

Court No. - 22

(Reserved)
A.F.R.

Case :- SERVICE SINGLE No. - 12438 of 2019

Petitioner :- Vijay Kishore Anand And 9 Ors.

Respondent :- State Of U.P. Thru Prin.Secy.Transport Lucknow And Ors.

Counsel for Petitioner :- Gaurav Mehrotra, Abhinav Singh

Counsel for Respondent :- C.S.C.,Apoorva Tewari,Hemant Kr
Mishra,Rajeu Kumar Tripathi,Surya Narayan Mishra,Vinod Kumar Singh

Hon'ble Manish Kumar,J.

(1) Heard Sri Gaurav Mehrotra and Sri Abhinav Singh, learned counsel for the petitioners, learned State Counsel for Opposite Parties No. 1 and 2 and Sri Sudeep Seth, learned Senior Advocate, assisted by Sri V.K. Singh for Opposite Party No.3, Sri Suraya Narayan Mishra for Opposite Party No.13, Sri Hemant Mishra for Opposite Party Nos. 14 and 15 and Sri Apurva Tewari, who has moved an impleadment application on behalf of one Sri Mahesh, he has been allowed to make his submissions.

(2) The present writ petition has been preferred by the petitioners feeling aggrieved by the final Seniority list issued vide office order no.871E/2019-371E/GPT/85-18 dated 15.04.2019 in so far as it relates to the placement of the petitioners below Passenger Tax / Goods Tax Superintendents, whose services have been merged in the higher cadre of posts of Passenger Tax, Goods-Tax Officer to which petitioners were directly appointed. They have also challenged the order dated 15.04.2019, by which the representation of the petitioners against the tentative seniority list has been rejected.

(3) The dispute pertains to the placement of seniority on the post of Passenger Tax, Goods-Tax Officer amongst the direct recruits i.e. the petitioners and the private respondents, who were working on the post of Passenger Tax / Goods Tax Superintendents, the feeding cadre for

promotion to the post of Passenger Tax, Goods-Tax Officers, but their services have been merged with Passenger Tax, Goods-Tax Officers vide Government Order dated 3.5.2011 abolishing post of Passenger Tax / Goods Tax Superintendents.

(4) The services of the petitioners and the respondents are governed by the Provisions of the Uttar Pradesh Transport Taxation (Subordinate), Service Rules, 1980 (hereinafter referred as 'Rules 1980'). The Rule 5, in Part III of the Rules 1980 deals with sources of recruitment to the service and as per Sub-Rule (1) of Rule 5, the post of Passenger Tax/ Goods-Tax Officers is to be filled up by direct recruitment through the Commission and by promotion also through the Commission from amongst the permanent Passenger Tax / Goods Tax Superintendents, who have put in at least 5 years of continuous service as such besides some other sources. According to the Rule 5, the post of Passenger Tax, Goods-Tax Officers were advertised by the U.P. Public Service Commission in the year 2009. The petitioners, since fulfilled the requisite eligibility criteria, applied for the aforesaid advertised post and were selected for appointment.

(5) Thereafter, the State government issued a Government Order dated 3.5.2011, by which the Post of the Passenger / Goods Tax Superintendents was abolished and the persons working on those posts were merged with the post of Passenger Tax Goods Officers. The government order dated 3.5.2011 was challenged by the ministerial employees, who were also eligible to be considered for promotion on the post of Passenger Tax, Goods-Tax Officers alongwith Passenger Tax / Goods Tax Superintendents, by filing a Writ Petition No.2811 (S/S) of 2011 (Ministerial Service Association Transport Lucknow vs. State of U.P.) and in this case, an interim order dated 27.05.2011 was passed by this Court directing for maintaining the status quo till the next date of listing.

(6) In the above mentioned writ petition, an application was preferred by the State of U.P. for modification / clarification of the order dated 27.05.2011 to the extent that the 15 selected candidates including the present petitioners be allowed to join on the post of Passenger Tax, Goods-Tax Officers. The application for modification was allowed by this Court vide order dated 22.02.2013 allowing the 15 selected candidates including the present petitioners to join on the post of Passenger Tax, Goods-Tax Officer.

(7) The appointment letters were issued on 22.07.2013 as far as the petitioners no.2, 3, 4, 5, 6, 8, 9 and 10 are concerned and on 6. 8. 2013 as far as it relates to Petitioners No.1 and 7.

(8) The petitioners also preferred a Writ Petition No.336 (S/B) of 2015 assailing the Government Order dated 3.5.2011, but not pressed the same with liberty to file a fresh writ petition, as permitted by the order of this Court dated 26.03.2015. At the same time, the Writ Petition No.2811 (S/S) of 2011 was also dismissed as withdrawn vide order dated 17.07.2015. After the disposal of above writ petitions, on 13.08.2015 a tentative seniority list was published, wherein the names of the petitioners were tentatively placed below the employees, who were initially appointed as Passenger Tax / Goods Tax Superintendents and subsequently claimed to have been merged on the post of Passenger Tax, Goods-Tax Officers in the light of Government Order dated 3.5.2011. The petitioners preferred detailed objections to the seniority list, but the same was rejected and a final seniority list was published on 11.09.2015 for the post of Passenger Tax, Goods-Tax Officers, maintaining the seniority shown in the tentative seniority list.

(9) The petitioners then preferred a writ Petition No.1802 (S/B) of 2015 (Vijay Kishor Anand And Ors. vs. State of U.P. & Ors) challenging the validity of the seniority list dated 11.09.2015 and the Government Order dated 3.5.2011. The Writ Petition was finally allowed by this Court vide judgment and order dated 13.04.2017, quashing the seniority list dated 11.09.2015 with a further direction to prepare a fresh seniority list of Passenger Tax/ Goods Tax Officer within a period of two months from the date of communication of the aforesaid order. Against the final judgment and order dated 13.04.2017, a review petition was preferred by two private respondents, which was dismissed vide order dated 18.12.2017 and the matter attained finality.

(10) The department despite the judgment of this Court kept sitting over the matter instead of issuing a fresh seniority list. The petitioners then filed a contempt petition being Contempt Case No.1544 of 2017 before this Court. During the pendency of the contempt petition, a seniority list dated 6.11.2017 was issued in three parts, wherein more than one person was placed at Serial No.1 including the Passenger Goods Tax Superintendents, but the same was not accepted by the Court, thereafter, another seniority list of Goods/ Passenger Tax Officers was issued on 17.11.2017 of petitioners only excluding the names of respondents and other similarly situated persons.

(11) On 5.3.2018, the **U.P. Transport Taxation (Subordinate) Service (First Amendment) Rules, 2018**, were passed giving it immediate effect. The Passenger Tax / Goods Tax Superintendents preferred a Writ Petition No.16657/2018 for inclusion of their names in the Seniority list of Passenger Tax, Goods – Tax Officer in the light of the amendment in the Rules. The Writ Petition was disposed off without expressing any opinion on the merits of the case vide judgment and order dated 27.07.2018, with a direction to the Transport Commissioner to decide their representations.

(12) During the pendency of the Writ Petition No.36294 (S/S) of 2018 filed by the present petitioners seeking consideration for promotion on the vacant post of ARTO (Assistant Regional Transport Officer), an order dated 19.12.2018 was issued by the Deputy Secretary providing therein that the private respondents i.e. Passenger Tax / Goods Tax Superintendents, who were merged on the post of Passenger Tax, Goods – Tax Officer may be treated as substantively appointed as such w.e.f. 3.5.2011. This court after hearing the counsels for the respective parties, considering the facts that the service rules have been amended with effect from 5.3.2018, allowed the writ petition vide order / judgement dated 17.01.2019 directing the respondents to consider the petitioners for promotion on the post of ARTO

(13) The aforesaid order dated 19.12.2018 passed by Deputy Secretary was challenged by the petitioners by filing a Writ Petition No.3654 (S/S) of 2019 and also the tentative seniority list dated 30.01.2019. The writ petition was finally disposed of by this Court vide judgment and order dated 7.02.2019 directing the Transport Commissioner to pass appropriate order in regard to the controversy involved in the writ petition for placing the private respondents in the seniority list, ignoring the order dated 19.12.2018 passed by the State Government. Further taking into consideration promulgation of Rules dated 5.3.2018 in the light of judgment and order dated 13.04.2017, after affording the opportunity of hearing to the petitioners and the private respondents.

(14) Despite the direction of this Court, the impugned order dated 15.04.2019 has been passed by rejecting the objections submitted by the petitioners and issued a final seniority list including the respondents and other similarly situated persons in the seniority list, which is under challenge and the subject matter of the present writ petition.

(15) Learned counsel for the petitioner has submitted that the impugned orders dated 15.04.2019 has been passed in the teeth of the judgment of this Court dated 13.04.2017 in Writ Petition No.1802 (S/B) of 2015, wherein, it has been held that the provisions of Government Order dated 3.5.2011 were contrary to the existing Service Rules and the merger of the post of Passenger Tax / Goods Tax Superintendents with the Passenger Tax, Goods-Tax Officers is not provided in the relevant statutory Rules i.e. Rules 1980, as such the private respondents and other similarly situated Passenger Tax / Goods Tax Superintendents are not entitled to be placed in the Seniority list of the Passenger Tax, Goods-Tax Officers alongwith the petitioners. The judgment and order dated 13.04.2017 has attained finality as the Review Petition against the aforesaid judgment had been dismissed by this Court by means of judgment and order dated 18.12.2017 and the same was never assailed by anyone before any Court.

(16) In the contempt petition preferred by the petitioners, firstly an attempt was made by placing the seniority list dated 06.11.2017 deliberately including the names of Goods/ Passenger Tax Superintendents, but on 16.11.2017 the contempt court held that the seniority list prepared by the department is not in consonance with the judgment and order dated 13.04.2017, thereafter the Respondent No.2 had issued a fresh seniority list of petitioners dated 17.11.2017 in which the private respondents were not included.

(17) The submission is that the impugned orders are also in total defiance of judgment¹ and order dated 07.02.2019 passed in Writ Petition No.3654 (S/S) of 2019, whereby this Court while disposing of the writ petition directed to the Transport Commissioner, Uttar Pradesh for passing an appropriate order with regard to the controversy involved in the writ

petition, ignoring the order dated 19.12.2018 passed by the Deputy Secretary of the State of U.P. or being influenced by it.

(18) The second submission raised by the learned counsel for the petitioner is that the private respondents and other similarly situated persons cannot be included in the seniority list of Passenger Tax, Goods-Tax Officers in pursuance of the Government Order dated 3.5.2011 by which the Passenger Tax / Goods Tax Superintendents were merged with the posts of Passenger Tax, Goods-Tax Officers without there being any amendment in the Rules 1980 as required in the Govt. order itself. The Passenger Tax / Goods Tax Superintendents would become Goods / Passenger Tax Officers only after the amendment in the relevant service Rules.

(19) The submission is that the Rules 1980 have been amended by first amendment and promulgated on 5.3.2018. As per Rule 1(2) of Amendment Rules 2018, it has clearly been provided that the said amended rules shall come into force at once and, hence, it is explicit that the amendment in the Service Rules 1980 has been made effective with immediate effect, i.e. 5.3.2018. It is not retrospective. So, at the most, the respondents and other similarly situated Passenger Tax / Goods Tax Superintendents are entitled to be included in the seniority list from the date of promulgation of first amendment Rule 2018 i.e. 5.3.2018 not with effect from 3.5.2011.

(20) It has further been contended as per Rule 3 (hh) which defines term substantive appointment, has been inserted in the service rules for the first time with effect from 5.3.2018. The functioning of the private respondents is at the most on officiating basis and not as substantive appointment.

(21) It is further contended that the definition clause pertaining to substantive appointment says that the substantive appointment means an appointment, not being an ad-hoc appointment, on the post in the cadre of service, made after selection in accordance with rules and, if there were no rules, in accordance with procedure prescribed for the time being by the executive instructions issued by the State Government. In the present case there were Rules i.e. Rules 1980 and, hence, any executive orders would be in contravention of the same and bad in law.

(22) It has further been submitted that the Transport Commissioner has no power to unsettle the final seniority list dated 17.11.2017 finalized in compliance of mandamus issued by this Court without there being any challenge and interference by any competent court of law.

(23) In support of his arguments, learned counsel for the petitioner has relied upon the judgment reported in **2010 (4) SCC page 301 (H. S. Vankani and others vs. State of Gujarat & Ors)**. It is further contended that the promulgation of first amendment Ruled 2018 would not nullify the judgment and orders dated 13.04.2017, 7.2.2019, 17.11.2019 passed by this Court in different writ petitions, as per law laid down in the case of **Madan Mohan Pathak and other vs. Union of India and other** reported in **(1978) 2 SCC page 50** . By the judgment and order dated 17.11.2019 passed in Writ Petition no. 36294 (S/S) 2018 a direction has been issued to the State Government that the petitioner be considered for promotion on the post of Assistant Regional Transport Officer on the basis of final seniority list dated 17.11.2017. It has further been contended that it is the settled proposition of law that the right accrued cannot be taken away even by a retrospective amendment and in support thereof the judgment of the Supreme Court in the case of **Chairman, Railway Board & Ors. vs. C.R. Rangadhamaiah** reported in **(1997) 6 SCC, page 623**, and **J.S.**

Yadav vs. State of U.P. reported in **(2011) 6 SCC Page 570** have been relief upon.

(24) On the other hand, learned State Counsel has submitted that the Post of Passenger Tax/ Goods Tax Superintendents has been abolished and the persons who were working on the said post were merged with the post of Passenger Tax, Goods – Tax Officer vide Government Order dated 3.5.2011 which was never set aside by this court. After the promulgation of first amendment in Rule 2018, wherein in the note it has been provided that the Goods/ Passenger Tax Superintendents have been merged with the post of Passenger Tax, Goods-Tax Officer by abolishing the posts of Passenger Tax / Goods Tax Superintendents gives the Government Order dated 3.5.2011 retrospective effect and hence, the private respondent and the similarly situated persons have rightly been place in the seniority list.

(25) Sri Sudeep Seth, learned Senior Advocate, assisted by Sri V. K. Singh appearing for one of the private respondents has submitted that the writ petition is liable to be dismissed on the ground of non-joinder of necessary parties in the memo of writ petition. The petitioners are claiming their seniority over and above the merged Goods Tax Officers and inter se seniority being a civil right, the right of the parties must be determined in their presence and, as such, all the incumbents in the impugned seniority list are necessary parties. In support of the arguments, learned counsel has relied upon the judgment in the Case reported in 2012 (7) SCC 610 **Vijay Kumar Kaul Vs. Union of India**, 2008 (6) SCC 797 **State of Uttranchal Vs Madan Mohan Joshi**, 2010 (1) SCC **Amarjeet Singh Vs. Devi Ratan**.

(26) It has further been submitted vide Government order dated 3.5.2011 the post was abolished and the services of Passenger Tax / Goods Tax Superintendents were merged with the next higher post of Passenger Tax, Goods-Tax Officers. The petitioner and other persons preferred a writ

petition challenging the Government Order dated 3.5.2011, but the same was either dismissed as not pressed or dismissed as withdrawn with liberty to file afresh petition and in none of the writ petition, the order dated 3.5.2011 has ever been set aside or quashed by this Court, so it still holds good and is in existence. Even in the judgment dated 13.04.2017 the Government Order dated 3.5.2011 was not set aside though the seniority list was quashed with a direction for preparation of the fresh seniority list. Under these circumstances, the private respondents and other similarly situated persons have rightly been placed in the final seniority list of the Passenger Tax, Goods-Tax Officer.

(27) It is also contended that the merger / substantive appointment of the private respondents and other similarly situated persons is prior to the appointment of the petitioners on the post of Passenger Tax, Goods-Tax Officer on 22.07.2013 / 06.08.2013 / 05.03.2014. The date of entry of the petitioners in the service was subsequent to the private respondents and as such the petitioners cannot be granted seniority from the date prior to birth in the cadre by placing them over and above the respondents. In support of this argument, learned counsel has relied upon the judgement of the Supreme Court in the case of **Amarjeet Singh Vs. Devi Rata** reported in **2010 (1) SCC Page 417**.

(28) It is further submitted that the safest criteria for determination of seniority is date of substantive appointment and in the present case, the private respondents were merged on the post of Passenger Tax, Goods - Tax Officer on 3.5.2011 on abolition of post of Passenger Tax / Goods Tax Superintendents, while the petitioners were subsequently appointed on the supernumerary post of Passenger Tax, Goods-Tax Officer. The seniority list dated 17.11.2017 comprised of only petitioner i.e. direct recruits and did not include the merged Passenger Tax, Goods Tax Superintendents in compliance of the Courts order and judgment dated

13.04.2017 pursuant to the contempt proceedings drawn by the petitioner and also that as the rules were not amended till then.

(29) It is further contended by Sri Sudeep Seth that the petitioners have nowhere disclosed that they were appointed on the supernumerary posts. The Supernumerary post is not cadre post. The Substantive appointment could only be made on the cadre post, so the seniority of the petitioners can be determined as per Seniority Rules 1991 i.e. from the date of order of substantive appointment. In support of the submissions, learned counsel has relied upon the judgement of Supreme Court in the Case of ***Pawan Pratap Singh Vs. Reevan Singh*** reported in **2011 (3) SCC 267**, ***T. Thangavelu vs. Union of India*** reported in **2009 (16) SCC 302**.

(30) It is further submitted the phrase “.....***if there were no rules, in accordance with the procedure prescribed for the time being by the executive instructions issued by the Government***.....” in Rule 3 (hh) defining substantive appointment and to the effect that the note appended to the Rule 4(4) for about merger of post of Passenger Tax / Goods Tax Superintendents in the post of Passenger Tax, Goods - Tax Officer, gives credence to the order dated 3.5.2011 and despite amendment of service rule by the notification dated 5.3.2018 being prospective in nature, the merger of services by Opposite Party No.3 as the post of Passenger Tax, Goods - Tax Officer on 3.5.2011 has retrospective effect.

(31) It has further been submitted that the seniority is not vested right and Act or State legislature or Rule made under Article 309 of Constitution of India can have retrospective effect in the matter of seniority of the Government servants. The Seniority is a civil right and could be effected by the amendment of the service Rules. In support thereof, he relied upon the judgment of Supreme Court reported in **2010**

(6) SCC 545 (*T. Narasinhulu Vs. State of Andhra Pradesh*), 1969 (2) SCC (*Chaman Singh Vs. Jai Kaur*), and 1991 Suppl. (1) SCC 367 (*Sheshrao Jangluji Bagde Vs. Bhaiyya*).

(32) It has further been submitted that as far as the judgment and order dated 7.2.2019 is concerned, this Court neither quashed the tentative seniority list nor granted relief for not disturbing the placement of petitioner in the seniority list dated 17.11.2017 and granted liberty to the Transport Commissioner to deal with the controversy about the placement of merged Passenger Tax, Goods-Tax Officers in the seniority list after taking into consideration the amended rules promulgated on 5.2.2018 and the observation made in judgment dated 13.04.2017. The Transport Commissioner heard the petitioners and passed the order dated 15.04.2019 after considering the amended rules as well as observations in order dated 13.04.2017. The merits of the matter were not decided in the judgement dated 7.2.2019 and reliance placed by the petitioners upon the judgement dated 7.2.2019 is misconceived.

(33) Since the above case has a checkered history having several rounds of litigation by filing writ petitions and contempt petitions by different parties, which have been decided with certain directions to the authorities to act in particular manner in preparation of the final seniority list. However, the case mainly hinges upon the question as to whether the amended Rules 2018 are partly retrospective in effect so far as it bestowes benefit of seniority to the respondents and other similarly situated persons in the list of seniority of Passenger Tax, Goods - Tax Officer. In this connection as seen in the preceeding paras mainly two contentions have been raised by learned counsel for the respondents. Firstly, about the language used in the newly added provision i.e. Rule 3(hh) and Secondly, on the note appended to Rule (4)(4) of the amended Rules 2018.

(34) The case of the petitioners is that they had applied for consideration of their candidature to be directly appointed on the post of Passenger Tax, Goods-Tax Officers in pursuance of the advertisement published in the year 2009 by the U.P. Public Service Commission but before the appointment letters could be issued, an interim order dated 27.05.2011 was passed in Writ petition No. 2811 (S/S/) of 2011 for maintaining the status quo till the next date of listing. The appointment letters were issued only after the interim order dated 27.05.2011 was modified by this Court vide its order dated 22.02.2017 to the extent that the 15 selected incumbents including the petitioners were allowed to join on the post of Passenger Tax, Goods-Tax Officer.

(35) The post of Goods / Passenger Tax Superintendent and Passenger Tax, Goods-Tax Officer are governed by the Uttar Pradesh Transport Tax (Subordinate) Services Rule, 1980 (hereinafter referred as 'The Rules 1980'). Rule 5 in Part III of the Rules 1980 is quoted hereinbelow :

5. Source of recruitment. - *recruitment to the various categories of posts in the service shall be made from the following sources -*

(1) Passenger Tax, Goods-Tax Officer - (i) By direct recruitment through the commission.

(ii) By promotion through the Commission from amongst -

(a) the permanent Tax Superintendent / Passenger Tax / Goods Tax Superintendents who have put in at least five years of continuous service as such;

(b) the permanent Assistant Public Prosecutors who have put in at least five years of continuous service as such; and

(c) the permanent Head Assistants, Head Clerks of the Transport Commissioner's Office, who have put in at least five years of continuous service as such:

(36) During the pendency of the completion of the selection, the State Government issued a Government Order dated 3.5.2011 and took a decision that 93 vacant posts of Goods/ Passenger Tax Superintendents shall be abolished and merged with 133 posts of Passenger Tax, Goods-Tax Officers. It is also provided in the G.O. dated 3.5.2011 that the relevant service rules shall be amended accordingly.

(37) The Government order dated 3.5.2011 was challenged by the petitioners by filing Writ Petition No.336 (S/B) of 2015 (Irshad Ali and others Vs. State of U.P.), but subsequently, it was not pressed with liberty to file a fresh petition vide order dated 26.03.2015 and the Writ Petition No.2811 (S/S) of 2011 preferred by the Ministerial Services Association was also dismissed as withdrawn vide order of this Court dated 17.07.2015.

(38) The Opposite Parties after the withdrawal of the above mentioned writ petitions issued a tentative seniority list on 13.08.2015 placing the Passenger Tax / Goods Tax Superintendents over and above the petitioners against which the petitioners preferred objections, which were rejected and the final seniority list was issued on 11.09.2015. The seniority list was challenged by the petitioners by filing the writ petition no.1802 (S/B) of 2015 (Vijay Kumar Anand and Ors. Vs. State of U.P. and others). The writ petition was finally allowed by this Court quashing the seniority list dated 11.09.2015 with a direction to the Transport Commissioner to prepare a fresh list of Goods/ Passenger Tax Officer, the relevant paragraphs of the Division Bench judgment and order dated 13.04.2017 passed in Writ Petition No. 1802 (S/B) of 2015 are extracted and quoted hereinbelow:

2. The petitioners have assailed the order dated 11.9.2015 issued by the Transport Commissioner, Lucknow, whereby the respondents, who were posted as Good/Passenger Tax Superintendents, have been merged into Passenger Tax Officers and consequently, they have been placed in the seniority list of the Passenger Tax/ Goods

Tax Officers amongst the petitioners. The petitioners have also assailed Government Order dated 3.5.2011, whereby the Government has taken a decision to merge the Good/ Passenger Tax Superintendents into the post of Passenger Tax Officer.

11. The Government Order dated 3.5.2011 provides the provisions contrary to the Rules, therefore it cannot be said that by way of Government Order, the State Government has supplemented the Rules.

12. The State Government cannot be permitted to transgress the power of legislature by way of executive order.

13. Therefore, we are of the view that since the decision taken by the State Government for restructuring the post and placing the Passenger Tax Superintendent at par with the Tax Officer has not been inserted in the Rules, the private respondents, who are posted as Passenger Tax Officers, have no right to be placed in the seniority list of Passenger Tax and Goods Tax Officers amongst the petitioners. (Emphasis Supplied by the Court).

14. In the result, the office order dated 11.9.2015 issued by the Transport Commissioner, State of U.P., is hereby quashed and a direction is issued to the State Government to prepare a seniority list of Passenger Tax, Goods Tax Officer afresh within two months from the date of communication of this order.

15. The writ petition stands allowed.

(39) When the order and judgment was not complied with, a contempt petition being Contempt No.1544 of 2017 was preferred, in which on 16.11.2017, the contempt Court had directed the Opposite Parties to issue a fresh seniority list, the relevant extract of the order dated 16.11.2017 is quoted hereinbelow :

“A final seniority list of substantive members of service is one which allows one person to be placed at one place. The tentative seniority list issued in three parts seeks to place more than one person at serial no. 1 in the three parts yet it is termed to be a list of one and the same cadre. The list issued

does not stand in the spirit of the final judgment dated 13.4.2017 and according to the Rules.

The Officer present in the Court has however explained that the government order dated 3.11.2011 not being struck down has throughout caused a difficulty of understanding the judgment, hence the bonafide mistake.

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The above observations made in the judgment lead to no other conclusion but to a clear picture of the fact that substantive members of service appointed as per Rule-5 of the Service Rules, 1980 on the post of Passenger Tax and Goods Tax Officers have to be included in the final seniority list at their respective places in an ascending order.

The officer who is present in person has prayed that he may be permitted to carry out the mandate of law understood in the manner stated above within a further period of three days.”

(40) And only thereafter, a final seniority list was issued on 17.11.2017, in which the only petitioners were included and not the private respondents.

(41) In the light of the orders passed by this Court, it is apparent that the orders impugned in the present petition dated 15.04.2019 are in the teeth of the judgment of this Court. Once the controversy has finally been adjudicated by this Court and the same has not been challenged before any Competent Court of law then the Opposite Parties cannot sit as an appellate authority and pass an order contrary to the directions issued by the judgment of this Court, in the matter the lis has finally been adjudicated between the parties.

(42) The Rules 1980 has been amended namely the U.P. Transport Taxation (Subordinate) Service (First Amended) Rules 2018, Rule (1) (c) specifically provides that the rules have come into force at once that is

w.e.f. since 5.3.2018. It has no retrospective effect. The inclusion of the respondents and similarly situated persons in the impugned seniority list is bad in the eyes of law. The Opposite Party No.2 could not modify or disturb the seniority list dated 17.11.2017 issued in pursuance of the Division Bench judgment dated 13.04.2017 in the garb that the Rules have been amended in the year 2018.

(43) Learned counsel for the petitioner has relied upon the case of **Madan Mohan Pathak Vs. Union of India and others**, the relevant extract from the judgment is quoted below.

“If by reason of retrospective alteration of the factual or legal situation, the judgment is rendered erroneous, the remedy may be by way of appeal or review, but so long as the judgment stands, it cannot be disregarded or ignored and it must be obeyed by the Life Insurance Corporation. We are, therefore, of the view that, in any event, irrespective of whether the impugned Act is constitutionally valid or not, the Life Insurance Corporation is bound to obey the writ of mandamus issued by the Calcutta High court and to pay annual cash bonus for the year April 1, 1975 to March 31, 1976 to Class III and Class IV employees.”

(44) The other judgment relied upon by the learned counsel for the petitioner is **Chairman, Railway Board and others vs. C.R. Rangadhamaiah & Ors.** reported in (1997) 6 SCC 623. In this case, the Supreme Court has held that the accrued rights in the matter of promotion / seniority cannot be taken away by retrospective amendment in the statute. The Relevant extract of the judgment is quoted hereinbelow;

“24. In many of these decisions the expressions “vested rights” or “accrued rights” have been used while striking down the impugned provisions which had been given retrospective operation so as to have an adverse effect in the matter of promotion, seniority, substantive appointment. etc., of the employees. The said expressions have been used in the context of a right flowing under the relevant rule which was sought to be altered with effect from an anterior date and thereby taking away the benefits available under the rule in force at that time. It has been held that such an amendment

having retrospective operation which has the effect of taking away a benefit already available to the employee under the existing rule is arbitrary, discriminatory and violative of the rights guaranteed under Articles 14 and 16 of the constitution.”

(45) The attention of this court has been drawn to the judgment dated 7.2.2019, passed in Writ Petition No.3654(S/S.) of 2019 (Vijay Kishor Anand vs. State of U.P. and others) assailing the order dated 19.12.2018 issued by the Deputy Secretary directing therein that the respondents shall be treated as substantively appointed w.e.f. 3.5.2011 and also assailing the tentative seniority list dated 30.01.2019. The said Writ Petition was disposed off finally by this Court vide its judgement / order dated 7.2.2019. The relevant extract of the judgment and order is quoted hereinbelow :

“In view of the submission advanced by learned counsel for the parties and nature of controversy involved in the present writ petition, this Court thinks it appropriate in case direction is issued to the competent authority to pass an appropriate order without being influenced with the impugned order dated 19.12.2018, the controversy shall be resolved.

*Accordingly, this writ petition is finally disposed of with the direction to the Transport Commissioner, Uttar Pradesh, Lucknow (respondent No.4) to pass appropriate order in regard to the controversy involved in the present writ petition for the placement of private respondents in the seniority list **ignoring the order dated 19.12.2018 passed by the State Government, taking into consideration promulgation of Rules on 5.3.2018 in the light of the observation made in the judgment and order dated 13.4.2017 (emphasis supplied by the Court)** after affording an opportunity of hearing to the petitioners and to the private respondents within a period of 6 weeks from the date of production of certified copy of this order.*

With the following observation and direction, the writ petition is finally disposed of.”

(46) Even in the second round of the litigation against the adamant attitude of the State Government for including the respondents and other similarly situated persons in the seniority list of the Passenger Tax, Goods-Tax Officers, this Court was very clear in its judgment and order dated 7.2.2019 that while deciding the controversy, the Competent Authority would pass appropriate order without being influenced by the impugned order dated 19.12.2018, as well the amended Rules dated 5.3.2018 and further in the light of the observation made in the judgment and order dated 13.04.2017. The Court in its judgment dated 13.04.2017 passed in the Writ Petition No.1802 (S/B) of 2015 and judgment and order dated 7.2.2019 passed in Writ Petition No.3654 (S/S) of 2019 (Vijay Kumar Anand Vs. State of U.P.) holding that the respondent and other similarly situated persons could not be included in the seniority list in pursuance of the Government order dated 3.5.2011 and order 11.12.2018 passed by the Deputy Secretary. It is clear that the impugned orders passed on 15.04.2019 are in the teeth of the judgment of this Court dated 13.04.2017 and 7.2.2019 as well as observations of the Contempt Court in its order dated 16.11.2017. As indicated above, it has been held by the Supreme Court that an amendment even if having retrospective effect would not adversely affect the rights accrued to the employees under the Rules as existed.

(47) The impugned orders dated 15.04.2019 are also in complete violation of law laid down in the case of ***Madan Mohan Pathak Vs. Union of India (Supra)***. The authorities cannot disregard or ignore the judgment so long as the judgment stands and the authorities are bound to obey the same. The judgment dated 13.04.2017 had already been acted upon and complied with by issuance of the seniority list dated 17.11.2017, which is much prior to the amendment of Service Rules 1980 with effect from 3.5.2018.

(48) The learned counsel for the respondents raised a preliminary objection regarding maintainability of the writ petition on the ground of non-joinder of necessary party. As the petitioners have failed to array all the merged Passengers Tax, Goods – Tax Officer from Serial No.1 to 41 and promoted Passenger Tax, Goods-Tax Officer from Serial No.41 to 60 except Respondent Nos. 3 to 15, the petitioners are claiming seniority over and above the merged Passenger Tax, Goods - Tax Officer. The inter se seniority being a civil right (not vested right), the rights of the parties, must be determined in their presence. In support of the submission, the learned counsel for the respondents has relied upon the judgment reported in **2012 7 SCC 610 (Vijay Kumar Kaul And Others Vs. Union of India)**, and **(2008) 6 SCC 797 (State of Uttarakhand vs. Madan Mohan Joshi)**. Both these judgment are not applicable in the present case for the reasons that the facts in the case of **Vijay Kumar Kaul and Ors. vs. Union of India** and in the case of **State of Uttarakhand vs. Madan Mohan Joshi** are totally different from the facts of the present case.

(49) The respondents and other similarly situated persons are claiming seniority in pursuance of the Government order dated 3.5.2011. Some persons from the list of the Government order dated 3.5.2011 are sufficient to be arrayed in the array of the opposite parties in the representative capacity. There is no individual dispute between the parties, which may require the presence of all the parties at the time of adjudication of the seniority. The objection raised is frivolous and is liable to be rejected. The Supreme Court in the case of **A. Janardana v. Union of India** reported in **1983 (3) page 601** has held that in case the person does not claim seniority over anyone particular individual. In the background of any particular fact controverted by that persons against whom the claim is made, then it necessary to have all the persons impleaded as respondent . The relevant para of the judgment is extracted hereinbelow:

“36. However, there is a more cogent reason why we would not countenance this contention. In this case, appellant does not claim seniority over particular individual in the background of any particular fact controverted by that person against whom the claim is made. The contention is that criteria adopted by the Union Government in drawing-up the impugned seniority list are invalid and illegal and the relief is claimed against the Union Government restraining it from upsetting or quashing the already drawn up valid list and for quashing the impugned seniority list. Thus the relief is claimed against the Union Government and not against any particular individual. In this background, we consider it unnecessary to have all direct recruits to be impleaded as respondents. In such proceedings, the necessary parties to be impleaded are these against whom the relief is sought, and in whose absence no effective decision can be rendered by the Court. Approaching the matter from this angle, it may be noticed that relief is sought only against the Union of India and the concerned Ministry and not against any individual nor any seniority is claimed by anyone individual against another particular individual and therefore, even . if technically the direct recruits were not before the Court, the petition is not likely to fail on that ground. The contention of the respondents for this additional reason must also be negated.”

(50) The Supreme Court in another judgment of **Prabodh Verma and others Vs. State of U.P. and others**, reported in (1994) 4 SCC page 251 has held that those who were vitally concerned, namely, at least some of them in a representative capacity may be made respondent in the writ petition, if the member is large. The relevant extract of the paras of the judgment is here being quoted below:

“To summarize our conclusions:

(1) A High Court ought not to hear and dispose of 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 some of them being before it as respondents in a representative capacity if their number is too large to join them as respondents individually, and, if the petitioners refuse to so join them, the High Court ought to dismiss the petition for non- joinder of necessary parties.

(2) The Allahabad High Court ought not to have proceeded to hear and dispose of Civil Miscellaneous Writ No. 9174 of 1978-Uttar Pradesh Madhyamik Shikshak Sangh and Others

v. State of Uttar Pradesh and Others-without insisting upon the reserve pool teachers being made respondents to that writ petition or at least some of them being made respondents thereto in a representative capacity as the number of the reserve pool teachers was too large and, had the petitioners refused to do so, to dismiss that writ petition for non-joinder of necessary parties.”

(51) The Supreme Court in the case of ***B Prabhakar Rao and Ors. v. State of Andhra Pradesh and Ors.*** reported in ***1985 (Supp) SCC page 432***, has held that even some individual affected parties have not been impleaded and their interest are identical with those and have been sufficiently and well represented, then the writ petition cannot be dismissed on the ground of jon-joinder of parties to the litigation. The relevant extract of this judgment is quoted hereinbelow:

“22.So also the second objection which related to the nonjoinder of all affected parties to the litigation. We are quite satisfied that even if some individual affected parties have not been impleaded before us, their interests are identical with those and, have been sufficiently and well represented. Further, the relief claimed in Writ petition Nos. 3420-3426 of 1983 etc. is of a general nature and claimed against the State and no particular relief is claimed against any individual party. We do not think that the more failure to implead all affected parties is a bar to the maintainability of the present petitions in the special circumstances of these cases where the actions are really between two 'warning groups'.”

(52) The submission of learned counsel for the respondent is that the petitioners were appointed subsequently that too on the supernumerary post which could not be counted as a post of cadre and the services on the supernumerary post could not be taken into account for the determination of seniority and as per settled law, the seniority is to be determined from the date of substantive appointment and in support of arguments that the seniority list is to be seen from the date of substantive appointment, the judgments of Supreme Court reported in ***2011 (3) SCC 267 (Pawan Pratap Singh vs. Reevan Singh)***; and ***2009 (16) SCC 302 T. Thangavelu vs. Union Of India***, has been relied.

(53) As far as argument about the language used in the Rule 3(hh) is concerned, it may be observed that a reading of Rule 3(hh) makes it amply clear that if there were no rules only in that event an order could be passed in accordance with the procedure prescribed for time being by the executive instructions issued by the State Government. In the present case, Rule 5 of Part III deals with sources of recruitment including the recruitment on the post of Passenger Tax / Goods Tax Officer i.e. 50 % posts by direct recruitment through the Commission and 50 % posts by promotion through the Commission from amongst Passenger Tax/ Goods Tax Superintended, who have put in 5 years of continuous services as such. There were no provision for recruitment on the post of Passenger Tax, Goods Tax Officers by adopting the method of merger by executive order issued by the State Government. The Rules 1980 were very much in existence in the year 2011 when the Government Order dated 3.5.2011 was issued for recruitment / merger of the respondents and other similarly situated persons on the post of Passenger Tax, Goods Tax Officers. It is an admitted case of the respondent that they were initially appointed in the year 2008 and as per Rules existing then at least 5 years of continuous service was required to be considered for promotion through the commission on the next higher post of Passenger Tax, Goods Tax officer. Whereas at the time of issuance of the Government order dated 3.5.2011, the respondents had completed only three years of service and they were not even eligible for being considered for promotion according to Rules 1980. It was in gross violation of Rules that the respondents were promoted / recruited by inventing an extraneous method of merger of their services with the cadre of Passenger Tax, Goods Tax Officers for merger of the respondents and other similarly situated persons. It is in complete contravention of the statutory provisions, which cannot be superseded by the executive order.

(54) So far as reliance placed on note appended to Rule 4(4) is concerned, that is also of no help to the respondents. The note is only a statement of a fact. It has no effect of an amendment on Rules.

(55) As held in the judgment of the Supreme Court reported in **2004 (9) SCC (Prakash Nath Khanna and other vs. Commissioner of Income Tax and Another)**, that the marginal notes to a Section of an Act cannot be referred for the purpose of construing the meaning of section, particularly when the language of the section is plain and simple. Function of the marginal note is just brief indication of the contents of the sections and cannot construe the meaning of the body of the sections if the language of provision is not clear. It cannot be treated as substantive part of the main provision itself. The relevant extract of the judgment is mentioned hereinbelow:

“17. The heading of the Section or the marginal note may be relied upon to clear any doubt or ambiguity in the interpretation of the provision and to discern the legislative intent. In C.I.T v. Ahmedbhai Umarbhai and Co. (AIR 1950 SC 135) after referring to the view expressed by Lord Macnaghten in Balraj Kunwar v. Jagatpal Singh (ILR 26 All. 393 (PC), it was held that marginal notes in an Indian Statute, as in an Act of Parliament cannot be referred to for the purpose of construing the statute. Similar view was expressed in Board of Muslim Wakfs, Rajasthan v. Radha Kishan and Ors. (1979 (2) SCC 468), and Kalawatibai v. Soirvabai and ors. (AIR 1991 SC 1981). Marginal note certainly cannot control the meaning of the body of the Section if the language employed there is clear. (See Smt. Nandini Statpathy v. P.L. Dani and Anr. (AIR 1978 SC 1025) In the present case as noted above, the provisions of Section 276-CC are in clear terms. There is no scope for trying to clear any doubt or ambiguity as urged by learned counsel for the appellants. Interpretation sought to be put on Section 276-CC to the effect that if a return is filed under sub-section (4) of section 139 it means that the requirements of sub-section (1) of Section 139 cannot be accepted for more reasons than one.”

(56) Another case on the point is in **2007 (5) Mh. L.J., (Prabhudas Damodar Kotecha and another Vs. Smt. Manharbala Jaram Damodar and others)**, the relevant paras are quoted hereinbelow:

“32. It is now well settled that marginal notes to the section of an Act cannot be referred to for the purpose of construing the meaning of section particularly when a language of the section is plain and simple. (See in this connection [I.T. Commissioner v. Ahmadabhai Umarbhai](#) and Co. AIR 1950 SC 131; *Kalavatibai v. Soiryabai Chela Sundardas v. Shiromani Gurudwara Prabhandhak Committee*). Similarly, marginal note cannot certainly control the meaning of the body of the section if the language employed therein is clear. In this connection, we can usefully refer to the judgment of the Supreme Court in *Nalinakhya Bysack v. Shamsunder Haider and Ors.* . The Supreme Court in this case has observed that marginal note cannot control the meaning of the body of the section if the language employed therein is clear and unambiguous. If the language of the section is clear then it may be there is an accidental slip in the marginal notes rather than it is correct and accidental slip in the body of the section itself. (See [Nandini Satpathy v. P.L. Dani and Ors.](#)). The Supreme Court in [S.P. Gupta and Ors. v. President of India and Ors.](#) , after considering the law on the use of marginal notes while interpreting the provisions of a statute in paragraph 1096, held thus:

1096. A reading of the passages and decisions referred to above leads to the view that the Court while construing a statute has to read both the marginal notes and the body of its provisions. Whether the marginal notes would be useful to interpret the provisions and if so to what extent depends upon the circumstances of each case. No settled principles applicable to all cases can be laid down in this fluctuating state of the law as to the degree of importance to be attached to a marginal note in a statute. If the relevant provisions in the body of the statute firmly point towards a construction which would conflict with the marginal note the marginal note has to yield. If there is any ambiguity in the meaning of the provisions in the body of the statute, the marginal note may be looked into as an aid to construction.

33. It is thus clear that the function of a marginal note is as a brief indication of the contents of the section. It cannot be referred to for the purpose of construing the meaning of section particularly when the language is plain and simple. In other words, it cannot construe the meaning of the body of the section if the language employed therein is clear. If the relevant provisions in the body of the statute firmly point towards a construction which would conflict with the marginal note the marginal note has to yield. In short, the marginal note is a poor guide to the scope of a section. In any case, the marginal note cannot be legitimately used to restrict the wide words/expressions in the section or plain term of an enactment and it cannot be said to be enacted in the same sense.”

(57) In the case of Union of India and another vs. National Federation of the Blind and others reported in (2013) 10 SCC page 772, the said proposition is reiterated and the relevant extract of the judgment is quoted hereinbelow:

“(46) The heading of a Section or marginal note may be relied upon to clear any doubt or ambiguity in the interpretation of the provision and to discern the legislative intent. However, when the Section is clear and unambiguous, there is no need to traverse beyond those words, hence, the headings or marginal notes cannot control the meaning of the body of the section. Therefore, the contention of Respondent No. 1 herein that the heading of [Section 33](#) of the Act is “Reservation of posts” will not play a crucial role, when the Section is clear and unambiguous.”

(58) In the first amendment Rules 2018, there is no ambiguity with regard to the applicability of the Rules by reading Rule 1 (2), it is clear that it would come into effect at once w.e.f. 5th March, 2018. The intention of the legislature was not to make this rule retrospective. And as observed earlier the Note to the Rule 4(4) cannot be treated as amendments of the Rule 1980.

(59) So far as such claim for seniority of respondent on the ground that they have been working on the post of Passenger Tax, Goods-Tax Officer prior to the joining of the petitioners, it may be observed that the private respondents and similarly situated persons were merged in the cadre of Passenger Tax, Goods-Tax Officer by means of Government Order dated 3.5.2011 despite the fact that it could not be permissible since Rule 1980 were already in existence which provided for only promotion of Passenger Tax / Goods Tax Superintendents to the post of Passenger Tax, Goods-Tax Officer. This process of selection for promotion was not applied to the respondents, hence, they cannot be said to have been duly promoted to the post of Passenger Tax, Goods-Tax Officer. The Rules did not provide for merger of the feeding cadre to the higher cadre. However, they are not entitled to claim seniority, as per the discussion made hereinabove and in view of the judgment dated 13.04.2017, which was duly complied with by Opposite Party No.2. The petitioners have been duly selected from the Public Service Commission fully complied with the Rules 1980. It may, further be worth noted that the petitioners were selected in pursuance of the advertisement of 2009, but the appointment was delayed due to the order passed in the writ petitioner no.2811 (S/S) of 2011.

(60) So far the argument raised about the petitioners being not entitled for seniority since they have been working on supernumerary posts, it does not arise since the Government placed the respondents above the petitioners solely on the ground of their merger by order dated 3.5.2011. The order dated 3.5.2011 has already been found to be bad in law by Division Bench of this Court vide judgment and order dated 13.04.2017. Since the Rules did not provide for the merger and Government Order could not alter or over-ride the provision of the Statutory Rules.

(61) In view of the discussion held above and finding no merit in submissions made on behalf of the respondents, the writ petition is allowed. The two impugned orders dated 15.04.2019 are quashed. The seniority list dated 17.11.2017 issued by Opposite Party No. 2 in compliance with the judgment dated 13.04.2017 shall be maintained and remained operative.

(62) No order as to cost.

(Manish Kumar,J.)

Order Date :- 20th October, 2020

S. Kumar