Court No. - 7

Case :- SPECIAL APPEAL No. - 819 of 2019

Appellant :- Rajesh Kumar Singh And Another
Respondent :- Rajeev Nain Upadhyay And 24 Others
Counsel for Appellant :- Prabhat Kumar Singh,Adarsh Singh,Indra Raj Singh
Counsel for Respondent :- C.S.C.,Jitendra Kumar Srivastava,Kartikeya Saran,Vikas Budhwar

Hon'ble Biswanath Somadder,J.
Hon'ble Ajay Bhanot,J.

1. The instant Special Appeal arises out of a judgment and order rendered by a learned Single Judge on 14.05.2019 in Writ-A No.53123 of 2012, Rajeev Nain Upadhyay and others v State of U.P. and others, wherein the learned Single Judge was pleased to allow the writ petition after quashing the seniority list dated 05.09.2006 and 05.03.2010.

2. A writ in the nature of mandamus was also issued by the learned Single Judge, directing the respondents to draw up a fresh seniority list in accordance with Rule 5 of the Seniority Rules of 1991. Relevant directions of the learned Single Judge are extracted hereunder:

"37. Writ petition consequently succeeds and is allowed. Impugned seniority lists dated 5.9.2006 and 5.3.2010 stands quashed. A writ of mandamus is issued directing the respondents to draw a fresh seniority list in accordance with Rule 5 of the Seniority Rules of 1991, particularly as relevant records relating to selection are available with the U.P. Public Service Commission. Any promotion made during the pendency of present writ petition would not be interfered with but would remain subject to the fresh seniority list to be prepared in terms of the Seniority Rules of 1991. No order is passed as to costs."

3. An application for leave to appeal was filed in aid of the memo of appeal since the applicants were not impleaded as co-respondents in the writ petition. The application for leave to appeal was allowed by this Court by an order dated

02.07.2019. Consequently, the applicants are now the appellants before this Court in the instant Special Appeal.

4. Two questions arise for consideration in the instant special appeal:

a) Whether on account of non-joinder of the appellants as co-respondents, the writ petition was liable to be dismissed?

b) Whether the impugned judgment erred in law by quashing the seniority list of 2006 and directing the respondents to draw up a fresh seniority list in the light of Rule 5 of the Seniority Rules of 1991?

5. The appellants were senior to the writ petitioners in the seniority list created by the respondent department in 2006. The appellants were not impleaded as co-respondents to the writ petition. The appellants were necessary parties to the writ petition inasmuch as their interests would be directly affected by the adjudication of the seniority list of 2006 as well as of 2010. Further, the prejudice caused by non-impleadment has been realised in the form of the judgment rendered by the learned Single Judge, which is clearly adverse to the appellants.

6. This short narrative establishes the fact that the proceedings before the learned Single Judge were *ex parte* to the appellants and in violation of principles of natural justice. The prejudice caused to the appellants is beyond recall.

7. Some persons who were part of the seniority list of 2006, were indeed arrayed as co-respondents in the writ petition. However, it is admitted that the said private respondents

were not arrayed in a representative capacity and never represented the interests of the appellants. The number of respondents/persons to be directly affected was only 77 (seventy seven). This was not too large a number to be impleaded. The appellants were never noticed on the proceedings before the learned Single Judge. Non-joinder of necessary parties or those persons who would be vitally affected by the judgment of the Court, renders the writ petition virtually having no legs to stand on. The fatal consequences of non-joinder of parties who would be vitally affected by the judgment emanates from applicability of the first principles of Code of Civil Procedure regarding joinder of parties as applicable analogously to a writ petition. The proposition shall now be reinforced by good authority in point.

8. The Hon'ble Supreme Court in ***Prabodh Verma v State of U.P.***, reported at (***1984) 4 SCC 251,*** discussed the consequences of non-joinder of necessary parties to a writ petition, the result of which would vitally affect them; para 28 of the said judgment is extracted hereinunder:

> "28. ....A High Court ought not to decide a writ petition under Article 226 of the Constitution without the persons who would be vitally affected by its judgment being before it as respondents or at least by some of them being before it as respondents in a representative capacity if their number is too large, and, therefore, the Allahabad High Court ought not to have proceeded to hear and dispose of the Sangh's writ petition without insisting upon the reserve pool teachers being made respondents to that writ petition, or at least some of them being made respondents in a representative capacity, and had the petitioners refused to do so, ought to have dismissed that petition for non-joinder of necessary parties."

9. Joinder of persons of the parties to a writ petition where the seniority rights of such persons would be affected was

considered by the Hon'ble Supreme Court in the case of ***State of Uttaranchal and another v. Madan Mohan Joshi and others***, reported at ***(2008) 6 SCC 797***. The Hon'ble Supreme Court underscoring the indispensable requirement of impleading such persons as parties in the writ petition held thus:

"16. The High Court, in its impugned judgment, proceeded on the basis as to what would constitute a substantive appointment. The decisions of this Court, whereupon strong reliance has been placed by the High Court in arriving at its conclusion may not be of much significance but what is significant is that in the writ petition even Savita (Mohan) Dhondyal and others who lose their seniority in the event writ petition was to be allowed, were not impleaded as parties. They, in our opinion, should have been impleaded as parties in the writ application. Savita (Mohan) Dhondyal and others, if the writ petition is allowed, would suffer civil consequences. Inter se seniority may not be a fundamental right, but is a civil right. (See State of U.P. v. Dinkar Sinha [(2007) 10 SCC 548 : (2008) 1 SCC (L&S) 38 : (2007) 7 Scale 8] .) The respective rights of seniority of the parties, thus, required determination in their presence."

10. Similarly, in ***Indu Shekhar Singh and others v. State of U.P. and others***, reported at ***(2006) 8 SCC 129***, the Hon'ble Supreme Court, emphasizing the necessity of impleading persons who would be affected by the determination of seniority, ruled as follows:

"56.There is another aspect of the matter. The appellants herein were not joined as parties in the writ petition filed by the respondents. In their absence, the High Court could not have determined the question of *inter se* seniority."

11. Effect of non-impleadment of necessary parties was also considered by the Hon'ble Supreme Court in ***Vijay Kumar Kaul and others v. Union of India and others***, reported at ***(2012) 7 SCC 610***, wherein the well-settled position of declining relief to the petitioners when the effected parties

were not impleaded was reiterated:

"36.Another aspect needs to be highlighted. Neither before the Tribunal nor before the High Court, Parveen Kumar and others were arrayed as parties. There is no dispute over the factum that they are senior to the appellants and have been conferred the benefit of promotion to the higher posts. In their absence, if any direction is issued for fixation of seniority, that is likely to jeopardise their interest. When they have not been impleaded as parties such a relief is difficult to grant."

12. Importing the principles of joinder of parties under Order 1, Rule 9 of the Code of Civil Procedure in the writ jurisdiction, the Hon'ble Supreme Court in the case of ***Ranjan Kumar and others v. State of Bihar and others***, reported at ***(2014) 16 SCC 187,*** again highlighted the necessity of impleading the persons who would be affected as a result of the writ petition. The Hon'ble Supreme Court refused to grant relief to the petitioners on account of failure to implead necessary parties after considering good authority in point, stating:

"13. In view of the aforesaid enunciation of law, we are disposed to think that in such a case when all the appointees were not impleaded, the writ petition was defective and hence, no relief could have been granted to the writ petitioners."

13. Reliance on the law laid down by the Hon'ble Supreme Court in ***A Janardhana Vs. Union of India and others***, reported at ***(1983) 3 SCC 601,*** in the impugned judgment is misplaced. In ***A Janardhana (supra)***, no relief was claimed against any individual, and the only issue therein was the interpretation of a service rule. In that fact situation, the Hon'ble Supreme Court held that all employees were not required to be impleaded as a party.

14. The judgment is an authority for what it decides. A small

factual difference, or distinction in the circumstances of the case would render a precedent wholly inapplicable to a different fact situation. On applying the same principle to this case, we find that the law laid down by the Hon'ble Supreme Court in ***A Janardhana (supra)*** is not applicable to the facts of this case.

15. In the light of the preceding narrative, we find that the non-joinder of the appellants as parties to the writ petition was fatal to the competency of the writ petition. The writ petition is liable to be dismissed on this ground alone and as a consequence, the judgment of the learned Single Judge is also apt to be reversed for like reason. But before doing that, a few other aspects of the impugned judgment need consideration.

16. The learned Single Judge decided the challenge to the seniority list of the year 2006, in light of the various judgments, including ***Shiba Shankar Mohapatra and others v. State of Orissa and others***, reported at ***(2010) 12 SCC 471***. Reliance was had to the law laid down by the Hon'ble Supreme Court in ***Shiba Shankar Mohapatra (supra)*** in para 18 and 30, which read thus:

"18. The question of entertaining the petition disputing the long-standing seniority filed at a belated stage is no more res integra. A Constitution Bench of this Court, in Ramchandra Shankar Deodhar v. State of Maharashtra [(1974) 1 SCC 317 : 1974 SCC (L&S) 137] considered the effect of delay in challenging the promotion and seniority list and held that any claim for seniority at a belated stage should be rejected inasmuch as it seeks to disturb the vested rights of other persons regarding seniority, rank and promotion which have accrued to them during the intervening period. A party should approach the court just after accrual of the cause of complaint. While deciding the said case, this Court placed reliance upon its earlier judgments, particularly in Tilokchand Motichand v. H.B. Munshi [(1969) 1

SCC 110] , wherein it has been observed that the principle on which the court proceeds in refusing relief to the petitioner on the ground of laches or delay, is that the rights, which have accrued to others by reason of delay in filing the writ petition should not be allowed to be disturbed unless there is a reasonable explanation for delay. The Court further observed as under: (Tilokchand case [(1969) 1 SCC 110] , SCC p. 115, para 7)

> "7. … a party claiming fundamental rights must move the Court before other rights come into existence. The action of courts cannot harm innocent parties if their rights emerge by reason of delay on the part of the person moving the Court."

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

17. The judgment of the Hon'ble Supreme Court in the case of ***Kuldip Chand Vs. Union of India and others***, reported at ***(1996) 1 All India Services Law Journal***, was submitted on behalf of the petitioners. Reliance was also placed upon para 31 of the judgment of the Hon'ble Supreme Court rendered in ***M.Ramakotaiah and others v. Union of India and others,*** reported at ***(2007) 14 SCC 405***, which reads thus*:*

"31. Coming to the second issue, the question raised before this Court is whether even after the preparation of a new seniority list by the authority in 2001, which was held to be correct, the list prepared in the year 2000 was still open to challenge. We are of the opinion that once the new seniority list comes into existence, it overrides the previous list. Considering this, it only appeases common sense that once the new list has come into existence and had been held to be valid, the old list would be assumed to have been superseded, thus, making it redundant..."

18. Thereafter, the impugned judgment, while upholding the challenge to the seniority list of 2006 held as under :

"28. It is in the light of the aforesaid judgments of the Apex Court that the issue of laches is required to be examined in the facts of the present case. It is admitted that although appointments were made on the post of Junior Engineer (Minor Irrigation) in the year 2000-2001 but no seniority list was prepared prior to the year 2006. The seniority list finalized on 5th September, 2006 clearly records that seniority of Junior Engineers (Minor Irrigation) who have been appointed between 1.1.1989 and 28.2.2006 has been prepared in accordance with their merit. This statement of fact is clearly inconsistent with the admitted position on record as per which the seniority list has been prepared on the basis of the date of receipt of select list from the Commission and the consequential issuance of appointment and not on the basis of merit. The petitioners contention that they were misled, on facts, with regard to the basis adopted for preparation of seniority list appears to have substance. No service rules otherwise existed in respect of the service concerned. No rights otherwise were created on the basis of the select list of the year 2006 inasmuch as none of the Junior Engineers had acquired eligibility for promotion to the next higher post of Assistant Engineer which was ten years under the service rules of 1991. Mere fact that certain promotions have been made after entertainment of this writ petition would also not be a relevant circumstance since appropriate interim protection has already been granted by making such promotions to be subject to this petition. The service rules also got framed under the proviso to Article 309 only in the year 2009. The objection to the tentative seniority list published in the year 2009 were submitted by the petitioners and after its rejection a timely challenge is made by filing this writ petition."

19. We are in respectful disagreement with the said findings in the impugned judgment.

20. The process of creating a seniority list of junior engineers of different trades namely, civil, mechanical, electrical, and agriculture in the Minor Irrigation Department, was initiated by issuance of a communication dated 17.03.2006. The said communication of date 17.03.2006, called for objections from all concerned, before creation of the final seniority list as per the Rules of 1991.

The said communication directed wide publicity of the tentative seniority list and invitation of objections.

21. One of the writ petitioners submitted his objections to the seniority list. It needs to be emphasized that while making the aforesaid objections, it was not asserted that there was violation of the seniority Rules of 1991, in the creation of the tentative seniority list. The said objections of petitioner no.4, were rejected by an order bearing reasons, dated 05.09.2006. A final seniority list was thereafter published on 05.09.2006. The rest of the petitioners did not even file their objections. No further challenge to the seniority list dated 05.09.2006 was made, in the proximate time period. In this manner, the seniority list of 2006 was allowed to attain finality.

22. In the year 2009, service rules under the nomenclature of "Uttar Pradesh Minor Irrigation Department Subordinate Engineering Service Rules, 2009", were promulgated. The Service Rules of 2009, integrated two cadres, of Junior Engineer (Mechanical) and Junior Engineer (Minor Irrigation) in the Minor Irrigation Department. The amalgamation of the two cadres, consequent to the promulgation of the Service Rules of 2009, created the necessity of having a composite seniority list, for the cadre of Junior Engineers in the Minor Irrigation Department.

23. On 29th December, 2009, the process of creation of a composite seniority list was commenced. Objections were called from the Junior Engineers to the tentative seniority list, by the said communication of date. The said communication also noticed the concerned officials, that in the event of failure to tender objections, an inference would

be drawn, that there is no objection to the aforesaid seniority list.

24. The exercise of creation of the fresh seniority list in the year 2009, was premised on the finality of the seniority list of 2006. The said communication dated 29.12.2009, clearly records that the final seniority list of the Junior Engineers (Minor Irrigation), was duly published on 05.09.2006. In this manner, the communication of date, while inviting objections to the tentative seniority list of 2009, precluded the officials from challenging the seniority list of 2006, and restricted the scope of the objections only to the proposed seniority list of 2009. Five petitioners, namely, petitioner no.2, petitioner no.3, petitioner no.6, petitioner no.9, and petitioner no.11, submitted their objections, in response to the communication dated 29.12.2009.

25. It is noteworthy that even at this stage, the said petitioners did not object to the seniority list of 2006. The said objections were rejected by orders supported with reasons. Thereafter, the final seniority list was drawn up on 05.03.2010.

26. The petitioners were aggrieved by the final seniority list thus created on 05.03.2010, and assailed the same by instituting the Writ-A No.53123 of 2012, Rajeev Nain Upadhyay and others Vs. State of U.P. and others. At the time of the institution of the writ petition in the year 2012, yet again, no challenge was put to the seniority list of 2006. The relief sought at the time of the institution of the writ petition, has been noticed in the impugned judgment and is being extracted hereunder:

“1. This writ petition arises out of a seniority dispute in the cadre of Junior Engineer, Department of Minor Irrigation, State of Uttar Pradesh. An order dated 5th March, 2010, passed by the Chief Engineer (Minor Irrigation), U.P. Lucknow, rejecting petitioner's objection against the tentative seniority list is assailed in addition to the final seniority list drawn for the cadre. A further prayer is made to command the respondents to prepare and publish a revised seniority list in conformity with the U.P. Government Servant Seniority Rules, 1991 (hereinafter referred to as "the Seniority Rules of 1991"), within a period to be specified by the Court.”

27. However, by means of an amendment application, filed in the year 2017, a challenge was laid to the seniority list of 2006. The amendment application was allowed, and the seniority list of 2006 was also assailed, in the newly incorporated relief clause. In this manner, for the first time, the seniority list of the year 2006, came to be challenged by the petitioners in 2017, 11 (eleven) years after its creation.

28. The amendment application does not state any reasons for the inordinate delay in assailing the seniority list of 2006, by the petitioners.

29. Seniority list in any government department is an incident of service which is of critical importance to the individual as well as to the department. A seniority list depicts the current status and future prospects of an official. The career progression of an official is more often than not based on the existing seniority list. Merely because no promotion has been made on the foot of a seniority list, does not alter its efficacy or dilute its significance. Hence, it cannot be stated that because none of the junior engineers were promoted on the basis of the seniority list of 2006, no rights were created in their favour. Civil rights accrue to officials after the promulgation of a final seniority list as per

law.

30. The contention that the petitioners were “misled”, with regard to the basis adopted for preparation of seniority, is also fallacious; and the finding in the impugned judgment which approves the submission is flawed. The contention is an afterthought to revive a stale claim, and a device to tide over the impediment of estopple against the petitioners.

31. The process of creation of the seniority list in 2006 was fully transparent. The petitioners were alerted to the procedure of creation of the seniority list in the year 2006. The presumption that the petitioners were aware of the existing Seniority Rules of the year 1991, on which basis the seniority list was drawn is also attracted in this case.

32. The case of the petitioners of having been “misled” is also negated by the fact that one of the petitioners had tendered his objections to the seniority list.

33. It is also evident that the petitioners participated in the process of creation of the seniority list of 2006. One set of the petitioners availed the opportunity of objecting to the list. The said petitioner accepted the outcome of the adjudication of his objections, and never challenged the same. The other set of petitioners did not press objections despite the opportunity. These petitioners consciously waived their rights to tender any objection to the seniority list of 2006 and thus accepted its finality.

34. The petitioners, by their conduct, are hence estopped from resiling from their earlier stand, and introducing a fresh case for the first time after 11 (eleven) years by challenging the seniority list of 2006.

35. We have seen how with the promulgation of a final seniority list in 2006, rights accrued in favour of the appellants. These civil rights have become entrenched over a period of time. In such circumstances to disturb long settled seniority would create uncertainty in conditions of service of individuals, and disarray in administration of the department. Both are contrary to public interest. In this case, the delay is inordinate & unexplained and not liable to be condoned.

36. Considering the importance of a seniority list as an incident of service and the need for certainty, the Courts have steadfastly set their face against a belated challenge to a seniority list. At this stage, it would be apposite to reinforce the above findings with judicial authority.

37. The issue and consequences of a belated challenge to long standing seniority have been settled by consistent pronouncements of high authorities. The Hon'ble Supreme Court in ***R.S.Makashi and others v. I.M. Menon and others***, reported at ***(1982) 1 SCC 379*** rejected the challenge to a seniority list as well as the principles of seniority which ruled the seniority list, on the ground of delay and laches by holding thus:

"28. …'33. ...we must administer justice in accordance with law and principle of equity, justice and good conscience. It would be unjust to deprive the respondents of the rights which have accrued to them. Each person ought to be entitled to sit back and consider that his appointment and promotion effected a long time ago would not be set-aside after the lapse of a number of years.....

30. ...The petitioners have not furnished any valid explanation whatever for the inordinate delay on their part in approaching the Court with the challenge against the seniority principles laid down in the Government Resolution of 1968... We would accordingly hold that the challenge

raised by the petitioners against the seniority principles laid down in the Government Resolution of March 2, 1968 ought to have been rejected by the High Court on the ground of delay and laches and the writ petition, in so far as it related to the prayer for quashing the said Government resolution, should have been dismissed."

38. Detailing the complications and defects arising from a challenge to a seniority list long years after it was created, the Hon'ble Supreme Court in ***Malcom Lawrence Cecil D'Souza v. Union of India and others***, reported at ***(1976) 1 SCC 599*** observed as follows:

"9. Although security of service cannot be used as a shield against the administrative action for lapse of a public servant, by and large one of the essential requirement of contentment and efficiency in public service is a feeling of security. It is difficult no doubt to guarantee such security in all its varied aspects, it should at least be possible to ensure that matters like one's position in a seniority list after having been settled for once should not be liable to be re-opened after lapse of many years in the instance of a party who has itself intervening party chosen to keep quiet. Raking up old matters like seniority after a long time is likely to resort in administrative complications and difficulties. It would, therefore, appear to be in the interest of smoothness and efficiency of service that such matters should be given a quietus after lapse of some time."

39. In ***B.S. Bajwa and another v. State of Punjab and others***, reported at ***(1998) 2 SCC 523*** held thus:

"7. It is well settled that in service matters, the question of seniority should not be re-opened in such situations after the lapse of reasonable period because that results in disturbing the settled position which is not justifiable. There was inordinate delay in the present case for making such a grievance. This along was sufficient to decline interference under Article 226 and to reject the writ petition"

40. Similar view was reiterated by the Hon'ble Supreme

Court in ***Dayaram Asanand Gursahani v. State of Maharashtra and others***, reported at ***(1984) 3 SCC 523*** by holding that in absence of a satisfactory explanation for the inordinate delay from 8 to 9 years, the challenge to the seniority could not be entertained.

41. The Hon'ble Supreme Court in ***Dinkar Anna Patil v. State of Maharashtra***, reported at ***(1999) 1 SCC 354*** held that the delay and laches in challenging the seniority is always fatal, but in case the party satisfies the court regarding delay, the case may be considered.

42. The Hon'ble Surpeme Court in ***Shiba Shankar Mohapatra (supra)*** disentitled persons to relief, if they were not diligent to their cause, by holding as follows:

"29. It is settled law that fence-sitters cannot be allowed to raise the dispute or challenge the validity of the order after its conclusion. No party can claim the relief as a matter of right as one of the grounds for refusing relief is that the person approaching the Court is guilty of delay and the laches. The Court exercising public law jurisdiction does not encourage agitation of stale claims where the right of third parties crystallises in the interregnum."

43. Thereafter, the Hon'ble Supreme Court found that the issue of delay and laches goes to the root of the cause and held that the petition ought to be rejected only on the ground of delay and laches in the following words:

"32. ...We are of the considered opinion that the said application ought to have been rejected by the Tribunal only on the ground of delay and laches. The High Court has also not dealt with this issue, however, it goes to the root of the cause. Such an inordinate delay cannot be ignored particularly when the issue of delay has been pressed in service before this Court."

44. The same view was taken by the Hon'ble Supreme Court in ***Ranjan Kumar and others v. State of Bihar and others***, *reported at* ***(2014) 16 SCC 187.***

45. The issue where a party takes calculated chances of participating in selection/appointment process only to turn around after it is unsuccessful, also fell for consideration before the Hon'ble Supreme Court on more than one occasion. The authorities in point have settled the issue. These matters relate to selection of candidates. However, by analogy, the ratio can well be applied to the facts of this case. In this case, some petitioners had knowingly submitted objections and others had consciously waived their rights to submit objections at the time of creation of seniority list of 2006. The petitioners cannot, in such circumstances, escape the consequence of the doctrine of estoppel, which arises from their conduct.

46. In the case of ***Madan Lal and others v. The State of Jammu & Kashmir and others***, reported at ***(1995) 3 SCC 486***, the Hon'ble Supreme Court held thus:

> "9. ...It is now well settled that if a candidate takes a calculated chance and appears at the interview, then, only because the result of the interview is not palatable to him, he cannot turn round and subsequently contend that the process of interview was unfair or the Selection Committee was not properly constituted. In the case of Om Prakash Shukla v. Akhilesh Kumar Shukla it has been clearly laid down by a Bench of three learned Judges of this Court that when the petitioner appeared at the examination without protest and when he found that he would not succeed in examination he filed a petition challenging the said examination, the High Court should not have granted any relief to such a petitioner."

47. A similar view engaged the attention of the Hon'ble Supreme Court in ***Chandra Prakash Tiwari and others v.***

Shakuntala Shukla and others, reported at ***(2002) 6 SCC 127*** with no different results as under:

"34. There is thus no doubt that while question of any estoppel by conduct would not arise in the contextual facts but the law seems to be well settled that in the event a candidate appears at the interview and participates therein, only because the result of the interview is not "palatable" to him, he cannot turn round and subsequently contend that the process of interview was unfair or there was some lacuna in the process."

48. The Hon'ble Supreme Court in ***Union of India and others v. S. Vinodh Kumar***, reported at ***(2007) 8 SCC 100*** disentitles the candidates from challenging the selection process after participating in the same and knowing fully well the procedure laid out thereunder.

49. Similarly, candidates who had participated in the selection process were estopped from challenging the same, post participation in ***Ranjan Kumar v. State of Bihar***, reported at ***(2014) 16 SCC 187.***

50. The reasonings in the precedents cited above, apply to the present case.

51. The authorities relied upon in the impugned judgment, to invalidate the seniority list of 2006, were rendered in different fact situations and are not applicable to this case. Here, the challenge to the seniority of 2006 was barred by laches resulting from an unexplained delay of 11 (eleven) years, as opposed to a delay of three years in the relied on precedents. Moreover, estoppel was not an issue in the cited judgments. Here estoppel created against the petitioners is the backbone of the case against them and is directly and substantially in issue.

52. Clearly the challenge to the seniority list of the year

2006, was highly belated and barred by laches. We also find that the petitioners are estopped from challenging the seniority list of 2006. In these circumstances, the seniority list of 2006 had attained finality and could not have been interfered with.

53. The impugned judgment, however, entered into the merits of the seniority list of 2006, despite the inordinate and unexplained delay and the bar of laches. The impugned judgment also neglected to consider the estoppel created against the petitioners which prevents them from challenging the seniority list of 2006. The judgment is clearly misdirected in law.

54. The issue of “single selection” also needed a more searching enquiry. For reasons stated earlier, we are not proposing to judge this point on merits. However, suffice to say that single selection may be deduced from a deliberate decision by the employer to hold one selection, as opposed to fortuitous circumstances of clubbing of vacancies of various trades and different departments in one advertisement. Particularly, when no single selection ever took place at any prior point in time.

55. As a matter of fact, in this case, seniority is based on the merit of the candidates in the respective lists. The selections to different posts had separate proceedings and distinct timelines. These material facts were not properly factored-in the impugned judgment.

56. The impugned judgment is premised on the fact, that “all posts in the cadre of Junior Engineers were to be filled by direct recruits”. This premise is not correct. It is undisputed

that the posts of junior engineers are tenable both by promotion and direct recruitment.

57. Rule 5 of the Seniority Rules of 1991, applies to a single source of recruitment, and does not appear to be applicable to the facts of the case. Rule 8 of the Seniority Rules of 1991 is applicable, where appointments are made by promotion and direct recruitment, as in the instant case. Rule 8 is extracted hereunder:

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

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

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

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

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

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

(3) Where appointments are made both by promotion and direct recruitment on the result of any one selection the seniority of promotees vis-a-vis direct

recruits shall be determined in a cyclic order (the first being a promotee) so far as may be, in accordance with the quota prescribed for the two sources.

Illustrations

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

First	...	Promotee
Second	...	Direct recruits

and so on.

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

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

and so on:

Provided that-

(i) where appointment from any source are made in excess of the prescribed quota, the persons appointed in excess of quota shall be pushed down, for seniority, to subsequent year or years in which there are vacancies in accordance with the quota;

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

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

58. The escapement of consideration of the impact of Rule 8,

and the direction to create a seniority list only on the foot of Rule 5, vitiates the judgment. A pleading in regard to the applicability of Rule 8 for determination of seniority has been specifically taken in the counter affidavit filed by one of the co-respondents. Clearly, the aforesaid aspect was not brought to the notice of the learned Single Judge, which led to the incurable omission in the judgment. The applicability of Rule 5 or Rule 8 is a matter of adjudication. In the interest of justice, however, we are refraining from entering a decisive finding on this point at this stage.

59. It is open to the parties to agitate this aspect of the matter before the competent authority or Court as they may be advised in law. The question of validity of the 2009 seniority list is also left open.

60. In the wake of the preceding discussion, we are of the view that the judgment dated 14th May, 2019 assailed in the instant special appeal, is unsustainable in law and is liable to be set aside and is accordingly set- aside.

61. The writ petition is dismissed.

62. The special appeal is allowed, subject to the observations made above.

Order Date :- 04.12.2019
Ashish Tripathi

(Biswanath Somadder,J.)

(Ajay Bhanot,J.)