

This petition coming on for admission this day, the court passed the following:

ORDER

1. Petitioner Rajesh Vijayvargiya was appointed as a Sub-Engineer on daily wage basis alongwith Respondent No.4 Shri Suresh Kumar Soni on 22.12.1990. Vide Annexure P/4 dated 8.1.1992, the petitioner was regularized with private respondent No.4 with effect from 22.12.1990. The petitioner's name appears at Serial No.2 and the private respondent's name appears below him at Serial No.6. In order dated 22.12.1990 Annexure P/1 vide which by removing the anomaly of the administrative set up and on the basis of the performance, the daily wagers were temporarily regularized and the name of the petitioner appears above that of the private respondent.

2. Petitioner's case is that the aforesaid position continued upto 2012 when the petitioner was shown above the private respondent but in the year 2012, all of a sudden, this position was altered and the private respondent was given promotion on the post of Assistant Engineer in preference to the petitioner treating him to be senior. Petitioner had sought information under Right to Information Act and he was informed by the authorities that the said order was passed in terms of some Board Meeting No.43 Memorandum No.7 dated 15.12.1998 where the principle adopted for preparation of final gradation list is mentioned, which says that the State Government vide its order dated 9.1.1990 (copy enclosed as Annexure-1) had given direction for regularization of Class-III and Class-IV Employees, who were working on daily wage basis or on adhoc basis till 31.12.1988. The principle for fixing seniority was mentioned in the Circular, which reads as under:-

1 कुल की गई सेवा की अवधि के आधार पर वरिष्ठता आँकी जायेगी और सूची बनायी

जावेगी और उसके अनुसार नियुक्तियां दी जावेगी।

2 वरिष्ठताक्रम निर्धारित करते समय यदि दो व्यक्तियों की सेवा अवधि समान हो तो उनमें से जो आयु में अधिक होगा उसको वरिष्ठ माना जायेगा।”

3. Thus, taking note of the Circular dated 9.1.1990, it is mentioned that the seniority of the private respondent is fixed above the petitioner because he was senior in age.

4. Note:-There is an interruption in the flow of dictation because the Computer System is not supporting opening of the documents as are required to by the parties.

5. The Registrar (IT) is directed to take remedial action and report the matter.

6. The respondents have placed reliance on a decision of a Coordinate Bench of this Court in **Writ Petition No.486/1998 (Vinod Gupta versus Madhya Pradesh Audyogik Kendra Vikas Nigam Limited & Others)** whereby the Coordinate Bench noting the contentions of learned counsel for respondent No.3 Shri A.K.S.Sengar, held that regularization of service is made by issuance of order on the same day and the interse seniority of the regularized employees should be fixed on the basis of their age.

7. In **Writ Petition No.486/1998 (Vinod Gupta versus Madhya Pradesh Audyogik Kendra Vikas Nigam Limited & Others)**, reliance was placed on the decisions of the Apex Court in **Ashok Gulati & Others versus B.S.Jain & Others AIR 1987 SC 424** and **Union of India versus H.R.Patankar & Others AIR 1984 SC 1587** and after quoting the relevant Circular and its Sub-Paragraph Nos.4&5 of Paragraph No.9, the Coordinate Bench held that age can be a basis only if total length of service prior to regularization of more than one employee is same. The aforesaid ratio has been

culled out from Circular dated 9.1.1990, which has been quoted by a Coordinate Bench of this Court extensively in **Writ Petition No.486/1998 (Vinod Gupta versus Madhya Pradesh Audyogik Kendra Vikas Nigam Limited & Others)**.

8. Annexure P/15 contains complete Circular dated 9.1.1990 issued by the Government of Madhya Pradesh, Personnel, Administrative Reforms and Training Department (Pay Commission Cell), which in the subject itself speaks that it is in regard to regularization of daily wagers or adhoc employees appointed on Class-III or Class-IV posts upto 31.12.1988 in the Work Charged & Contingency Paid Establishment or where the posts are not sanctioned under the said Establishment then in the Regular Establishment.

9. Thus, the first thing, which is apparent is, that the Circular dated 9.1.1990 is applicable only to those employees, who were appointed upto 31.12.1988. It is not the case of the petitioner or the private respondent or the M.P.TRIFAC Limited that their appointment was upto 31.12.1988, therefore, prima facie, the aforesaid Circular has no application to the facts of the present case.

10. Secondly, Sub-Paragraph Nos.4&5 of Paragraph No.9, which has been quoted by a Coordinate Bench of this Court in **Writ Petition No.486/1998 (Vinod Gupta versus Madhya Pradesh Audyogik Kendra Vikas Nigam Limited & Others)** will have no application to the facts of the present case because the subject matter, which is covered, is in regard to those employees, who were appointed upto 31.12.1988 and not for those employees, who were appointed thereafter. Hence, the aforesaid Circular will not have an automatic application to those employees, whose cases are not covered by the

said Circular. Even otherwise, in this very Circular, it is mentioned that this order will not be applicable to Diploma/Degree Holder Engineers and the Teachers.

11. This is another vital distinguishing ground, which has not been considered by a Coordinate Bench of this Court in **Writ Petition No.486/1998 (Vinod Gupta versus Madhya Pradesh Audyogik Kendra Vikas Nigam Limited & Others)**, therefore, the decision rendered by a Coordinate Bench of this Court in **Writ Petition No.486/1998 (Vinod Gupta versus Madhya Pradesh Audyogik Kendra Vikas Nigam Limited & Others)** is not binding and oblivious of these two distinctive factors and mechanically the aforesaid Circular has been applied to determine the interse seniority will not be a binding precedent.

12. As far as the ratio of law laid down by the Apex Court in **Union of India versus H.R.Patankar & Others (supra)** is concerned, it deals with a situation where there were no rules to determine the interse seniority of the direct recruits or the promotees of the same cadre and in those facts and circumstances, it has been held that the direct recruits through competitive examination will be senior to the promotees from the State Civil Services and that is not the case here and, therefore, the ratio of law laid down by the Apex Court in **Union of India versus H.R.Patankar & Others (supra)** will not be applicable to the facts of the present case.

13. Similarly, the ratio of law laid down by the Apex Court in **Ashok Gulati & Others versus B.S.Jain & Others (supra)** is in regard to interse seniority between the direct recruits vis a vis promotees and it has been held by the Apex Court that the service, which has been rendered on adhoc basis or by stop gap arrangement cannot be considered. However, it does not say that

amongst daily wagers, interse seniority is to be determined overlooking the merit list by giving preference to the age over the merits.

14. I am prompted to say this because the order Annexure P/1 is specific and the relevant portion of order dated 22.12.1990 is reproduced thus:-

प्रशासनिक पदसथापना की विसंगतियों को दूर करते हुये एवं कार्यक्षमता के आधार पर निम्नलिखित दैनिक वेतन भोगी कर्मचारियों को उनके नाम के सम्मुख दर्शाये गये पदों एवं वेतनमानों पर अस्थायी रूप से सूचना दी जावेगी। सेवक के नियमितीकरण दिनांक के बारे में अलग से सूचना दी जायेगी।

15. The aforesaid order categorically takes into consideration the working efficiency and merit of the persons and they have been placed in the order of determination of their working efficiency and merit, which should be the criteria for determining interse seniority. The petitioner and the private respondent being appointed on the same date and the petitioner being found to be more efficient, thus, more meritorious was placed above the private respondent and once that criteria was adopted then without setting aside that criteria or upsetting it by saying that the petitioner is less efficient than the private respondent for which no material has been produced by the respondents, the interse seniority could not have been tempered on the basis of a G.A.D.Circular, which has no application to the facts of the present case.

16. The issue herein is that when age can be treated to be a determinative factor. If two persons secure same merit then usually in the matter of recruitment merit being same age is treated to be a criteria for placement/selection.

17. In the present case, as is evident from Annexure P/1 and discussed above, merit being not the same between the petitioner and the private

respondent inasmuch as in Annexure P/1 itself, it is mentioned that on the basis of efficiency, daily wages have been placed in a particular order and having considered the merit, age cannot be given a preference over the merit and when tested from this aspect also then the decision of the authorities to give preference to age over merit without discounting for the merit cannot be given a seal of approval.

18. Accordingly, this writ petition deserves to and is allowed.

19. Petitioner's interse seniority over private respondent Suresh Kumar Soni is restored. Since the petitioner was not a party in other litigation, which has been referred to in Annexure P/7 in Writ Petition No.545/1999, will not bind the petitioner because he was not a party to the said litigation. The respondents are directed to restore the aforesaid seniority and extend all notional benefits of promotion, seniority, pay fixation and payment of actual dues as were extended in favour of respondent No.4 Suresh Kumar Soni within a period of forty-five days from the date of receipt of certified copy of the order being passed today. Since the petitioner has been held to be senior to the private respondent No.4 Shri Suresh Kumar Soni, he is entitled to proforma promotion on the principle of next below rule over and above atleast from the date when his junior Suresh Kumar Soni (Respondent No.4) was promoted.

20. In above terms, this writ petition is allowed and disposed of.

(VIVEK AGARWAL)
JUDGE