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**CENTRAL ADMINISTRATIVE TRIBUNAL
PRINCIPAL BENCH**

OA No.2135/2003

With

OA No. 2138/2003

New Delhi this the 2nd day of December, 2004.

**HON'BLE MR. V.K. MAJOTRA, VICE-CHAIRMAN (A)
HON'BLE MR. SHANKER RAJU, MEMBER (J)**

Naresh Kumar
Udai Ram

...Applicant in OA 2135/03
...Applicant in OA 2138/03

(By Advocate Shri Thomas Oommen)

-Versus-

Union of India and others.

-Respondents

(By Advocate Shri A.K. Bhardwaj)

1. To be referred to the Reporters or ~~not~~?

Yes

2. To be circulated to other Benches of the Tribunal or ~~not~~?

Yes.

S. Raju
(Shanker Raju)
Member (J)

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Hon'ble Shri V.K. Majotra, Vice Chairman (A)
Hon'ble Shri Shanker Raju, Member (J)

O.A. No. 2135/2003

Naresh Kumar S/o Shri Lal Singh,
R/o CB-45, Naraina,
Delhi - 110 028.

...Applicant

(By Advocate:- Shri Thomas Oommen)

-versus-

Union of India through:

1. The Secretary,
Ministry of Finance & Company Affairs,
Rajpath, North Block,
New Delhi.
2. The Secretary,
Department of Company Affairs,
Shastri Bhawan, 5th Floor, A-Wing,
Dr. Rajendra Prasad Road,
New Delhi.

...Respondents

(By Advocate:- Shri A.K. Bhardwaj)

O.A. No. 2138/2003

Udai Ram s/o Shri Roop Singh,
R/o 77/46, Shamji Mal Colony,
Circular Road, Shahdara,
Delhi - 110 032.

...Applicant

(By Advocate:- Shri Thomas Oommen)

-versus-

Union of India through

1. The Secretary,
Ministry of Finance & Company Affairs,
Rajpath, North Block,
New Delhi.
2. The Secretary,
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Dr. Rajendra Prasad Road,
New Delhi.

...Respondents

(By Advocate:- Shri A.K. Bhardwaj)

ORDER

By Shri Shanker Raju, Member (J):

The issue arisen is founded on common facts and identical question of law. Accordingly, these OAs are disposed of by this common order.

2. Before dealing with the issue in question, a brief factual matrix relevant is to be highlighted.
3. Applicant in OA No. 2135/2003 had earlier approached this Tribunal seeking reckoning of ad hoc service as Computer as regular service for the purpose of Assured Career Progression Scheme. By an order dated 3.9.2003, the Tribunal dismissed the O.A. and R.A. filed against it vide No. 288/2003 was also rejected. Applicant has carried these orders before the High Court of Delhi in CWP No. 6244/2004 wherein by an order dated 23.4.2004 setting aside the orders giving liberty to amend the petition, matter was remanded back to the Tribunal for re-consideration.

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4. In OA no. 2138/2003 applicant had sought reckoning of ad hoc service as Computer as regular service for the purpose of granting the benefit under A.C.P. Scheme with consequential benefits. By an order dated 3.9.2003 OA was rejected and the RA filed against the said order was also rejected. The High Court of Delhi vide its order dated 23.4.2004 passed in CWP No. 6280/04 remanded back the matter to the Tribunal for re-consideration.

5. Applicant in OA No. 2135/2003 was appointed, being sponsored through the Employment Exchange, on the post of computer on ad hoc basis initially for a period of one year, which was extended from time to time. There is no stipulation in the order as to the fact that the continuous officiation on ad hoc would not confer any right of seniority or regularisation. Ultimately on 2.4.1993, the applicant was appointed on regular basis w.e.f. 12.2.1993. OA No. 1725/2002, preferred by the applicant, was disposed of on 8.7.2002 and in pursuance thereof an order passed by the respondents on 25.4.2003 denying them the benefit of ACP and treating the ad hoc period as regular service, gives rise to the present OA. Whereas in OA 2138/2003, the applicant, who was sponsored through employment exchange, was appointed on ad hoc basis as Computer on 23.5.1983 and was continued from time to time without stipulation in the order as to non-conferment of right of seniority and regularisation. Applicant was regularised w.e.f. 12.2.1993 on his filing OA No. 1724/2002 decided on 19.7.2002. Respondents vide order dated 25.4.2003 rejected his request for treating ad

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hoc service as regular and denied him the benefit of ACP Scheme.

6. Learned counsel for the applicant Shri Thomas Oommen vehemently contended that the Department of Company Law Administration (Class-I, II & III Posts) Recruitment Rules, 1962, which were in vogue when the applicants were appointed, do not specify the appointment to be made through UPSC or SSC rather on fulfillment of all conditions precedent and having fully eligible they had been appointed by the competent authority and the Commission had agreed that recruitment to the post may be made by the Ministry without reference to them. In this view of the matter, learned counsel states that initial appointment of the applicants was in accordance with rules. Accordingly, they cannot be deprived of seniority and regularisation from the initial appointment having worked continuously and appointed in accordance with rules. A reliance has been made on the decision of Constitutional Bench of the Apex Court in **Rudra Kumar Sain vs. Union of India**, 2000(6) AD (SC) 605 to contend that a long officiation, once a person is appointed in accordance with rules, cannot be held to be either stop gap or fortuitous.

7. Learned counsel states that once the continuous service on ad hoc basis without stipulation is followed by regularisation, the entire period shall have to be deemed to be regular. As such, if the service is regular, benefit of not only seniority but also ACP would be applicable to the applicants. In this backdrop, it is stated that only in 1987 the concept of consultation with SSC

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was inducted in the rules on amendment. As such for regularisation, the rules in vogue in 1983 when the applicants were appointed are to be resorted to.

8. On the other hand, learned counsel for the respondents Shri A.K. Bhardwaj vehemently opposed the contentions and contended that as per the decision of the Apex Court in **State of Punjab vs. Ishar Singh**, (AIR 2000 SC 2422 in CA No. 6526 with 6523 of 1998), ad hoc services rendered prior to regular appointment in accordance with Rules shall not count for the purpose of seniority. A reliance has also been placed on a decision of Apex Court in **State of Haryana vs. Haryana Veterinary and AH TS Association & Anr.**, JT 2000(10) SC 561. Learned counsel states that the applicants were appointed on ad hoc basis till the regular incumbent joins and as the rules prescribe consultation with SSC in Group C posts, their appointment was not in accordance with rules and on their appointment on regular basis in 1993, regular service as referred to in Office Memorandum dated 10.02.2000 would be the service rendered on a regular basis which only would count for seniority for the purpose of promotion in terms of relevant service rules and would be countable for financial upgradation under ACP Scheme as well.

9. Shri Bhardwaj, relying upon the decision of Apex Court in **Dr. Chandra Prakash vs. State of U.P.**, 2002 SCC 710, contended that service without consulting the SSC cannot be treated as regular service. A reliance has also been placed on the

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decision of the Apex Court in **Dr. Chanchal Goel vs. State of Rajasthan**, 2003 SSC L&S 322, where the doctrine of legitimate expectations in a case where incumbent was appointed on ad hoc basis without concurrence of PSC has been held to be fortuitous service.

10. Shri Bhardwaj has also relied on DOP&T OM dated 30.03.1998 and 23.7.2001 to fortify that ad hoc service cannot be counted as regular service.

11. We have carefully considered the rival contentions of the parties and perused the material on record.

12. It is trite law that merely because one has continuously officiated on ad hoc basis would not confer any right upon him to claim seniority or regularisation from the date of his initial appointment. If the initial appointment is de hors the rules, the same would not confer any right to claim seniority. However, the juxtaposition, as settled by law, is that if the initial appointment is in accordance with rules, continuous officiation for long years even on ad hoc basis would date back the appointment for the purpose of seniority and the appointment would be deemed to be a regular appointment.

13. The Constitution Bench of the Apex Court in **Direct Recruit Class-II Engineering Officers Association vs. State of Maharashtra & Ors.**, 1990 (2) SCC 715, after meticulous discussion held as follows:

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"(A) Once an incumbent is appointed to a post according to rule, his seniority has to be counted from the date of his appointment and not according to the date of his confirmation.

The corollary of the above rule is that where the initial appointment is only ad hoc and not according to rules and made as a stop-gap arrangement, the officiation in such post cannot be taken into account for considering the seniority.

(B) If the initial appointment is not made by following the procedure laid down by the rules but the appointee continues in the post uninterruptedly till the regularisation of his service in accordance with the rules, the period of officiating service will be counted.

(C) When appointments are made from more than one source, it is permissible to fix the ratio for recruitment from the different sources, and if rules are framed in this regard they must ordinarily be followed strictly.

(D) If it becomes impossible to adhere to the existing quota rule, it should be substituted by an appropriate rule to meet the needs of the situation. In case, however, the quota rule is not followed continuously for a number of years because it was impossible to do so the inference is irresistible that the quota rule had broken down.

(E) Where the quota rule has broken down and the appointments are made from one source in excess of the quota, but are made after following the procedure prescribed by the rules for the appointment, the appointees should not be pushed down below the appointees from the other source inducted in the service at a later date.

(F) Where the rules permit the authorities to relax the provisions relating to the quota, ordinarily a presumption should be raised that there was such relaxation when there is a deviation from the quota rule.

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(G) The quota for recruitment from the different sources may be prescribed by executive instructive instructions, if the rules are silent on the subject.

(H) If the quota rule is prescribed by an executive instruction, and is not followed continuously for a number of years, the inference is that the executive instruction has ceased to remain operative.

(I) The posts held by the permanent Deputy Engineers as well as the officiating Deputy Engineers under the State of Maharashtra belonged to the single cadre of Deputy Engineers.

(J) The decision dealing with important questions concerning a particular service given after careful consideration should be respected rather than scrutinized for finding out any possible error. It is not in the interest of Service to unsettle a settled position.

With respect to Writ Petition No. 1327 of 1982, we further hold:

(K) That a dispute raised by an application under Article 32 of the Constitution must be held to be barred by principles of res judicata including the rule of constructive res judicata if the same has been earlier decided by a competent court by a judgment which became final."

14. In **State of Haryana & Ors. vs. Piara Singh & Ors.**, 1992 SCC (L&S) 825 where a group of ad hoc employees, who had continued for a longer period have approached for regularisation, the Apex Court observed as under:-

"45. The normal rule, of course, is regular recruitment through the prescribed agency but agencies of administration may sometimes call for an ad hoc or temporary appointment to be

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made. In such a situation, effort should always be to replace such an ad hoc/temporary employee by a regularly selected employee as early as possible. Such a temporary employee may also compete along with others for such regular selection/appointment. If he gets selected, well and good, but if he does not, he must give way to the regularly selected candidate. The appointment of the regularly selected candidate cannot be withheld or kept in abeyance for the sake of such an ad hoc/temporary employee.

46. Secondly, an ad hoc or temporary employee should not be replaced by another ad hoc or temporary employee; he must be replaced only by a regularly selected employee. This is necessary to avoid arbitrary action on the part of the appointing authority.

47. Thirdly, even where an ad hoc or temporary employment is necessitated on account of the exigencies of administration, he should ordinarily be drawn from the employment exchange unless it cannot brook delay in which case the pressing cause must be stated on the file. If no candidate is available or is not sponsored by the employment exchange, some appropriate method consistent with the requirements of Article 16 should be followed. In other words, there must be a notice published in the appropriate manner calling for applications and all those who apply in response thereto should be considered fairly.

48. An unqualified person ought to be appointed only when qualified persons are not available through the above processes.

49. If for any reason, an ad hoc or temporary employee is continued for a fairly long spell, the authorities must consider his case for regularisation provided he is eligible and qualified according to the rules and his service record is satisfactory and his

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appointment does not run counter to the reservation policy of the State."

15. In the facts and circumstances of the present case where the initial appointment of the applicants as Computer under the then recruitment rules of 1962 clearly provided that appointment with eligibility conditions and the UPSC/SSC/Consulting authority has also agreed to the recruitment to the post without their reference by the Ministry itself. In this conspectus, the ad hoc officiation of the applicant was continued without break till 1993. In the orders passed by the competent authority, there is no stipulation as to non-conferment of right of regularisation or seniority to the incumbents. The appointments were made on ad hoc basis till further orders or till regular incumbent becomes available.

16. From the counter reply, we find that the respondents have categorically stated that the appointment was made keeping in view the qualifications as prescribed in the prevalent recruitment rules but the same has been defended only on the ground that prior to appointing the applicants, SSC was not consulted and their appointments are without reference to the SSC. Therefore, the same are de hors the rules, which would not confer upon the applicants to claim their ad hoc service as regular service.

17. The misnomer of ad hoc service has been crystallized by a Constitution Bench of the Apex Court in Rudra Kumar Sain's

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case (supra). The following observations have been made:

"16. The three terms 'ad hoc', 'stop gap' and 'fortuitous' are in frequent use in service jurisprudence. In the absence of definition of these terms in the rules in question we have to look to the dictionary meaning of the words and the meaning commonly assigned to them in service matters. The meaning given to the expression "fortuitous" in Stroud's Judicial Dictionary is accident or fortuitous casualty". This should obviously connote that if an appointment is made accidentally, because of a particular emergent situation and such appointment obviously would not continue for a fairly long period. But an appointment made thereunder Rule 16 or 17 of the Recruitment Rules, after due consultation with the High Court and the appointee possesses the prescribed qualification for such appointment provided in Rule 7 and continues as such for a fairly long period, then the same cannot be held to be "fortuitous". In Black's Law dictionary, means "something which is formed for a particular purpose". The expression "stop-gap" as per Oxford Dictionary, means "a temporary way of dealing with a problem or satisfying a need."

17. In Oxford Dictionary, the word 'ad hoc' means for a particular purpose; specially. In the same Dictionary, the word 'fortuitous' means happening by accident or chance either than design.

18. In P. Ramanatha Aiyer's Law Lexicon (2nd Edition) the word 'ad hoc' is described as for particular purpose. Made, established, acting or concerned with a particular and or purpose. The meaning of word 'fortuitous event' is given as 'an event which happens by a cause which we cannot resist, one which is unforeseen and caused by superior force which it is impossible to resist a term synonymous with Act of God.'

19. The meaning to be assigned to these terms while interpreting provisions

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of a Service Rule will depend on the provisions of that Rule and the context in and the purpose for which the expressions are used. The meaning of any of these terms in the context of computation of inter-se seniority of officers holding cadre post will depend on the facts and circumstances in which the appointment came to be made. For that purpose it will be necessary to look into the purpose for which the post was created and the nature of the appointment of the officer as stated in the appointment cadre. If the appointment order itself indicates that the post is created to meet a particular temporary contingency and for a period specified in the order, then the appointment to such a post can be aptly described as 'ad hoc' or 'stop-gap'. If a post is created to meet a situation which has suddenly arisen on account of happening of some event of a temporary nature then the appointment of such a post can aptly be described as 'fortuitous' in nature. If an appointment is made to meet the contingency arising on account of delay in completing the process of regular recruitment to the post due to any reason and it is not possible to leave the post vacant till then, and to meet this contingency an appointment is made then it can appropriately be called as a 'stop-gap' arrangement and appointment in the post as 'ad hoc' appointment. It is not possible to lay down any straight-jacket formula nor given an exhaustive list of circumstances and situation in which such an appointment (ad hoc, fortuitous or stop-gap) can be made. As such, this discussion is not intended to enumerate the circumstances or situations in which appointments of officers can be said to come within the scope of any of these terms. It is only to indicate how the matter should be approached while dealing with the question of inter-se seniority of officers in the cadre.

20. In the Service jurisprudence, a person who possesses the requisite qualification for being appointed to a particular post and then he is appointed

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with the approval and consultation of the appropriate authority and continues in the post for a fairly long period, then such appointment cannot be held to be "stop-gap or fortuitous or purely ad hoc. In this view of the matter, the reasoning and basis on which, the appointment of the promotees in the Delhi Higher Judicial Service in the case in hand was held by the High Court to be fortuitous, ad hoc / stop-gap are wholly erroneous and, therefore, exclusion of those appointees to have their continuous length of service for seniority is erroneous."

18. If one has regard to the above, it is the ratio deci dendi of a judgment that an order is not only to be derived from the facts and circumstances but from the overall discussion of law and the issue of law in question. The facts of the case in Ruder Kumar Sain's case (supra) were that there was no inter-se seniority dispute between promotees and direct recruits. Those who were appointed on temporary post of Additional District & Sessions Judge on ad hoc basis having regard to the fact that they had been appointed with requisite qualification with the approval and consultation of the appropriate authority, continuance on the post for a fairly long period belies the nomenclature of the appointment as stop gap or fortuitous. In this conspectus, we find in all fours application of the aforesaid ratio to the present OAs.

19. In 1983 when the recruitment rules of 1962 ibid were in vogue there was no requirement for consultation with SSC. This consultation was introduced through an amendment carried out in the recruitment rules in the year 1987. It is trite law that a rule

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amended or framed under Article 309 of the Constitution of India would have no retrospective effect unless specifically provided therein. In absence of any indication as to the retrospectivity of the rules, the rules as amended in 1987 would be effective prospectively and the right created of the applicants in 1983 under the un-amended recruitment rules would not be affected. Applicants, who are undisputedly eligible in all respects as per the qualification prescribed under the recruitment rules, have been appointed through employment exchange. The aforesaid appointment cannot be termed as de hors the rules but rather is in consonance with the rules. Accordingly, the applicants, who were appointed on ad hoc basis in accordance with rules, cannot be deprived of the regular service from initiation and the consequences of seniority and reckoning regular service for ACP as well.

20. DOP&T OM, as referred to by the respondents dated 30.03.1998 revising the instructions of ad hoc appointment, inter alia provides as under:-

"Where ad hoc appointment by direct recruitment (which as explained above should be very rare) is being done as a last resort, it should be ensured that the persons appointed are those nominated by the employment exchange concerned and they also fulfil the stipulations as to the educational qualifications/ experience and the upper age limit prescribed in the Recruitment Rules.

Where the normal procedure for recruitment to a post is through the employment exchange only, there is no justification for resorting to ad hoc appointment.

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Where the appointing authority is not the Ministry, the authorities competent to approve ad hoc appointments may be decided by the Administrative Ministries themselves. The competent authority so authorized by the Ministry should be one level higher than the appointing authority prescribed for that post."

21. If one has regard to the above, in a case where employment exchange is the normal procedure for recruitment, ad hoc appointment should be avoided.
22. OM of 2001 also reiterates the same. In these instructions, the following has been held:

"5. It has all along been emphasized in the existing instructions that ad hoc appointments should be made only in rare cases and in real exigency of work, where the post cannot be kept vacant till regular candidate becomes available. It has been emphasized, in particular, that ad hoc appointment by direct recruitment from the open market should be resorted to only a last resort. This is because, once a person is appointed from outside the Government on ad hoc basis, such arrangement is generally continued for long periods, either because a regularly selected candidate is not available or some other vacancy in the grade/cadre becomes available against which he is adjusted. Consequently, when efforts are made to replace such an officer, he/she invariably approaches a court of law for regularisation of their appointment. Apart from the fact that regularization of appointment in such cases is not in public interest as they have not come through proper selection procedure and on merit, regularization also creates problems in the matters of seniority, promotion, pension, etc. However, notwithstanding these instructions, ad hoc appointments by direct recruitment from open market are being made as a matter of routine. In

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fact, on many occasions, such appointments are being made only to avoid the post getting abolished in terms of the relevant instructions of the Ministry of Finance, providing for automatic abolition of posts if they remain vacant for more than one year. Of late, instances of ad hoc appointments from open market have substantially increased resulting in more and more court cases being filed for regularisation of service of such ad hoc appointees.

6. In view of the aforesaid undesirable trend, the matter has been reviewed and it has been decided that hereafter no appointment shall be made on ad hoc basis by direct recruitment from open market. Where the vacant post cannot be kept vacant for functional considerations, efforts may be made to entrust the additional charge of the post to a serving officer under provisions of FR 49, failing which only appointment by ad hoc promotion/ad hoc deputation may be considered. If in an exceptional case (e.g., in the case of an operational organization), it is inescapable to resort to ad hoc appointment by direct recruitment, prior concurrence of the Department of Personnel and Training (Establishment 'D' Section) may be obtained by giving full and complete justification for the same.

7. Continuation of an ad hoc appointment beyond one year will, as per the existing instructions, continue to require the prior approval of Department of Personnel and Training as before."

23. If one has regard to the above, these instructions are of 2001 and for want of executive instructions to be applied retrospectively would have no application in the case of the applicants who were appointed in the year 1983 yet these instructions normally envisage that ad hoc appointment should not have been resorted to.

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24. Learned counsel for the respondents had referred to decision of Ishar Singh's case of the Apex Court (Supra) to contend that ad hoc service would not be counted for eligibility. The aforesaid would have no application in the present case as in the present case ad hoc appointment of the applicants was in accordance with rules and as such the same has to be counted for purposes of seniority and regularisation.

25. The decision in Haryana Veterinary & A.H.T.S. Association & Anr.'s case (supra) of the Apex Court would also have no application as the same is distinguishable because in that case the consultation with PSC was sine qua non of appointment and not following the same the appointment was found de hors the rules but in the present case in the year 1983 when the applicants were appointed there was no requirement of prior consultation with SSC for appointment, therefore, the applicants' appointment was in accordance with rules.

26. As regards the decision in Dr. Chanchal Goel's case (supra) of the Apex Court, the same is also distinguishable as no PSC was to be consulted before making appointment. However, in this case the doctrine of legitimate expectations was belied yet keeping in view the long service on ad hoc, the period was directed to be reckoned for the purpose of pensionary benefit. In the decision of Apex Court in Chandra Prakash's case (supra) the same is also distinguishable on the aforesaid count.

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27. However, we find that as the decision in Rudra Kumar Sain's case of the Constitution Bench fully covers the present issue, the same overrides other decisions, referred to by the respondents, and is a binding precedent to be respectfully followed in the present case.

28. As regards benefit of ACP, no doubt the ACP Scheme refers to regular service as clarified by the OM issued in 2000, yet the applicants who were appointed on regular basis as per the rules and if their services are to be deemed as regular from initial appointment would have to be reckoned for eligibility for financial upgradation under ACP.

29. The last contention put forth as to non-impleadment of necessary parties and prejudice to be caused to the affected parties who are not impleaded and the objection regarding non-joinder of necessary parties is concerned, we are conscious of the aforesaid position of law to implead affected parties whose seniority is likely to be affected is in consonance with the principles of natural justice as held by the Apex Court in A.M.S. Sushanth & Anr. Vs. M. Sujata & Others, 2000(10) SCC 197. Basically the object of impleading the affected parties as necessary parties is that if the outcome of the proceedings adversely affects the rights of others, they should be given an opportunity to present their case which would in consonance of audi alteram partem and in-built of the principle of natural justice. However, this has been taken care of by affording an opportunity to the affected parties by way of a show cause notice before

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their rights are affected. Moreover, the seniority though may not be a fundamental right but treatment of regular service being condition of service cannot be deprived to the applicants if they have established successfully the nature of appointment as regular in accordance with rules. Accordingly, the rights, consequences of which are now followed, are as per the outcome of their legal right.

30. Now coming back to the objections of the respondents that appointment was de hors the rules as SSC was not consulted in 1983 when the applicants were regularised prospectively, even then the SSC was not consulted as if the requirement was exempted as relaxation, this is very illogical that the respondents adopt two different criteria and defence while contesting the above position of law.

31. Doctrine of legitimate expectations is an equitable principle sine qua non of which is fairness in the action of the administration. Though the applicants were appointed in 1983 and the provision of consultation with SSC came in 1987, no regular appointments had been made and the applicants had been continued for about ten years, now loss of 10 years from their service would cause substantial prejudice to the rights of pension further progression in career as well financial upgradation.

32. In our considered view, following the ratio in the case of **Rudra Kumar Sain's** case (supra) we have no hesitation to hold that the appointment of applicants was in accordance with rules

and ad hoc was only a misnomer as they had continued for a fairly long period, the aforesaid period cannot be treated as no service and the appointment as fortuitous ad hoc. This is only the guise.

33. In the result, OAs are allowed and impugned orders are quashed and set aside. Respondents are directed to reckon the service rendered by applicants from their initial appointment on ad hoc basis as deemed regular service and the same shall be reckoned not only for seniority but also for financial upgradation under ACP as a regular service. Applicants shall also be entitled to all consequential benefits. However, in the event of implementation of these directions, if the rights of others are adversely affected in the matter of seniority, the concerned affected persons be put to notice before a decision is taken adverse to them. These directions shall be complied with within a period of three months from the date of receipt of a certified copy of this order. No cost. A copy of this order be placed in the respective files of these OAs.

S. Raju

(Shanker Raju)
Member (J)

V. K. Majotra

(V. K. Majotra)
Vice Chairman (A)

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