points, no general category candidate would have been appointed against such vacancies having regard to the decision of the apex Court in R.K. Sabharwal & Ors. vs. State of Punjab & Ors. [1995 (2) SCC 745]. The learned counsel would urge that the vacancies must be filled up as per roster points and this principle of law has been reiterated by a Constitution Bench of this in All India Judges' Association and Ors. vs. Union of India & Ors. [2002 (4) SCC 247].

Dr. Chauhan urged that having regard to the Amendment in the Constitution inserting Article 16(4A), the decision of this Court in Ajit Singh & Ors. (II) vs. State of Punjab [1999 (7) SCC 209] must be held to have lost its efficacy. Our attention has also been drawn to the opinion of the Commission that inter se seniority of the officers be determined on the basis of respective dates of appointment.

Mr. P.P. Rao, learned senior counsel appearing on behalf of Appellant Nos. 8 to 11, on the other hand, submitted that having regard to the practice prevalent in the Punjab & Haryana High Court inter se seniority has rightly been determined on the basis of result of the examination conducted by

the Public Service Commission. The learned counsel would urge that as this Court in Neelima Shangla (supra) while considering the question of appointment of a candidate under the said Rules directed that she be placed in the seniority list of 1984 Batch, there is no reason as to why this Court would deviate from the said principle.

Mr. Rao would urge that it is not within the province of the Commission to make recommendations as regards the inter se seniority of the candidates in as much as its function is merely to make recommendations for appointment of the candidates upon preparing a select list therefor.

It was submitted that having regard to the instructions issued by the Haryana Government in its Circular letter dated 27.4.1982; roster points cannot be considered as seniority points and further having regard to the fact that these instructions have been followed by the High Court for a long time, there is absolutely no reason as to why such a practice should be deviated from. The learned counsel contended that this Court in Ajit Singh-(II) (supra) having categorically held that roster points are not intended to determine seniority between general candidates and reserved candidates, the impugned judgment cannot be faulted with.

It is not in dispute that the Rules are in force since 26.10.1951. Part -A of the Rules lays down the qualifications for appointments. Part- B of the Rules provides that the advertisement to be issued for the post by Haryana Public Service Commission as also the mode and manner in which the applications are required to be submitted by the candidates. Part- C of the said Rules relates to the examination of the candidates. Rules 7 provides that "no candidate shall be called for the viva-voce test unless he obtains at least 45 per cent marks in the aggregate in all the written papers and 33 per cent marks in the language paper of Hindi (in Devnagri Script)".

Rule 8 of the Rules is as under:

"No candidate shall be considered to have qualified in the examination unless he obtains atleast 55 per cent marks in the aggregate of all papers including the viva-voce test.

The merit of the qualified candidates shall be determined strictly according to the marks obtained by them;

Provided that in case two or more candidates obtain equal marks, their merit shall be determined according to the marks secured by them in viva- voce and if the marks in the viva-voce of the candidates are also equal the older in age shall be placed higher in order of merit."

Rule 10 which is important for the purpose of determination of the matter reads as under:

"(i)The result of the Examination will be published in the Punjab Government Gazette. (ii) Candidates will be selected for appointment strictly in the order in which they have been placed by the Punjab Service Commission in the list of those who have

qualified under rule 8.

Provided that in the case of candidates belonging to the Scheduled Castes/Tribes and other backward classes, Government will have a right to select in order of merit a candidate who has merely qualified under rule 8, irrespective of the position obtained by him in the examination;

Provided further that the selection of candidates belonging to the Scheduled Castes/Tribes and other Backward Classes in the order of merit inter se shall be made against the vacancies reserved for them and in the manner prescribed by Government from time to time."

Rules 1 and 8 or Part-D governing appointments read thus:

"1. The names of candidates selected by Government for appointment of Subordinate Judges under rules 10 and 11 of Part-C shall be entered on the High Court register in the order of their selection."

"8. There is no limit to the number of names borne on the High Court register but ordinarily no more names will be included than are estimated to be sufficient for the filling of vacancies which are anticipated to be likely to occur within two years from the date of selection of candidates as a result of an examination."

The Rules, therefore, indisputably lay emphasis on merit. It for all intent and purport excludes the applicability of rule of appointment in terms of roster points.

It is not in dispute that despite absence of any specific rule relating to determination of inter se seniority, a long standing practice prevailing in the High Court has been that it be determined strictly on the basis of the order of merit. It is relevant to note that the State of Haryana had issued instructions on or about 27.4.1972, the relevant portions whereof are as under:

"It has come to the notice in the matter of fixing seniority, there has been misinterpretation of the relevant instructions in some instances and members of SCs/BCs been assigned seniority according to the serial numbers of the vacancies reserved for them under the block system (as indicated below) and not as they should have according to the order of candidates determined by the Public Service Commission:-

Vacancies reserved for 1,6,11,24,16,21,26,27, 31-36, SCs/BCs in every block 41,46,56,61,66-71,76-77, 81, of 100 vacancies 86,91,96 (No. 27 and 77 for BCs.) For example when 8 vacancies were to be filled and the 1st and the 6th were reserved for the members of SCs two scheduled castes candidates respectively in the combined seniority list of the candidates although the combined seniority list prepared by the PSC/SSSB their position were lower.

2. It has to be pointed out that this was irregular and inter se seniority of all the candidates taken together (i.e. whether appointed against reserved vacancies or against open ones), must be fixed according to the combined merit list and not otherwise. Vacancies assigned to SCs/BCs under the block system for the purpose of reservation only and are not intended for are not assigned fixing inter se seniority of the candidates contrary to their order in the combined merit list prepared by the PSC/SSSB.

3. This may please be noted for careful compliance so that in future seniority is fixed on this basis in case in which reserved vacancies are filled whether by initial appointment or by promotion. Furthermore, all earlier cases in which members or SCs/BCs and others have been assigned seniority erroneously in disregard of the order of candidates in the combined merit list, should be reviewed and steps taken to refix seniority correctly. For that purposes, it will be necessary that the persons who will be affected should be given an opportunity of showing cause why their seniority should not be fixed at a lower place, in accordance with the order in the combined merit list such opportunity should be duly allowed before refixing seniority."

The contesting parties herein had appeared in the same examination. It is also not in dispute that the results of the said examination were published by the Commission on 15.9.1989. The candidate who could be appointed from amongst the said list were for those vacancies which were existing on that date as also likely to occur upto September, 1991. In terms of the Rules, as referred to hereinbefore, their names had to be entered in the register. It was not so done. The right of the candidates who could be appointed in terms of the extant rules was ignored.

The interpretation of the Rules came up for consideration of this Court in *Neelima Shangla vs. State of Haryana* reported in (1986) 4 SCC 268. Having regard to the purport of the said Rules it was held:

"The names of the selected candidates are to be entered in a Register maintained by the High Court in the Order of their selection and appointments are to be made from the names entered in the Register in that order. The number of names to be entered in the Register maintained by the High Court may be sufficient to fill vacancies anticipated to occur within two years from the date of selection of candidate as a result of the examination. Therefore, it appears that the duty of the Public Service Commission is confined to holding the written examination, holding the viva voce test and arranging the order of merit according to marks among the candidates who have qualified as a result of the written and the viva voce tests. Thereafter, the Public Service Commission is required to publish the result in the gazette and, apparently, to make the result available to the government. The Public Service Commission is not required to make further selection from the qualified candidates and is, therefore, not expected to withhold the names of any qualified candidates. The duty of the Public Service Commission is to make available to the government a complete list of qualified candidates arranged in order of merit. Thereafter, the government is to make the selection strictly in the order in which they have been placed by the

Commission as a result of the examination. The names of the selected candidates are then to be entered in the Register maintained by the High Court strictly in that order and appointments made from the names entered in that Register also strictly in the same order. It is, of course, open to the government not to fill up all the vacancies for a valid reason.

It was clearly held that having regard to the Rules, it was incumbent on the part of the Commission to communicate the entire list of qualified candidates to the Government. It was held that the Commission was not concerned with the number of vacancies at all and as such it could not have been withheld the full list of successful candidates on the ground that only a limited number of vacancies are available. Taking note of the fact that like the present case, therein also the High Court had informed the Government that more vacancies were required to be filled, it was observed:

"If the government had been aware that there were qualified candidates available, they would have surely applied Rule 8 of Part D and made the necessary selection to be communicated to the High Court. The net result is that qualified candidates, though available, were not selected and were not appointed. Miss Neelima Shangla is one of them. In the view that we have taken of the rules, Miss Neelima Shangla is entitled to be selected for appointment as Subordinate Judge in the Haryana Civil Service (Judicial Branch)."

In the aforementioned situation, this Court directed that the names of the petitioner therein be included in the list of 1984 list of candidates.

As noticed hereinbefore, a bench of this Court in State of Haryana vs. Rajiv Kumar C.A. Nos. 4426-28 of 1994 as noticed hereinbefore dismissed the special leave petition in respect of Ms. Manisha Batra (Now Ms. Manisha Chopra) holding that a clear vacancy existed.

We may further notice that a Division Bench of the Punjab & Haryana High Court in Kamal Kant & Ors. vs. State of Haryana & Anr. [1991 (3) Recent Services Judgments] arising out of the same advertisement, directed:

"In terms of the law laid down by the Supreme Court in Neelima Shangla's case(supra), we direct the State of Haryana to forward the list of 42 candidates who qualified in the examination (32 general and 10 reserved) held in December, 1988 forthwith and the High Court would enter the names of such number of candidates as would be necessary in terms of Rule 8 of Part D of the Rules in the Register in order of merit. The names of the candidates of the reserved categories would also be brought on the Register in the same manner. The High Court would then consider to fill up the remaining vacancies and would forward the names of the requisite number of candidates to the State Government for appointment as per Rule 7(1) of Part D of the Rules as Subordinate Judges under Article 234 of the Constitution. While doing

so it will be open to the High Court in the interests of higher standard not to recommend the names of all the candidates who obtained 55 per cent marks and the appointment can be restricted to such number of candidates who obtained higher percentage than 55 per cent as may be decided by the High Court and agreed to by the Government."

In the aforementioned backdrop, the submission of Dr. Chauhan is required to be considered.

The question as to whether the determination of inter se seniority would depend upon the filling up of the vacancies so far as the reserved categories are concerned, having regard to the roster points, in our opinion, is no longer res integra.

In *Ajit Singh & Ors. (II) vs. State of Punjab & Ors.* reported in 1999 (7) SCC 209 a five Judge Bench of this Court has laid down the law in the following terms:

"It must be noted that whenever a reserved candidate goes for recruitment at the initial level (say Level 1), he is not going through the normal process of selection which is applied to a general candidate but gets appointment to a post reserved for his group. That is what is meant by "reservation". That is the effect of "reservation".

Now in a case where the reserved candidate has not opted to contest on his merit but has opted for the reserved post, if a roster is set at Level 1 for promotion of the reserved candidate at various roster points to Level 2, the reserved candidate, if he is otherwise at the end of the merit list, goes to Level 2 without competing with general candidates and he goes up by a large number of places. In a roster with 100 places, if the roster points are 8, 16, 24 etc. at each of these points the reserved candidate if he is at the end of the merit list, gets promotion to Level 2 by side-stepping several general candidates. That is the effect of the roster- point promotion.

It deserves to be noticed that the roster points fixed at Level 1 are not intended to determine any seniority at Level 1 between general candidates and the reserved candidates. This aspect we shall consider again when we come to *Mervyn Continho v. Collector of Customs* (1966) 3 SCR 600 lower down. The roster point merely becomes operative whenever a vacancy reserved at Level 2 becomes available. Once such vacancies are all filled, the roster has worked itself out. Thereafter other reserved candidates can be promoted only when a vacancy at the reserved points already filled arises. That was what was decided in *R.K. Sabharwal v. State of Punjab* (1995) 2 SCC 745."

In *Ajit Singh (II)*, the decision of this Court in *R.K. Sabharwal* case has, thus, been explained.

P.S. Ghalaut vs. State of Haryana & Ors. [1995 (5) SCC 625] relied upon by Dr. Chauhan, is a decision rendered by a two Judge bench. In that case Rule 13 of the Rules envisaged that the seniority inter se of members of the service shall be determined by the length of continuous service on any post in the service; provided further that in the case of two or more members appointed by direct recruitment, the order of merit determined by the Commission shall not be disturbed in fixing the seniority. Despite the said Rule, it was held:

and 6, as pointed out in the Chief Secretary's letter have admittedly been reserved for Scheduled Castes. Suppose recruitment was made to fill up ten vacancies, three candidates from Scheduled Castes were selected on the basis of reserved quota. The question is whether the first candidate will be put in the quota allotted to the Scheduled Castes in the roster. Having been selected as a general candidate, though he is more meritorious than the second and third candidates, he will not get the placement in the roster, reserved for Scheduled Castes i.e. Nos. 1 and 6 points. Consequently candidates and 6 and the first candidate will get the placement in the order of merit along with the general candidates according to the order of merit maintained by the Selection Committee or the Public Service Commission. He cannot complain that having been selected in the merit, he must be placed in the placement reserved for Scheduled Castes at Point No. 1 in the roster. Equally, though general candidate is more meritorious in the order of merit prepared by the Public Service Commission or the Selection Committee, when the appointments are made and the vacancies are filled up according to the roster, necessarily and inevitably the reserved candidates though less meritorious in the order of merit maintained by the Public Service Commission would occupy the respective places assigned in the roster. Thereby they steal a march over some of the general candidates and get seniority over the general candidates. This scheme is, therefore, constitutional, valid and is not arbitrary."

We have not been able to persuade ourselves to the aforesaid view.

In A.I.I.M.S. Students' Union vs. A.I.I.M.S & Ors. [2002 (1) SCC 428], this Court observed:

"Reservation, as an exception, may be justified subject to discharging the burden of proving justification in favour of the class which must be educationally handicapped the reservation geared up to getting over the handicap. The rationale of reservation in the case of medical students must be removal of regional or class inadequacy or like disadvantage. Even there the quantum of reservation should not be excessive or societally injurious. The higher the level of the speciality the lesser the role of reservation.

Any reservation, apart from being sustainable on the constitutional anvil, must also be reasonable to be permissible. In assessing the reasonability one of the factors to be taken into consideration would be whether the character and quantum of reservation would stall or accelerate achieving the ultimate goal of excellence enabling the National constantly rising to higher levels. In the era of globalisation, where the nation as a whole has to compete with other nations of the world so as to survive, excellence cannot be given an unreasonable go by and certainly not compromised in its entirety. Fundamental duties, though not enforceable by a writ of the Court, yet provide a valuable guide and aid to interpretation of Constitutional and legal issues. In case of doubt or choice, people's wish as manifested through Article 51-A can serve

as a guide not only for resolving the issue but also for constructing or moulding the relief to be given by the Courts."

In *K.Duraisamy & Anr. vs. State of T.N. & Ors.*, (2001) 2 SCC 538, this Court held:

"The mere use of the word 'reservation' per se does not have the consequence of ipso facto applying the entire mechanism underlying the constitutional concept of a protective reservation specially designed for the advancement of any socially-and-educationally-backward classes of citizens or for the Scheduled Castes and Scheduled Tribes, to enable them to enter and adequately represent in various fields. The meaning, content and purport of the expression will necessarily depend upon the purpose and object with which it is used."

An affirmative action in terms of Article 16(4) of the Constitution is meant for providing a representation of class of citizenry who are socially or economically backward. Article 16 of the Constitution of India is applicable in the case of an appointment. It does not speak of fixation of seniority. Seniority is, thus, not to be fixed in terms of the roster points. If that is done, the rule of affirmative action would be extended which would strictly not be in consonance of the constitutional schemes. We are of the opinion that the decision in *P.S. Ghalaut* does not lay down a good law.

In *All India Judges' Association's case* [2002 (4) SCC 247], this Court was considering the matter relating to implementation of recommendations of Shetty's Commission as regard the fixation of pay scales of the Judicial officers. This Court noticed that sometimes merit suffers because of seniority. It was directed:

"We direct that recruitment to the Higher Judicial Service, i.e., the cadre of District Judges will be :

(1)(a) 50 per cent by promotion from amongst the Civil Judges (Senior Division) on the basis of principle of merit-cum-seniority and passing a suitability test:

(b) 25 per cent by promotion strictly on the basis of merit through limited competitive examination of Civil Judges (Senior Division) having not less than five years' qualifying service;

and

(c) 25 per cent of the posts shall be filled by direct recruitment from amongst the eligible advocates on the basis of the written and viva voce test conducted by respective High Courts.

(2) Appropriate rules shall be framed as above by the High Court as early as possible."

Only in relation to such promotion, the Court noticed that there exists a quota system in two different sources of recruitment in service in so far as seniority is concerned, and whence roster

system is followed, the litigation in the country had been lessor. In a case where there are different sources of recruitment to a service and quota of appointment for each source of recruitment is fixed under the rules, the seniority vis--vis of different sources of recruits could legally fixed on basis of roster points. It was in that situation a desire was expressed that quotas be specified in relation to posts as contradistinguished from quota in relation to vacancies. This Court, therefore, directed the High Courts to amend and promulgate seniority rules in the light of the decisions in R.K. Sabharwal (supra). It was clearly laid down:

"It is obvious that this system can only apply prospectively except where under the relevant rules seniority is to be determined on the basis of quota and rotational system. The existing relative seniority of the members of the Higher Judicial Service has to be protected but the roster has to be evolved for the future. Appropriate rules and methods will be adopted by the High Courts and approved by the States, wherever necessary by 31-3-2003."

The said decision cannot be said to have any application whatsoever in determining inter se seniority as regards vacancies required to be filled up in the years 1989-1991. Reliance by Dr. Chauhan on the decision of this Court in Direct Recruit Class II Engineering Officers' Association vs. State of Maharashtra & Ors. quoted in 1990 (2) SCC 715 is equally misplaced.

A question which arose therein for consideration was inter se seniority between direct recruits and promotees as there existed quota rules and furthermore appointments were also made on ad hoc basis. It is in that situation, this Court inter alia observed (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."

The said decision was rendered also having been regard to dispute as to whether the date of confirmation would be the measure for determining inter se seniority.

In Union of India vs. S.S. Uppal & Anr. reported in (1996) 2 SCC 168, it has been held: The provisions of Articles 16(1), 16(4) and 335 of the Constitution of India imply that a process should be adopted while making appointment though direct recruitment or promotion in which the merit is not affected.

It is also well settled that in the absence of rules governing seniority an executive order may be issued to fill up the gap. Only in the absence of a rule or executive instructions, the court may have to evolve a fair and just principle which could be applied in the facts and circumstances of the case.

In Union of India vs. M.L. Capoor reported in (1974) 1 SCR 797 this Court held:

"Merit is certainly an elusive factor capable of being judged very differently from different angles or, by applications of varying tests of it by different persons, or, by

the same persons, at different times. It was submitted on behalf of the respondents that to make supposed merit the sole test for selection would be to leave the door wide open for nepotism to creep into selections for higher rungs of public service by promotion and that this would undermine the morale of members of the State services and weaken incentives for honest work and achievement of better standards of proficiency by them.

The following passage, from Leonard D. White's "Introduction to Public Administration" (4th edn. Pages 380,383), cited with approval by this Court in Sant Ram Sharma's case, 1968(1) SCR 111 was quoted by the Division Bench: The principal object of a promotion system is to secure the best possible incumbents for the higher positions, while maintaining the morale of the whole organization. The main interest to be served is the public interest, not the personal interest of members of the official group concerned. The public interest is best secured when reasonable opportunities for promotion exist for all qualified employees, when really superior civil servants are enabled to move as rapidly up the promotion ladder as their merits deserve and as vacancies occur and when selection for promotion is made on the sole basis of merit, for the merit system ought to apply as specifically in making promotions as in original recruitment.

Employees often prefer the rule of seniority, by which the eligible longest in service is automatically awarded the promotion. Within limits, seniority is entitled to consideration as one criterion of selection. It tends to eliminate favouritism or the suspicion thereof; and experience is certainly a factor in the making of a successful employee. Seniority is given most weight in promotions from the lowest to other subordinate positions. As employees move up the ladder of responsibility, it is entitled to less and less weight. When seniority is made the sole determining factor, at any level, it is a dangerous guide. It does not follow that the employee longest in service in a particular grade is best suited for promotion to a higher grade; the very opposite may be true."

Seniority is not a fundamental right. It is merely a civil right. Inter se seniority of the candidates who are appointed on the same day would be dependant on the rules governing the same. Only in absence of any statutory rules, the general principles may be held to be applicable.

It has been noticed hereinbefore, that the Punjab & Haryana High Court in exercise of its power of control under Article 235 of the Constitution of India had been determining inter se seniority of the candidates in terms of the instructions of the State dated 27th April, 1972, as quoted supra. In absence of any statutory rules, the said practice was developed which cannot be said to be arbitrary. In any event, such practice cannot be interfered at this stage; keeping in view the fact that the rights of a large number of officers must have already been determined in terms thereof. In the instant case, the respondents Nos. 8 to 11 admittedly were more meritorious. They were unjustly deprived of their right of appointment, although they were entitled thereto having regard to Rule 10 of the Rules. They suffered for no fault on their part. They had to approach the High Court for ventilating

their grievances. The High Court directed the first respondent herein to make appointment and only pursuant thereto and in furtherance thereof they were appointed. Should they in aforementioned situation be permitted to lose their seniority is the question involved in this appeal? The answer thereto must be rendered in the negative. Long standing practice, as well as justice and equity favour the respondents. It is beyond any cavil that merit has a role to play in the matter of determination of inter se seniority.

In Wing Commander J. Kumar vs. Union of India & Ors. reported in (1982) 2 SCC 116, this Court laid down the law in the following terms:

"Further, the impugned rules are statutory in origin as they have been promulgated by the President of India under the proviso to Article 300 of the Constitution. Rule 16 contains a categorical declaration that in the past also the seniority of service officers permanently seconded to the R & D Organisation was being reckoned on the basis of their dates of attainment of substantive rank of Major/Sqn. Ldr./Lt. Cdr., subject to any penalty/loss of seniority that an officer might suffer subsequently. The declaration is clearly implied in the opening words "As hitherto"

occurring in Rule 16 of the impugned rules. A statement contained in a statute or statutory rule of the factual background leading up to the enactment has ordinarily to be accepted to be acted upon by the court as wholly correct; nothing clinching has been brought to our notice by the appellant to justify any departure from the said principle. We do not, therefore, find it possible to accept the contention of the appellant that prior to the coming into force of the impugned rule, he had acquired a vested right to have his seniority in the R & D reckoned with reference to the date of his permanent secondment and to have all officers joining the Organisation on subsequent dates ranked only below him. The plea advanced by the appellant that the impugned rules have illegally purported to divest him of his vested rights of seniority and promotion in the R & D must, therefore, be rejected as devoid of merit."

In this case also, although there does not exist any statutory rule but the practice of determining inter se seniority on the basis of the merit list has been evolved on interpretation of the Rules. A select list is prepared keeping in view the respective merit of the candidates. Not only appointments are required to be made on the basis of such merit list, seniority is also to be determined on that basis as it is expected that the candidates should be joining their respective posts almost at the same time. Yet again in Chairman, Puri Gramya Bank & Anr. vs. Ananda Chandra Das & Ors. [1994(6) SCC 301] this court held:

"It is settled law that if more than one are selected, the seniority is as per ranking of the direct recruits subject to the adjustment of the candidates selected on applying the rule of reservation and the roster. By mere fortuitous chance of reporting to duty earlier would not alter the ranking given by the Selection Board and the arranged one as per roster. The High Court is, therefore, wholly wrong in its conclusion that the seniority shall be determined on the basis of the joining reports given by the candidates selected for appointment by direct recruitment and length of service on its

basis."

In Pilla Sitaram Patrudu and Ors. vs. Union of India & Ors. reported in 1996(8) SCC 637 it was held:

"It is contended by the learned counsel for the petitioners that since the inter se seniority as Assistant Engineers was left open in the order, the directions given by the Tribunal to consider the case as Executive Engineer and determine his seniority on the basis of promotion, is not valid in law. We find no force in the contention. Once he is found to be eligible according to the rules, then his seniority is required to be determined as per the procedure prescribed in the rules in vogue. It is further contended that the fifth respondent was not qualified since he had not completed 8 years of required service. The Tribunal has recorded a finding that two years' period is relaxable in the case of the reserved candidate. The inter se seniority as Assistant Executive Engineer is required to be determined; he joined service in 1981 and, therefore, he did not have the requisite service. We find no force in the contention. Since he was selected by direct recruitment, he is entitled to be appointed according to rule. His appointment was delayed for no fault of his and he came to be appointed in 1981, he is, therefore, entitled to the ranking given in the select list and appointment made accordingly. Under these circumstances, we do not find any illegality in the order."

Furthermore, it is now well settled that a settled seniority position should not be unsettled. The respondents had already been posted to the post of Additional District Judge. As would appear from the report of the Sub-committee that the seniority list was published in the year 1992. Representations were, however, made only in the year 1997 which was rejected by the High Court on 22nd August, 1997. The writ petition was filed in March, 1998 which was dismissed by reason of the impugned judgment dated 18.8.1999.

For the foregoing reasons, we do not find any merit in this appeal. It is dismissed accordingly. However, in the facts and circumstances of the case, there shall be no order as to costs.