A STATE OF UTTAR PRADESH & OTHERS

v.

ASHOK KUMAR SRIVASTAVA & ANR.

(Civil Appeal No. 6967 of 2013)

AUGUST 21, 2013

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[ANIL R. DAVE AND DIPAK MISRA, JJ.]

Service Law:

C *Seniority – Date of seniority – Seniority granted w.e.f. the date of promotional order – The promotee claimed retrospective seniority w.e.f. the date the vacancy had arisen – High Court allowed the claim of the promotee on the grounds that the service rules provided to decide seniority* D *w.e.f. the date of arising of vacancy; and that there has been hostile discrimination against the promotee as other 10 promotees had been accorded seniority w.e.f. the date of arising of vacancy – Held: Conferment of retrospective seniority to the promotee by High Court is not tenable – As* E *per service rules the seniority has to be computed from the date of appointment, unless otherwise stipulated in the letter of appointment – High Court misdirected itself in holding that there was discrimination because the promotee in question and the other 10 promotees were governed by different set of rules – Uttar Pradesh Ayurvedic Aur Unani Mahavidyalaya* F *Adhyapako ki Seva Niyamavali, 1990 – r. 21 – Constitution of India – Article 14.*

State Public Service Commission recommended the name of respondent No.1 (lecturer in an Ayurvedic G **College) for promotion to the post of Reader against the vacancy which arose on 31.7.2001. On the recommendation of the Commission, the State Government promoted respondent No.1 giving him seniority w.e.f. 16.8.2005 i.e. the date of promotion order.**

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High Court, by the impugned judgment held that the service rules empower the Government to decide the seniority from the date of vacancy and that 10 promotees had been accorded seniority w.e.f. the date of arising of vacancy, hence non-granting of similar benefit to respondent No.1 would tantamount to hostile discrimination. Hence the present appeal.

Allowing the appeal, the Court

HELD: 1. The claim of the first respondent for conferment of retrospective seniority is absolutely untenable and the High Court has fallen into error by granting him the said benefit. [Para 16] [861-H; 862-A]

2. Rule 21 of Uttar Pradesh Ayurvedic Aur Unani Mahavidyalaya Aadhyapako Ki Seva Niyamavali, 1990, the seniority of the candidates is to be determined from the date of order of substantive appointment. The proviso carves out an exception by stipulating 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 order of substantive appointment otherwise it would be the date of the issue of the order. The second proviso clarifies that the seniority will be determined when more than one orders of appointment are issued in respect of any one selection. From the aforesaid, it is luminous that unless otherwise stipulated in the letter of appointment, the seniority has to be computed from the date of appointment to the post. In the case at hand, nothing has been stipulated in the letter of appointment. [Para 9] [856-G-H; 857-A-B]

3. The High Court has misdirected itself by recording the finding that there has been hostile discrimination, as ten promotees have been accorded seniority relating back to the date when the vacancies arose. An additional affidavit has been filed on behalf of the appellants

A clarifying the position that ten incumbents to whom the benefit of retrospective seniority was extended, they were selected under Rule 15 of Uttar Pradesh State Medical College Teacher Service (Second Amendment) Rules, 2005. Respondent is governed by different set of rules B and the promotions that have been given to other category of teachers are under separate set of rules. When the seniority is governed by two separate set of rules, it is inconceivable that one can claim seniority on the basis of the rule relating to determination of seniority C enshrined in the other rules. Respondent No. 1 is bound to base his case under Rule 21 of the 1990 Rules by which he is governed. The question of hostile discrimination would have arisen had the State Government extended the benefit under Rule 21 of the 1990 Rules to similarly placed persons governed by the D same Rules. [Para 6] [853-D-E; 854-F-H; 855-A-B]

4. The names of candidates selected by the Selection Committee were sent to the Commission. Be it noted, six candidates were found fit for promotion and none of them E was given retrospective seniority from the date when the vacancy arose. [Para 7] [855-C-D]

5. The High Court placed reliance on the recommendation of the Public Service Commission which F was a reply to the query dated 4.6.2007. The commission by letter dated 10.8.2007 had stated that recommendation has been made for promoting respondent No.1 w.e.f. the date of vacancy created on 31.7.2001. The commission in his clarificatory recommendation had amended its letter dated 2.7.2007. The language used in the communication G by the Commission is not free from ambiguity. That apart, the discretion, if any, rests with the Government. The recommendations of the Commission cannot be treated to be binding on the State Government. [Para 7] [855-C-G]

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Nirmal Chandra Sinha vs. Union of India **(2009) 14 SCC 29**; *Jatinder Kumar and Ors. vs. State of Punjab* **(1985) 1 SCC 122: 1985 (1) SCR 899**; *Union of India vs. S.S. Uppal and Anr.* **(1996) 2 SCC 168: 1996 (1) SCR 230**; *State of Karnataka and Ors. vs. C. Lalitha* **(2006) 2 SCC 747: 2006 (1) SCR 971**; *State of Uttaranchal and Anr. vs. Dinesh Kumar Sharma* **(2007) 1 SCC 683: 2006 (10) Suppl. SCR 1**; *Pawan Pratap Singh and Ors. vs. Reevan Singh and Ors.* **(2011) 3 SCC 267: 2011 (2) SCR 831 – relied on.**

Keshav Chandra Joshi and Ors. vs. Union of India and Ors. **1992 Supp (1) SCC 272: 1990 (2) Suppl. SCR 573 – distinguished.**

Case Law Reference:

1990 (2) Suppl. SCR 573	**distinguished**	**Para 3**
(2009) 14 SCC 29	**relied on**	**Para 3**
1985 (1) SCR 899	**relied on**	**Para 7**
1996 (1) SCR 230	**relied on**	**Para 11**
2006 (1) SCR 971	**relied on**	**Para 12**
2006 (10) Suppl. SCR 1	**relied on**	**Para 13**
2011 (2) SCR 831	**relied on**	**Para 15**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 6967 of 2013.

From the Judgment and Order dated 21.12.2009 of the High Court of Judicature at Allahabad, Lucknow Bench, Lucknow in Service Bench No. 1268 of 2008.

P.N. Misra, Sanjay V., Abhisth Kumar for the Appellants.

Aseem Chandra, Vivek Singh for the Respondents.

A The Judgment of the Court was delivered by

DIPAK MISRA, J. 1. Leave granted.

2. The 1st respondent was appointed as a Lecturer on 23.3.1996 in "Ras Shastra" in Rajkiya Ayurvedic College and B Chikitsalaya, Lucknow. The State Government vide notification dated 21.12.1990 notified the Service Rules, namely, Uttar Pradesh Ayurvedic Aur Unani Mahavidyalaya Aadhyapako Ki Seva Niyamawali, 1990 (for short, "the rules") for the teachers of Uttar Pradesh Ayurvedic Colleges. Under the rules, the C promotional post from amongst the Lecturers is Readers. As the vacancies in respect of Readers were not filled up, the respondent No. 1 preferred W.P. No. 1136 (S/B) of 2004 before the High Court of Judicature at Allahabad at Lucknow Bench, Lucknow, wherein the High Court took note of the D statement by the learned counsel for the State and directed that it should be in the fitness of things that the Public Service Commission shall make earnest efforts to expedite the whole process relating to promotion within a period of six months. Eventually, on 15.6.2005 the U.P. Public Service Commission, E (for short 'the Commission'), the respondent No. 2 herein, recommended the names of six persons for promotion to the post of Readers. As far as the respondent No. 1 is concerned, he was placed at serial No. 6 and it was mentioned therein that the vacancy in respect of which the 1st respondent had been F recommended for promotion had arisen after the superannuation of one Dr. Hari Shanker Pandey on 31.7.2001. The state Government considering the recommendation of the commission issued an office memorandum on 16.8.2005 promoting the 1st respondent and given him the posting in G State Auyrvedic College, Lucknow. As the 1st respondent was given seniority w.e.f. 16.8.2005 which is the date of passing of the order of promotion he felt aggrieved and the said grievance compelled him to prefer O.A. No. 134 of 2006 before the U.P. State Public Service Tribunal (for short "the tribunal"). The

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tribunal by order dated 2.2.2007 directed that the applicant therein should submit a representation to the Government within a period of one month against the order dated 16.08.2005 which shall be disposed of within two months by passing a reasoned order. In pursuance of the aforesaid order the State of U.P. vide letter dated 4.6.2007 sought a clarification from the Commission about its recommendation and after receipt of the said communication from the Commission and on due deliberation vide order dated 2.1.2008 the representation of the 1st respondent was rejected and it was clearly stated that seniority had been accorded to him from the date of passing of the order of promotion i.e. 16.8.2005.

3. Grieved by the order rejecting the representation the respondent No. 1 preferred W. P. No. 1268 (S/B) of 2008 before the High Court contending, inter alia, that he was entitled to be given retrospective seniority with effect from the date when the vacancy had arisen. The stand and stance put forth by him was opposed by the State and its functionaries by filing a counter affidavit that as per Rule 21 of 1990 rules the respondent's seniority had been correctly fixed from the date of promotion but not from the date when the vacancy arose. The 1st respondent brought to the notice of the High Court that ten persons had been conferred seniority with retrospective effect and he had been discriminated. The High Court placing reliance on a three-Judge Bench decision in *Keshav Chandra Joshi and Others v. Union of India and Others*[1] and after reproducing paragraph 24 of the said Judgment expressed the opinion that the principle laid down therein was binding and on that rationale distinguished the decision in *Nirmal Chandra Sinha v. Union of India*[2]. The High Court further proceeded to state that the service rules itself empower the Government to decide the seniority from the date of vacancy and when ten promotees had been accorded seniority relating back to the date of arising of

1. 1992 Supp (1) SCC 272.
2. (2009) 14 SCC 29.

A vacancy, denial of the similar benefit to the petitioner by adopting a different criteria amounted to hostile discrimination inviting the frown of Article 14 of the Constitution. Being of this view, the Division Bench of the High Court quashed the impugned order dated 2.1.2008 and directed the respondents B therein to consider the case of the petitioner and pass a fresh order in accordance with the verdict given by it. The penetrability of the aforesaid order is called in question by the State of U.P and its functionaries in this appeal by way of special leave.

C 4. It is submitted by Mr. P. N. Misra, learned senior counsel appearing for the appellant that the High Court has flawed by placing reliance on the decision rendered in *Keshav Chandra Joshi* (supra), as the same was delivered in a different context and that apart the ratio that has been culled out by the High court D from the said pronouncement is not the correct one. The learned senior counsel has criticized the reasoning that when the service rule itself empowers the Government to decide the seniority from the year of vacancy, the Government is not justified in deciding the seniority of the 1st respondent from the date of promotion to the post of Reader. It is his further submission that E the High Court has committed a grave factual error by opining that under Rule 21 of the 1990 rules when seniority was accorded to 10 persons form the date of vacancy, non-granting of the similar benefit to the respondent did tantamount to hostile discrimination, though it had clearly been brought on record that F seniority of all the promoted candidates was fixed from the date of promotion and not from the respective dates when the vacancies had arisen.

5. Mr. Aseem Chandra, learned counsel appearing for the G contesting respondent No. 1, per contra, urged that the High Court has properly applied the principle stated in *Keshav Chandra Joshi* (supra) and same being a three-Judge Bench decision has been aptly followed and, hence, the analysis made by the High court cannot be found fault with. Learned H counsel would submit as the department had not filled up the

promotional posts, the respondent was constrained to approach the High Court and on the basis of the direction issued by the High court when the posts had been filled up, it was incumbent on the authorities to reckon the seniority from the date when the vacancy had occurred. It is propounded by him that the language of Rule 21 of the 1990 rules confers discretionary power on the State Government and in the case at hand the authorities in an inequitable manner have failed to exercise the said power and, therefore, the High Court is absolutely justified in issuing directions for fixation of seniority with retrospective effect and, therefore, the order passed by it is absolutely impregnable.

6. At the very outset, we think it appropriate to deal with the facet of hostile discrimination. The High Court, as is manifest, has opined that ten promotees have been accorded seniority relating back to the date when the vacancies arose. Reference has been made to Rule 20. It is worthy to note that an additional affidavit has been filed on behalf of the appellants clarifying the position that ten incumbents to whom the benefit of retrospective seniority was extended, they were selected under Rule 15 of Uttar Pradesh State Medical College Teacher Service (Second Amendment) Rules, 2005. The said amended rules were brought into force on 12.5.2005 to amend the Uttar Pradesh State Medical Colleges Teachers Service Rules, 1990. Rule 15 of original rules dealt with procedure for recruitment by promotion. The amended Rule 15 of 2005 provides the procedure for recruitment by personal promotion. Rule 20 of the original rules dealt with seniority and it has been amended and in the present incarnation the said Rule reads as follows: -

> "**20. Seniority** – The seniority of persons substantively appointed in any category of posts in the service shall be determined in accordance with the Uttar Pradesh

A Government Servants Seniority Rules, 1991, as amended from time to time.

Provided that a person appointed to a post except the post of Associate Professor or Professor on the
B recommendation of the Commission for which the requisition had been sent to the Commission before the commencement of the Uttar Pradesh State Medical colleges Teacher Service (Second Amendment) Rules, 2005 shall be entitled to seniority from the date of his
C appointment notwithstanding the fact that a teacher has been given personal promotion to the same post under rule 15 in the same recruitment year."

Thus, on a plain reading of Rule 20 it is perceptible that
D certain categories of incumbents are entitled to seniority from the date of their appointment notwithstanding the fact that they have been conferred personal promotion to the same post under Rule 15 in the same recruitment year. It is evident that benefit of seniority has been given to the incumbents who are
E governed by a different set of rules altogether. The High Court, as we notice, has referred to Rule 21 of 1990 rules which governs the case of the respondent No. 1. The said Rule clearly stipulates that if an order of appointment specifies a particular back date with effect from which a person is substantively appointed then only that date will be deemed to be the date of
F the order of substantive appointment. From the narration of the aforesaid facts, it is demonstrable that respondent is governed by different set of rules and the promotions that have been given to other category of teachers are under separate set of rules. When the seniority is governed by two separate set of rules, it
G is inconceivable that one can claim seniority on the basis of the rule relating to determination of seniority enshrined in the other rules. The respondent No. 1 is bound to base his case under Rule 21 of the 1990 rules by which he is governed. Thus analysed, we find that the High Court has misdirected itself by
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recording the finding that there has been hostile discrimination. The question of hostile discrimination would have arisen had the State Government extended the benefit under Rule 21 of the 1990 rules to similarly placed persons governed by the same Rules. That being not the position we are afraid that the view expressed by the High Court on that score is not sustainable.

7. In this context, it is seemly to state that the names of candidates selected by the Selection Committee in its meeting held on 19.5.2005 were sent to the Commission. Be it noted, six candidates, namely, Dr Hari Shanker Pandey, Dr. Jai Ram Verma, Dr. S.K. Arya, Dr. V.P. Upadhyaya, Dr. Lal Bahadur Singh and Dr. Ashok Kumar Srivastava were found fit for promotion and none of them was given retrospective seniority from the date when the vacancy arose. The High Court has placed reliance on the recommendation of the Public Service Commission which was a reply to the query dated 4.6.2007. The commission by letter dated 10.8.2007 had stated that recommendation has been made for promoting Dr. Ashok Kumar Srivastava on the post of Reader of Ayurvedic and Unani Colleges w.e.f. the date of vacancy created on account of the superannuation of Dr. Hari Shanker Pandey on 31.7.2001. It is condign to note here that the commission in his clarificatory recommendation had amended its letter dated 2.7.2007. It is also perceivable that the language used in the communication by the Commission is not free from ambiguity. That apart, the discretion, if any, rests with the Government. Be that as it may, the recommendations of the commission cannot be treated to be binding on the State Government. (See *Jatinder Kumar and Others v. State of Punjab.*[3]) Thus, it is perceptible that all the incumbents promoted along with the respondent No. 1 were given seniority from the date of promotion and not from the date when the vacancies arose. Therefore, the factum of arbitrary

3. (1985) 1 SCC 122.

A discrimination does not arise and accordingly we are unable to concur with the view of the High Court.

8. Presently, we shall advert to the rule position. The relevant part of Rule 21 of the 1990 rules by which the 1st B respondent is governed, is reproduced below:-

"21. **Seniority** – (1) Except as hereinafter provided, the seniority of persons in any category of posts shall be determined from the date of the order of substantive appointment and if two or more persons are appointed C together by the order in which their names are arranged in the appointment order :

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

Provided further that, if more than one orders of appointment are issued in respect of any one selection the E seniority shall be as mentioned in the combined order of appointment issued under sub-rule (3) of rule 18 :

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

9. On a studied scrutiny of the aforesaid Rule, it is vivid G that the seniority of the candidates is to be determined from the date of order of substantive appointment. The proviso carves out an exception by stipulating 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

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be the order of substantive appointment otherwise it would be the date of the issue of the order. The second proviso clarifies that the seniority will be determined when more than one orders of appointment are issued in respect of any one selection. From the aforesaid, it is luminous that unless otherwise stipulated in the letter of appointment the seniority has to be computed from the date of appointment to the post. In the case at hand, nothing has been stipulated in the letter of appointment. The High Court while granting retrospective seniority with consequential benefits has placed reliance on the principle stated in *Keshav Chandra Joshi* (supra). In the said case, controversy related to fixation of seniority between direct recruits and the promotees. A three-Judge Bench took note of the plea which was to the effect that promotees should be declared to have been regularly appointed from the respective dates of their initial promotion as Assistant Conservators of Forest with all consequential benefits. To substantiate the said plea it was urged that though the promotees were appointed on ad hoc basis due to non-availability of direct recruits to the vacant posts of Assistant Conservators of Forest, yet they were continuing for well over 5 to 12 years discharging the same duties, drawing the same scale of pay without any reversion and, therefore, the posts held by them were not fortuitous, nor stop gap. In this backdrop it was contended that the entire continuous length of service from the dates of their initial promotion should be counted towards their seniority. In opposition, it was urged that the appointment of the promotees admittedly being ad hoc, they had no right to the posts and hence, their seniority could be counted only from the dates of their substantive appointment. The Court after scanning the anatomy of relevant rules opined that in order to become a member of the service he/they must satisfy two conditions, namely, the appointment must be in substantive capacity and the appointment has to be to the post in the service according to rules and within the quota to a substantive vacancy. The learned Judges observed that there exists a marked distinction between appointment in a substantive

A capacity and appointment to the substantive post. Therefore, the membership to the service must be preceded by an order of appointment to the post validly made by the Governor. Then only he/they become member/members of the service. The Court further stated that any other construction would be B violation of the Rules. After so expressing, the Court posed two questions :-

> "When promotees become members of the cadre of Assistant Conservators in accordance with the rules, and C whether the entire length of service from the date of initial appointments should be counted towards their seniority."

Thereafter, analyzing the entire gamut of case law, opined that employees appointed purely on ad hoc or officiating basis due to administrative exigencies, even though continued for a D along spell, do not become the members of the service unless the Governor appoints them in accordance with the rules, and so they are not entitled to count the entire length of their continuous officiating or fortuitous service towards their seniority. Eventually, in paragraph 24 which has been E reproduced by the High Court in entirety in the impugned order to build the edifice of its reasoning, in essence, it has been laid down thus: -

> "It is notorious that confirmation of an employee in a F substantive post would take place long years after the retirement. An employee is entitled to be considered for promotion on regular basis to a higher post if he/she is an approved probationer in the substantive lower post. An officer appointed by promotion in accordance with Rules G and within quota and on declaration of probation is entitled to reckon his seniority from the date of promotion and the entire length of service, though initially temporary, shall be counted for seniority. Ad hoc or fortuitous appointments on a temporary or stop gap basis cannot be taken into account for the purpose of seniority, even if the appointee H

was subsequently qualified to hold the post on a regular basis. To give benefit of such service would be contrary to equality enshrined in Article 14 read with Article 16(1) of the Constitution as unequals would be treated as equals. When promotion is outside the quota, the seniority would be reckoned from the date of the vacancy within the quota, rendering the previous service fortuitous. The previous promotion would be regular only from the date of the vacancy within the quota and seniority shall be counted from that date and not from the date of his earlier promotion or subsequent confirmation." A B C

In the ultimate conclusion the learned Judges ruled as follows:-

"Accordingly we have no hesitation to hold that the promotees have admittedly been appointed on ad hoc basis as a stop gap arrangement, though in substantive posts, and till the regular recruits are appointed in accordance with the rules. Their appointments are de hors the rules and until they are appointed by the Governor according to rules, they do not become the members of the service in a substantive capacity. Continuous length of ad hoc service from the date of initial appointment cannot be counted towards seniority." D E

10. From the aforesaid, it is clear as day that what is meant by reckoning of seniority from the date of vacancy in the context of the facts of the said judgment has been wholly misunderstood by the High Court. In the case of *Keshav Chandra Joshi* (supra), the controversy that arose pertained to the seniority between direct recruits and promotees. The Court opined that when promotion is given beyond the quota of the promotees, the seniority has to be reckoned from the date of vacancy arising within the quota meant for the promotees. The Court further observed that the previous promotion would be regular only from the date of vacancy within the quota and the F G H

A seniority shall be counted only from that date and not from date of earlier promotion or subsequent confirmation. The factual matrix, the relevant rules, the concepts of direct recruit quota and the promotee quota and the fortuitous appointment and the principle stated therein have nothing to do with grant of B retrospective seniority in the context of the present case. Thus, we have no scintilla of doubt that the High Court has erroneously applied the ratio laid down in *Keshav Chandra Joshi* (supra).

11. The thrust of the matter is how the seniority is to be C determined in such circumstances. In *Union of India v. S.S. Uppal and another,*[4] it has been opined that the seniority of a person is to be determined according to the seniority rule applicable on the date of appointment. It has also been observed that weightage in seniority cannot be given D retrospective effect unless it is specifically provided in the rule in force at the material time.

12. In *State of Karnataka and others v. C. Lalitha*[5] it has been observed that it is well settled that seniority should be governed by rules and a person should not be allowed to derive E any undue advantage over other employees, for concept of justice demands that one should get what is due to him or her as per law.

13. In *State of Uttaranchal and another v. Dinesh Kumar* F *Sharma*[6] it has been clearly stated that seniority has to be decided on the basis of rules in force on the date of appointment and no retrospective promotion or seniority can be granted from a date when an employee has not even been born in the cadre.

G 14. In *Nirmal Chandra Singh* (supra) it has been ruled that

4. (1996) 2 SCC 168.

5. (2006) 2 SCC 747.

H 6.. (2007) 1 SCC 683.

promotion takes effect from the date of being granted and not from the date of occurrence of vacancy or creation of the post. It has also been laid down therein that it is settled in law that date of occurrence of vacancy is not relevant for the determination of seniority.

15. Learned senior counsel for the appellants has drawn inspiration from the recent authority in *Pawan Pratap Singh and others v. Reevan Singh and others*,[7] where the Court after referring to earlier authorities in the field has culled out certain principles out of which the following being the relevant are reproduced below:

> "(ii) Inter se seniority in a particular service has to be determined as per the service rules. The date of entry in a particular service or the date of substantive appointment is the safest criterion for fixing seniority inter se between one officer or the other or between one group of officers and the other recruited from different sources. Any departure therefrom in the statutory rules, executive instructions or otherwise must be consistent with the requirements of Articles 14 and 16 of the Constitution.
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> xxx xxx xxx
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> (iv) The seniority cannot be reckoned from the date of occurrence of the vacancy and cannot be given retrospectively unless it is so expressly provided by the relevant service rules. It is so because seniority cannot be given on retrospective basis when an employee has not even been borne in the cadre and by doing so it may adversely affect the employees who have been appointed validly in the meantime."

16. In view of the aforesaid enunciation of law, the irresistible conclusion is that the claim of the first respondent

7. (2011) 3 SCC 267.

A for conferment of retrospective seniority is absolutely untenable and the High Court has fallen into error by granting him the said benefit and accordingly the impugned order deserves to be lancinated and we so do.

B 17. Consequently, the appeal is allowed and the order passed by the High Court is set aside. The parties shall bear their respective costs.

K.K.T. Appeal allowed.