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**U. Govinda Rao and Others Vs Government of Andhra Pradesh and Others**

**Writ Petition No"s. 5922 and 6360 of 1999**

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**Court:** Andhra Pradesh High Court

**Date of Decision:** Nov. 23, 2001

**Acts Referred:**

Andhra Pradesh Engineering Service Rules, 1983 " Rule 2, 4#Civil Procedure Code, 1908 (CPC) " Section 11, 141#Constitution of India, 1950 " Article 13, 137, 14, 141, 16

**Citation:** (2002) 1 ALD 347 : (2002) 1 ALT 713

**Hon'ble Judges:** S.B. Sinha, C.J; V.V.S. Rao, J; S.R. Nayak, J

**Bench:** Full Bench

**Advocate:** J.R. Manohar Rao and M. Ratna Reddy, for the Appellant; P. Balakrishna Murthy, Prakash Reddy, Addl. Advocate-General and Government Pleader for Service-II, for the Respondent

**Final Decision:** Allowed

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**Judgement**

S.B. Sinha, C.J.

**ISSUE:**

1. In these writ petitions the validity of G.O.Ms.No.54, Irrigation (Ser.IV-2) Department, dated 15.2.1983 has been questioned.

**HISTORY:**

2. There was single Engineering Department in the State of Andhra Pradesh for executing various works in different fields. The Madras Engineering

Service Rules issued in G.O.Ms.No.2690, dated 28.9.1953 were made applicable to the Engineers of Andhra State prior to formation of State of

Andhra Pradesh. The said rules were followed even after the formation of Andhra Pradesh State.

3. The Madras Engineering Subordinate Service Rules issued in G.O.Ms.No.2732 dated 30.9.1953 are followed in the State of Andhra Pradesh

with certain amendments from time to time. The post of Supervisor was included as Category 1 of Branch 1 to which the qualifications of Degree

in Engineering and also Diploma in Engineering were prescribed. The Supervisors possessing degree qualification were called as Junior Engineers

and whereas others as Supervisors, according to Rule I. The pay of Junior Engineer is more than that of Supervisor.

4. Roads and Buildings Department, Panchayat Raj Engineering Department, Public Health and Municipal Engineering Departments were created

with independent service rules in the year 1960. The nomenclature of the posts in the said departments is Assistant Engineers (formerly known as

Supervisors). Assistant Executive Engineers (formerly known as Junior Engineers) and Deputy Executive Engineers (formerly known as Assistant

Engineers).

5. The A.P. Engineering Service Rules, 1964 issued in G.O.Ms.No.285 dated 22-2-1967 were framed by the Governor in exercise of powers

conferred by the proviso to Article 309 of the Constitution of India. According to the said G.O., the Engineering Service, consisted of three

branches, viz., Public Works, Workshops and Stores and Horticulture. The post of Assistant Engineer, which has been re-designated as Deputy

Executive Engineer, is to be filled up by direct recruitment and also by recruitment by transfer from the category of Junior Engineers, Supervisors

and Draughtsmen, Special Grade Draughtsmen Grade of A.P. Engineering Subordinate Service. In case of direct recruits, they should possess

B.E. Degree (Civil or Mechanical) and in case of recruitment by transfer, the incumbents should possess B.E. degree (Civil or Mechanical) and

service of not less than five years as Junior Engineer. Of the substantive vacancies of Assistant Engineers, 37% of the posts shall be filled up by

direct recruitment. In case of recruitment by transfer, out of every three vacancies successively arising in the posts of Assistant Engineers, the first

two shall be filled or reserved to be filled from among the Junior Engineers specified under Group A and the third vacancy shall be filled or

reserved to be filled from among those specified under Group B as contained in the Table. Group A consists of Junior Engineer of A.P.

Engineering Subordinate Service and Group B consists of Supervisors, Draughtsmen, Special Grade and Draughtsmen 1st grade of A.P.

Engineering Subordinate Service.

6. By amendment to G.O.Ms.No.285 dated 22-2-1967, the cycle of vacancies, in case of recruitment by transfer, was raised to four by issuing

G.O.Ms.No.36 dated 12-1-1968. According to the said G.O., out of every four vacancies, three were to be filled by Junior Engineers and the

fourth by Supervisors and Draughtsmen. The said classification was challenged in the Supreme Court in Writ Petition No.385 of 1969 and the

Supreme Court by an order dated 3-5-1974 upheld the said rule.

7. The Government by reason of G.O.Ms.No.787, dated 9-6-1971 decided that the post of Junior Engineers to be filled in by Graduate Engineers

be constituted as a separate category distinct from Supervisors and the posts of Junior Engineers so separately categorized would be made

Gazetted. The posts in which the Junior Engineers were to be posted have been identified and the cadre strength of Junior Engineers and

Supervisors was fixed by reason of G.O.Ms.No.240, dated 28-2-1972.

8. G.O.Ms.No.893 dated 15-6-1972 was issued incorporating Note (2) under Rule 4 by amending the A. P. Engineering Service Rules,

according to which a Supervisor, who acquires B.E./A.M.I.E.. qualification while in service, shall be entitled to count 50% of their service, subject

to a maximum limit of four years, for being considered to be appointed as Junior Engineer by transfer subject to the conditions mentioned therein.

The benefit of aforementioned weightage was made applicable to selections that were made from 22.1.1968 to 28.2.1972 by the Public Service

Commission.

9. Challenging G.O.Ms.No.893, dated 15.6.1972, a writ petition, being W.P.No.4717 of 1972 was filed and a learned single Judge had struck

down the said G.O., by an order dated 11.12.1974. But the said order was reversed in writ appeal, being Writ Appeal No. 942 of 1974 and

batch by an order dated 10.2.1976 and ultimately G.O.Ms.No.893 was upheld.

10. Writ Petition No.132 of 1977, Devi Prasad and ors Vs. Government of Andhra Pradesh and ors, , was filed before the Supreme Court to

declare G.O.Ms.Nos.893, 815 and 451 as unconstitutional. By its judgment dated 8.4.1980 the Apex Court upheld the weightage provided for in

G.O.Ms.No.893 dated 15.6.1972.

11. Till 1972, there was a single category of Junior Engineers/Supervisors. The graduates being called Junior Engineers and non-graduates

(diploma holders) known as Supervisors. On 28.2.1972, the services of Junior Engineers were brought under the purview of A. P. Engineering

Service and Supervisors under the A.P. Subordinate Engineering Service.

12. The Note contained under Rule 1 of the Engineering Subordinate Service Rules, according to which the Supervisor with Degree qualification

was called as Junior Engineer, had been deleted by issuing G.O.Ms.No.1148 dated 5-11-1973. The Rules in G.O.Ms.No.1149, dated 5-11-

1973 were issued placing the Junior Engineers under Category-VI by providing for direct recruitment apart from appointment by transfer from

subordinate service. Consequently, the Supervisors holding the Degree qualification were not eligible for appointment as Junior Engineers.

13. By reason of G.O.Ms.No.786, dated 7.8.1974, the Government has provided for holding of special qualifying test for Junior Engineers and

criteria stipulated therein was the Junior Engineers, who have put in a minimum service of two years as on 1.1.1973, would be eligible to appear

for the said Test to be conducted by the A. P. Service Commission.

14. Temporary appointments to the post of Junior Engineers were made following due process of selection as there was ban on recruitment to

various posts in the State of Andhra Pradesh from 1968 onwards and for the purpose of regularising the services of temporary employees, who

had completed two years of service as on 1.1.1973 a Special Qualifying Test (SQT) was conducted by the Public Service Commission in

October, 1975 pursuant to G.O.Ms.No.786, dated 7.8.1974. The services of Junior Engineers, who were appointed temporarily from 1968

onwards, were regularized after conducting the Special Qualifying Test.

15. Directly recruited temporary Junior Engineers, who failed to clear the Special Qualifying Test filed Original Applications contending that their

seniority has to be fixed over and above the upgraded Junior Engineers. The learned Tribunal accepted their contention and found them to be

senior. The upgraded Junior Engineers (G.S. Venkat Reddy & others) have carried the matter in appeal to the Supreme Court. The Supreme

Court held that as the upgraded Junior Engineers are not covered by the explanation ""last regular appointment"" contained in G.O.Ms.No.647

dated 14.9.1979, they cannot be treated to be senior to directly recruited Junior Engineers.

16. The condition No.4 that was stipulated under Note (2) through amendment issued in G.O.Ms.No.893 dated 15-6-1972 was amended by

G.O.Ms.No.815, dated 8-11-1976 to the effect that the benefit of weightage given shall apply to the appointments that are to be made.

17. The Government issued G.O. Ms. No.451, dated 10.6.1976 providing for appointment of Supervisors in Public Works (Irrigation)

Department, who have acquired Graduate qualification while in service, as Junior Engineers prospectively.

18. A combined category of Junior Engineers/Supervisors under the Presidential Order was created with a cadre strength of 4273 vide

G.O.Ms.No.52 dated 24.1.1977.

19. Again, the Government by reason of G.O.Ms.No.559, dated 18.7.1977 permitted Supervisors to acquire graduate qualification to be

appointed as Junior Engineers on or after 28.2.1972 and provided for weightage of 1/3rd of service rendered as Supervisor before his

appointment as Junior Engineer and directing that seniority of Supervisors who were appointed as Junior Engineers shall be fixed with reference to

the notional date arrived at as per G.O. Ms. No.559 after giving weightage of service. The Chief Engineer (General) on 8.8.1977 issued

proceedings appointing Supervisors as Junior Engineers with retrospective effect i.e., from the next date of the last date of examination on which

the Supervisors have acquired B.E./A.M.I.E. qualification.

20. By reason of G.O.Ms.No.54, dated 15.2.1983, the Rules for Andhra Pradesh Engineering Service contained G.O. Ms. No.285, dated

22.2.1967 were amended and by virtue of the said amendment, a channel of appointment of Supervisors as Junior Engineers was provided for

with retrospective effect from 28.2.1972 by giving weightage of service. A note was also introduced stating that the General Rule 6 shall not apply

to appointment of Junior Engineer either by direct recruitment or by transfer.

21. K.S. MURALIDHAR and 15 other Junior Engineers, whose services were regularized pursuant to Special Qualifying Test, filed R.P.No.799

of 1977 before the State Administrative Tribunal to direct the respondents therein not to implement the rules issued in G.O.Ms.No.893, dated

15.6.1972 as amended in G.O.Ms.No.815 dated 8.11.1976 and the orders in G.O. Ms. No.451 dated 10.6.1976. An amendment petition in

RMP No.328 of 1983 in R.P.No.799 of 1977 was filed seeking declaration that G.O.Ms.No.54 dated 15.2.1983 is illegal.

22. By reason of an order dated 1.8.1983, the learned Tribunal upheld G.O.Ms. No.559 dated 18.7.1977 holding that the appointment of

upgraded Junior Engineers and directly recruited Junior Engineers had not been made strictly in accordance with the Rules and directed the

Government to issue specific orders after following the procedure laid down in the Rules. It was also held that there is no bar as to retrospective

regularization of services of directly recruited Junior Engineers from the date of their initial appointment. The matter was carried in appeal, being

Civil Appeal No. 752 of 1984, State of Andhra Pradesh and another Vs. K.S. Muralidhar and others, , to the Supreme Court. The Supreme

Court also upheld G.O.Ms.No.559, dated 18.7.1977 and the consequential appointment of upgraded Junior Engineers and directed that their

seniority should be counted from the notional date arrived at after giving weightage.

23. The Public Service Commission in August 1978 had conducted a test for the post of Junior Engineers under a limited and general recruitment.

The Junior Engineers selected under limited recruitment have joined as Junior Engineers in August 1978, June and July 1979.

24. The Government under Article 320(3) of the Constitution of India issued G.O.Ms.No.646, dated 14.9.1979 withdrawing from the purview of

the Service Commission all appointments made by direct recruitment to any post upto 9.8.1979 in the State Subordinate Service. By

G.O.Ms.No.647, dated 14.9.1979, the Government directed regularization of services of all temporary employees, who are in service as on

9.8.1979, without appearing for any test from the next date following the day on which last regular appointment in that category was made in the

unit concerned or from the date of temporary appointment whichever is later.

25. The said Government Orders were questioned by I.J. Diwakar and others before the State Administrative Tribunal in R.P.No.1639 of 1979.

The Administrative Tribunal by its order dated 11.9.1981 upheld G.Os. The matter was then carried in appeal, being Civil Appeal No. 2487 of

1982, I.J. Divakar and Others Vs. Government of Andhra Pradesh and Another, . The Supreme Court upheld G.O.Ms.No.646 and 647 dated

14.9.1979 by observing that in view of the compelling necessity, regularization of temporary services was justified and directed the Service

Commission to proceed with the finalisation of list of selection.

26. O.A. Nos.6116, 6533 of 1993, 1335, 1611 of 1994, 3620 and 4467 of 1997 were filed to declare G.O.Ms.No.54, dated 15.2.1983 in so

far as Clause (b) under Column 2 standing against Category 6 of the Table under Rule 2 and Note 3 appended to Rule 4 of the A. P. Engineering

Service Rules is concerned, as unconstitutional and violative of Articles 14 and 16 of the Constitution of India. O.A.Nos. 47298 to 47302 of 1998

were filed to set aside the retrospective effect given to the amended Rules from 28.2.1972 and also to declare the inclusion of Note-3 below the

table under Rule 4 of A. P. Engineering Service Rules as illegal and arbitrary. By reason of a judgment dated 15.6.1995 the learned Tribunal

quashed G.O.Ms.No.54 to the extent of giving retrospective effect from 1972, introducing of note under Category 6 in Rule 2 by excluding the

applicability of General Rule 6, in introducing Note-3 under Rule-4 providing for weightage in seniority in the cadre of Junior Engineers for those

appointed by transfer from the post of Supervisor and in excluding Junior Engineers appointed by transfer from Supervisors from the requirement

of being put on probation under Special Rule 6. Civil Appeal No.387 of 1997 was preferred in the Supreme Court against the said judgment and

the Supreme Court by reason of an order dated 15.1.1997 set aside the judgment of the learned Tribunal and remitted back the matter to the

Tribunal for deciding the validity of the impugned Rule afresh by keeping in view its earlier decision in R.P.No.799 of 1977 and batch dated

1.8.1983.

27. On remand from Supreme Court, the matters were heard by a Full Bench of the learned Tribunal and the following points were framed for its

consideration:

1) Whether the judgments of the Apex Court in Devi Prasad v. Govt. of A.P. reported in 1980 Suppl SCC 206 and the judgment of this Tribunal

in R.P.799/77 which merged into the decision of the Supreme Court in State of Andhra Pradesh and another Vs. K.S. Muralidhar and others,

operate as res judicata:

2) Whether the impugned G.O.Ms.No.54, Irrigation (Services-IV-2) dated 15.2.1983 is arbitrary, illegal, contrary to the provisions of the

Presidential Order and violative of Articles 14 and 16 of the Constitution of India.

28. The learned Tribunal dismissed the Original Applications holding that G.O.Ms.No.54, dated 15.2.1983 and consequential amendments made

to A.P. Engineering Service rules are legal, valid and in accordance with rules and law. It further observed:

1) The Junior Engineers on acquisition of Degree qualification in Engineering would be entitled for weightage of those appointments are made or

deemed to have been made under the Rules providing for such appointments and weightage with reference to their dates of appointment (not with

reference to acquisition of degree qualification) against a vacancy in the cadre of Junior Engineer.

2) The Government is advised to consider fixing a ratio between direct recruits and those appointees by appointment by transfer to the post of

Junior Engineer (now Assistant Executive Engineer) to the post of Assistant Engineer (now Deputy Executive Engineer).

29. Questioning the aforementioned order of the learned Tribunal, Writ Petition Nos.5922 and 6360 of 1999 have been filed.

30. Earlier, these writ petitions were heard by a Division Bench, but having regard to the importance of questions of law and fact involved therein

the matters have been referred to Full Bench.

#### SUBMISSIONS:

31. Mr. J.R. Manohar Rao, learned counsel appearing on behalf of the petitioners, would submit that the finding of the learned Tribunal to the

effect that its judgment in R.P.No.799 of 1977 dated 1.8.1983 operates as res judicata is not correct inasmuch as the validity of G.O.Ms.No.54,

dated 15.2.1983 as also G.O.Ms.Nos.451 and 559 had not been considered by the Supreme Court in K.S. MURALIDHAR (supra). The

learned counsel placed reliance on the decision of the Apex Court in MOST REV. P.M.A. METROPOLITAN v. MORAN MAR

MARTHOMA (1995) Supp. (4) 286, for the proposition that it is only the appellate order that operates as res judicata but not the order under

appeal.

32. The learned counsel would contend that even though the Governor in exercise of his powers under Article 309 of the Constitution of India

could frame rules making them applicable with retrospective effect, however, the same should not affect the rights of existing employees in the

matter of inter se seniority. In support of his contention, the learned counsel placed reliance on the decisions of the Supreme Court in B.S. Yadav

and Others Vs. State of Haryana and Others, , Ex-Capt. K.C. Arora and Another Vs. State of Haryana and Others, , P.D. Aggarwal and Others

Vs. State of U.P. and Others, and K.V. Subba Rao and Others Vs. Government of Andhra Pradesh and Others, . In elaboration of his contention,

he would submit that by giving retrospective effect to the Rules from 28.2.1972, the Government created a channel for the Supervisors to be

appointed as Junior Engineers, even though no Supervisor was appointed between 28.2.1972 and 10.6.1976 and by that action the regular Junior

Engineers who were appointed between 28.2.1972 and 15.2.1983 have been affected. He would also submit that the temporary appointments

that were made after 10.6.1976 were contrary to rules and by reason of the said amendment, illegal appointments would be regularized. For the

proposition that an illegal appointee could not be regularized, the learned counsel while placing reliance on a decision of the Apex Court in R.N.

Nanjundappa Vs. T. Thimmiah and Another, , would contend that any retrospective effect given to amendment made in G.O.Ms.No.54, dated

15.2.1983 is violative of Articles 14 and 16 of the Constitution of India.

33. The learned counsel would further contend that any rule, which violates the equality in continuance, promotion, etc., of a person who entered

service and which results in discrimination in the matter of seniority, is violative of Articles 14 and 16 of the Constitution. For the said proposition

he relied on a decision in K. Narayana Vs. State of Karnataka, .

34. The learned counsel would also contend that by reason of weightage of 1/3rd period of service rendered in the category of Supervisor being

given in view of the impugned rule, the upgraded Supervisor is getting his notional seniority fixed from anterior date on which he was not even

qualified to hold the post of Junior Engineer, and whereby an unqualified person would be treated senior to a qualified person, which is opposed to

the principle that service rendered in a subordinate service cannot be counted towards seniority in the State Service. Further, seniority of a person

is to be determined with reference to the date of his first appointment to such service, class or category. He would contend that the learned

Tribunal erred in upholding the impugned rule of giving weightage basing on the decisions in DEVI PRASAD and K.S. MURALIDHAR, which

could be distinguished in view of the fact that prior to 28.2.1972 both Supervisors and Junior Engineers belonged to same non-Gazetted category.

35. Mr. Prakash Reddy, the learned Additional Advocate General appearing on behalf of the State, however, would submit that the weightage rule

had been in force in the State of Andhra Pradesh since 1983. The validity of the earlier Government Orders had been gone into in DEVI

PRASAD, as also in K.S. MURALIDHAR, though no discussion appears to have been made in mis regard.

36. The learned Additional Advocate General would contend that the circumstances obtaining in DEVI PRASAD and also in the instant case are

similar and thus the said decision has a bearing in the instant case. He would distinguish the decision in NARAYANA (supra) on the ground that in

the instant case there had been a long standing practice and the Supervisors, as also the Junior Engineers had been discharging the same functions.

The performance of similar jobs is one of the grounds wherefor retrospective effect has been given. The learned Additional Advocate General

would concede that in any event, the Supervisors were entitled to be promoted to a higher post even if they had not obtained any Degree. In

support of his aforementioned contention, the learned Additional Advocate General has placed reliance on V. Sreenivasa Reddy and others Vs.

Govt. of Andhra Pradesh and others, Ram Janam Singh Vs. State of Uttar Pradesh and another, , STATE OF BIHAR v. AKHOURI

SACHINDRA NATH 1992 (3) SLR 94, Vijay Singh Deora and Others Vs. State of Rajasthan and Another, , S. Prakash and Another Vs. K.M.

Kurian and Others, and M. Ramachandran Vs. Govind Ballabh and Others, .

37. Mr. Balakrishna Murthy learned counsel appearing on behalf of the respondents, on the other hand, would submit that since 1973 the question

has received the attention of the Tribunal, the High Court and the Supreme Court in various cases. According to the learned counsel, having regard

to the fact that in R.P.No.799 of 1977, a specific prayer was made by way of amendment of the Original Application questioning the vires of the

said G.O.Ms.No.54, dated 15.2.1983, the principles contained in Explanation 5 appended to Section 11 of the CPC would apply. The learned

counsel would contend that in any event, the matter is squarely covered by the decisions of the Apex Court in DEVI PRASAD and MURALIDHAR and thus only because the said G.O.Ms.No.54, dated 15.2.1983 had not been expressly declared to be ultra vires, the same

could not be a ground to reopen the matter any further. Reliance, in this connection, has been placed on Forward Construction Co. and Others

Vs. Prabhat Mandal (Regd.), Andheri and Others, , The Direct Recruit Class-II Engineering Officers" Association and others Vs. State of

Maharashtra and others, and Daryao and Others Vs. The State of U.P. and Others, .

38. He would contend that in view of the judgment in K.S. MURALIDHAR directing weightage as given in G.O.Ms.No.559 dated 18.7.1977

was to be applied and notional date worked out for the purpose of seniority in paragraph 19, it would be a futile exercise and this Court cannot go

into the aforementioned decision. As regards the question as to whether any retrospective effect could be given to G.O.Ms.No.54, dated

15.2.1983 the learned counsel would contend that the category of Junior Engineers had been created with effect from 28.2.1972 and such of

those petitioners who had acquired the qualification earlier thereto having been given the benefit of weightage of service rendered in the post of

Supervisor subject to maximum of four years, there is no reason as to why the said benefit cannot be extended to the respondents herein. It has

been pointed out that having regard to the decision in MURALIDHAR (supra), the benefit of G.O.Ms.No.559, dated 18.7.1977 is required to be

given.

39. In view of the above submissions, the question that arises for consideration is:

(i) Whether the principles of res judicata are applicable? If not, whether G.O. Ms. No.54 is invalid?

40. In order to consider the aforementioned question, it is relevant to have a look at Section 11 of the Code of Civil Procedure, which reads:

Res Judicata : No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in

a former suit between the same parties, or under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has

been subsequently raised, and has been heard and finally decided by such Court.

Explanation I:--The expression ""former suit"" shall denote a suit which has been decided prior to the suit in question whether or not it was instituted

prior thereto.

Explanation II :--For the purpose of this section, the competence of a Court shall be determined irrespective of any provisions as to a right of

appeal from the decision of such Court.

Explanation III:--The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or

impliedly, by the other.

Explanation IV :--Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have

been a matter directly and substantially in issue in such suit.

Explanation V :--Any relief claimed in the plaint, which is not expressly granted by the decree, shall, for the purposes of this section, be deemed to

have been refused.

Explanation VI :--Where persons might litigate bona fide in respect of a public right or of a private right claimed in common for themselves and

others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.

Explanation VII :--The provisions of this section shall apply to a proceeding for the execution of a decree and references in this section to any suit,

issue or former suit shall be construed as references respectively, to a proceeding for the execution of the decree, question arising in such

proceeding and a former proceeding for the execution of that decree.

Explanation VIII :--An issue heard and finally decided by a Court of limited jurisdiction, competent to decide such issue, shall operate as res

judicata in a subsequent suit, notwithstanding that such Court of limited jurisdiction was not competent to try such subsequent suit or the suit in

which such issue has been subsequently raised.

41. Section 11 of the CPC or the general principles of res judicata must be applied only when the condition precedent therefore are satisfied. The

principles of res judicata contemplate that the issues may be directly or substantially the same; they have been raised between the parties or under

the same title; and they have been finally decided by such court. By reason of the Explanation appended to Section 141 of the Code the procedure

provided in the Code is not applicable to any proceeding under Article 226 of the Constitution. However, general principles of res judicata and

constructive res judicata are applicable. With a view to find out as to whether the principles of res judicata are applicable it may be necessary for

the court to look to the pleadings of the parties, to find out as to how and in what manner the issues, if any, were involved and whether there has

been any final determination thereof. The principles of res judicata have certain exceptions. When question of jurisdiction or a pure question of law

is raised, the same will not be res judicata. If constitutionality of a provision is raised but not decided not only the same will not operate as res

judicata as a result whereof it will be open to the court to decide the said issue subsequently. When a question is decided by the higher courts only

with regard to the lis between the parties and the wider aspect of the matter leading to the constitutional interpretation of a provision had not been

taken recourse to, it is open to the court to do so in future. Similarly, a question which has been decided in the fact of the matter which is not to be

treated to be a binding precedent cannot be held to be so. Generally a decision which is rendered per incuriam or passed sub silentio also does not

constitute a binding precedent in so far as the co-ordinate benches of same multi-judge court.

42. Now turning to the case law on the principle of res judicata, it would be expedient to notice the decision of the Apex Court in Chief Justice of

Andhra Pradesh and Others Vs. L.V.A. Dixitulu and Others, , wherein on the applicability of principles of res judicata and estoppel held:

Where the decision of"" a Tribunal is challenged on a pure question of law depending upon interpretation of a constitutional provision, which, if

upheld, would make the decision of the Tribunal as having been given by an authority suffering from inherent lack of jurisdiction, the decision

cannot be sustained by invoking doctrine either of res judicata or estoppel.

43. In DIRECT RECRUIT CLASS II ENGINEERING OFFICERS ASSOCIATION (supra), however it has been held by the Apex Court that

the principles of res judicata and constructive res judicata are applicable to writ proceedings also.

44. In Krishan Lal Vs. State of Jammu & Kashmir, , it has been held:

In so far as the second ground given by the High court the same being bar of res judicata it is clear from what has been noted above, that there

was no decision on merits as regards the grievance of the appellant; and so, the principle of res judicata had no application. The mere fact that the

learned Single Judge while disposing of the Writ Petition No.23 of 78 had observed that: ""This syndrome of errors, omissions and oddities, cannot

be explained on any hypothesis other than the one that there is something fishy in the petitioner"s version...."" which observations have been relied

upon by the High court in holding that the suit was barred by res judicata do not at all make out a case of applicability of the principle of res

judicata. The conclusion of the High court on this score is indeed baffling to us, because, for res judicata to operate the involved issue must have

been ""heard and finally decided"". There was no decision at all on the merit of the grievance of the petitioner in the aforesaid writ petition and,

therefore, to take a view that the decision in earlier proceeding operated as res judicata was absolutely erroneous, not to speak of its being

uncharitable.

45. Having regard to the Explanation appended to Section 141 of the Code of the Civil Procedure, there cannot be any doubt that the provisions

of the CPC are not applicable to the writ proceedings. In terms of the Writ Proceedings Rules framed by this Court only the procedural provisions

contained in CPC would apply. However, there cannot be any doubt that irrespective of applicability of Section 11 of the Code of Civil

Procedure, per se the general principles of res judicata and constructive res judicata apply to cases in writ proceedings.

46. It is, however, well settled that where the constitutional issues are involved, generally the principles of res judicata would not apply. Further,

when the Court moulds the relief in a case where the constitutionality of a provision of a statute or Government Order or statutory rule and

instruction is in question, the Court may not determine the same. It is axiomatic that the principles of res judicata or constructive res judicata shall

not apply in such a case inasmuch as having regard to the provisions contained in Article 13 of the Constitution of India, once a provision is found

to be unconstitutional, the same would be a nullity from its very inception. If a provision is found to be nullity from its inception, only because on

earlier occasions the Courts did not consider the question and moulded the relief in deciding the case, the principles of res judicata shall not apply.

The said principles apply only where the matter has been finally heard and determined.

47. It may, however, be another thing to say as to what would be the impact of the judgment of the Supreme Court in K.S. MURALIDHAR and

whether the same covers the field or not.

48. The question, in our opinion, having regard to the rival contentions raised must be answered by the Constitutional Court.

49. Mr. P. Balakrishna Murthy, learned counsel appearing on behalf of the respondents, would contend that it cannot be said that the judgment in

K.S. MURALIDHAR stood modified or altered or overruled by the Supreme Court in G.S. Venkat Reddy and others etc. etc. Vs. Government

of Andhra Pradesh and others, , in relation to upholding of weightage and fixation of seniority from the notional date pursuant thereto inasmuch as

the Apex Court did not refer to the decision in K.S. MURALIDHAR in G.S. VENKAT REDDY. He contended that it is not the case of Asst.

Executive Engineers regularised under G.O.Ms.No.647 and the Government that the judgment in K.S. MURALIDHAR was declared per

incuriam.

50. The Apex Court in G.S. VENKAT REDDY at paragraphs 13, 15 and 16 of the judgment and in P.B. CHOWDHURY at paragraph 4 of the

judgment held that the benefits flowing in respect of 1978 PSC batch are not restricted to the petitioners in I.J. DIWAKAR group but extends to

the entire 1978 PSC batch. It was held that all the candidates who were selected in 1978 PSC general recruitment, irrespective of the fact whether

they were regularized under G.O.Ms.No.647 are to be considered as in I.J. DIWAKAR"s batch as per the directions in paragraph 15 of

G.S.VENKAT REDDY. The decision in G.S. VENKAT REDDY was delivered on 16.7.1993 and the decision in K.S. MURALIDHAR was

delivered on 22.1.1992. In K.S. MURALIDHAR, the dispute was relating to seniority between candidates who were selected in special qualifying

test and the upgraded supervisors, whereas in G.S. VENKAT REDDY the issue of seniority relating to all categories was decided.

51. Whether the principles of res judicata would be applicable or not, must be determined having regard to the subsequent orders passed by the

apex court. (See: S. RAJAMALLAIAH v. GOVT. OF A.P., CA No.387 of 1997, dated 15-1-1997, and P.B. CHOWDHURY v. GOVT. OF

A.P., CA No.388 of 1997, dated 15-1-1997).

52. The aforementioned decisions of the apex court are clearly indicative of the fact that even according to the Supreme Court the issue as regards

validity of G.O.Ms.No.54 had not been determined. Ahmadi, J., was a member of the Bench both in the aforementioned order as also in the case

of K.S.MURALIDHAR. The Supreme Court directed the Tribunal to consider the constitutionality of G.O.Ms.No.54 afresh. Had the apex court

found that its decision in K.S.MURALIDHAR would operate as res judicata the question of the matter of remitting back the same to the tribunal

could not have arisen. The Tribunal considered the said question. We are therefore, of the opinion that the principles of res judicata would have no

application in the instant case.

53. G.O.Ms.No.559 dated 18.7.1977 has not been declared to be valid by the decisions in R.P.No.799 of 1977 and K.S. MURALIDHAR, but

it was only interpreted. In DEVI PRASAD, K.S. MURALIDHAR, G.S. VENKAT REDDY and NIRMALA, the validity of G.O.Ms.No.54

dated 15.2.1983 had neither been gone into nor determined.

54. Mr. Balakrishna Murthy, learned counsel appearing on behalf of the respondents sought to make a distinction between a declaration of law

and determination of inter party disputes. It is not necessary to delve into the principles governing the field having regard to the directions of the

Supreme Court itself. If the contention of Mr. Balakrishna Murthy is to be accepted that the decision in K.S. MURALIDHAR has attained finality

because it contained the directions as to how the seniority should be fixed, the Court is also bound by the directions of the Supreme Court to the

Tribunal that the question relating to the constitutionality of G.O. Ms. No.54 be determined.

55. Was it, in the aforementioned situation, open to the Tribunal not to determine the question of constitutionality of G.O.Ms.No.54?

56. The answer to the said question must be rendered in negative. If the said question had been determined by the Tribunal in one way or the

other, the High Court, evidently, is not precluded from going into the said question in exercise of its power of judicial review having regard to the

decision of the Apex Court in L. Chandra Kumar Vs. Union of India and others, .

57. However, recently the Apex Court in M/s. Indian Petrochemicals Corporation Ltd. and Another Vs. Shramik Sena, , has categorically held

that even where there exists conflicting decisions, it is for the High Court to interpret the same. It was held:

We have perused the impugned order of the High Court. We are unable to appreciate the approach of the High Court. Even when it was faced

with diametrically apposite (sic opposite) interpretation of the judgment of this Court, it was expected of the High Court to decide the case (writ

petition) on merit according to its own interpretation of the said judgment,

58. Reference to Article 137 of the Constitution of India by Mr. Balakrishna Murthy, in our considered opinion, is based on a wrong premise.

There cannot be any doubt that the Supreme Court may review its own order or a larger Bench may overrule the decision of the smaller bench as

has been held by the Apex Court in A.R. Antulay Vs. R.S. Nayak and Another, and Union of India (UOI) and Another Vs. Raghbir Singh

(Dead) by Lrs. Etc., .

59. In Supreme Court Advocates-on-Record Association and another Vs. Union of India, , upon which Mr. Balakrishna Murthy placed strong

reliance, the law has been stated in the following terms:

So it falls upon the superior courts in a large measure the responsibility of exploring the ability and potential capacity of the Constitution with a

proper diagnostic insight of a new legal concept and making this flexible instrument serve the needs of the people of this great nation without

sacrificing its essential features and basic principles which lie at the root of Indian democracy. However, in this process our main objective should

be to make the Constitution quite understandable by stripping away the mystique and enigma that permeates and surrounds it and by clearly

focussing on the reality of the working of the constitutional system and scheme so as to make the justice delivery system more effective and

resilient. Although frequent overruling of decisions will make the law uncertain and later decisions unpredictable and this court would not normally

like to reopen the issues which are concluded, it is by now well settled by a line of judicial pronouncements that it is emphatically the province and

essential duty of the superior courts to review or reconsider their earlier decisions, if so warranted under compelling circumstances and even to

overrule any questionable decision, either fully or partly, if it had been erroneously held and that no decision enjoys absolute immunity from judicial

review or reconsideration on a fresh outlook of the constitutional or legal interpretation and in the light of the development of innovative ideas,

principles and perception grown along with the passage of time. This power squarely and directly falls within the rubric of judicial review or

reconsideration.

....It was only in the above brief historical recapitulation including the opinion of the experienced judges and jurists etc., and the compelling

necessity, we now in the eleventh hour, boldly set ourselves with renewed energy to the task of reconsidering the decision in Gupta case on a

proper and just interpretation of the relevant constitutional provisions and definitely not on an imaginative reinterpretation and to explore the

situation as to whether the needed changes could be made by ourselves rather than by legislative, process be entering into the realm of the original

intention of the Constitution thereby undoubtedly ensuring a palladium to protect the independence of judiciary from being violated or impaired or

damaged. Otherwise we apprehend that strikingly disastrous and calamitous results would follow in the proper functioning of the judiciary and that

the system itself would become dysfunctional.

60. However, in K.S.MURALIDHAR no law has either been interpreted or has been declared, but certain directions merely have been issued,

which were inter parties, for giving quietus to the issue. The matter could be re-agitated before the appropriate forum having regard to the

subsequent developments.

61. It is now well settled principle of law that a point, which has not been argued, cannot be treated to be a precedent. What is binding upon the

High Court, having regard to Article 141 of the Constitution of India, is the law laid down by the Apex. Court. The judgment of the Apex Court

also must be interpreted having regard to the fact situation involved therein. Any cursory observation made which has no bearing to the fact matter

does not operate as a binding precedent. Even a title variation of fact or additional fact may also lead to a different conclusion.

62. In Dias on Jurisprudence, Fifth Edition (at page 143), it is stated-

Pronouncements of law, which are not part of the ratio decidendi are classed as obiter dicta and are not authoritative. Rationale and dicta tend to

shade into each other. The former have law-quality and are binding on lower courts; dicta, too, have law quality but are not binding at all. Vis-ar-

vis a higher court even the ratio decidendi of a lower court decision has only persuasive force like that of a dictum. It has been pointed out that

some dicta are so authoritative that the distinction between ratio and dictum is reduced to vanishing point. Dicta, which have no force, are

propositions stated by way of illustration or on hypothetical facts. Greater difficulties attend rulings of law which are subsequently relegated to the

status of dicta by interpretation. The distinction in such cases between ratio and dictum is but a device employed by subsequent courts for the

adoption or rejection of doctrine expressed in previous cases according to the inclination of the Judges. An example would be the treatment of

Lord Atkin's neighbour proposition in subsequent cases.

63. In Salmond on Jurisprudence (12th Edition page 29), it is stated-

One of the essential features of the doctrine of precedent in the common law is that rules of law are developed in the very process of application.

This means that they are created by judges and not by teachers and other academic lawyers. However, learned they may be. It also means that

they are created by judges only when acting as Judges i.e., when deciding cases and not for example when giving lectures or other addresses,

statements made by judges in their extra-judicial capacity, like other extra-judicial opinions, are without binding authority. For the fundamental

notion is that the law should result from being applied to live issues raised between actual parties and argued on both sides.

In the course of his judgment, however, a judge may let fall various observations not precisely relevant to the issue before him. He may for instance

illustrate his general reasoning by reference to hypothetical situation and the law which he considers to apply to the case. Here of course, since the

issue is not one that arises between the parties, full argument by counsel will be lacking, so that it would be unwise to accord the observation equal

weight with that given to his actual decision. Or again, having decided the case on one point, (he judge may feel it unnecessary to pronounce on the

other points raised by the parties, but he may nevertheless want to indicate how he would have decided these points if necessary. Here again we

are not given the judge's final decision on a live issue, so that once more it would be unwise to endow it with as much authority as the actual

decision. These observations by the way, obiter dicta are without binding authority, but are nonetheless important; not only do they help to

rationalize the law but they serve to suggest solutions to problems not yet decided by Courts. Indeed dicta of the House of Lords or of judges who

were masters of their fields, like Lord Blackburn, may often in practice enjoy greater prestige than the rationale of lesser judges.

64. In Commissioner of Income Tax Vs. M/s. Sun Engineering Works (P.) Ltd., , Dr. A.S. Anand, J (as the learned Judge then was) stated the

law in the following terms:

...It is neither desirable nor permissible to pick out a word or a sentence from the judgment of this Court, divorced from the context of (he

question under consideration and treat it to be (he complete "law" declared by this Court. The Judgment must be read as a whole and the

observations from the Judgment have to be considered in the light of the questions which were before this Court.....

65. In JAVA SEN v. SUJIT KR. SARKAR ILR 2000 A&N 145, it was held-

It is now well known that a decision is an authority for what it decides and not what can logically be deduced therefrom. It is also well known that

even a slight distinction in fact or an additional fact may make a lot of difference in decision making process (See Quinn v. Leathair (1990-1993)

AER (Rep.) 1), Krishana Kumar and Others Vs. Union of India and others, , Commissioner of Income Tax Vs. M/s. Sun Engineering Works (P.)

Ltd., , The Regional Manager and Another Vs. Pawan Kumar Dubey, and Municipal Corporation of Delhi v. Gurnam Kaur 1988(1) SCC 101

66. It is also a settled law that a decision is not an authority on a point which was not argued. [See: Mittal Engineering Works (P) Ltd. Vs.

Collector of Central Excise, Meerut, ].

In A-ONE GRANITES v STATE OF U.P. AIR 2001 SCW 848, it is observed:

The first question which falls for consideration of this Court is as to whether the question regarding applicability of Rule 72 of the Rules in relation

to the present case is concluded by the earlier decision of this Court rendered in Prem Nath Sharma Vs. State of U.P. and another, . From a bare

perusal of the said judgment of this Court it would be clear that the question as to whether Rule 72 was applicable or not was never canvassed

before this Court and the only question which was considered was whether there was violation of the said rule.

This question was considered by the Court of Appeal in *Lancaster Motor Co (London) Ltd v. Bremith Ltd* (1941) 1 KB 675, and it was laid

down that when no consideration was given to the question, the decision cannot be said to be binding and precedents *sub silentio* and without

arguments are of no moment.

67. In *Arnit Das Vs. State of Bihar*, the Apex Court observed:

A decision not expressed, not accompanied by reasons and not proceeding on a conscious consideration of an issue cannot be deemed to be a

law declared to have a binding effect as is contemplated by Article 141. That which has escaped in the judgment is not the *ratio decidendi*. This is

the rule of *sub silentio*, in the technical sense when a particular point of law was not consciously determined.

68. A decision, having regard to the aforementioned authoritative pronouncements of the Apex court must, thus, be read in the context what has

been rendered. A decision as is well known cannot be read as a statute. The ratio must be culled out from a decision upon reading the judgment in

its entirety and not in isolation.

Validity of G.O.Ms.No.54 dated 15.2.1983:

69. The said G.O., reads as under :

In the said Special Rules:

(1) In Rule 2, the entry in column 2 of the Table against Category-6 Junior Engineers shall be lettered as clause (a) and after it is so lettered the

following entry shall be added namely:-

(b) Recruitment by transfer of supervisors of the Andhra Pradesh Engineering subordinate service who have acquired the B.E. or A.M.I.E. (India)

qualification and who are approved probationers in that category.

NOTE :--The provisions of General Rule 6 shall not apply for appointment either by direct recruitment or by transfer to the category of Junior

Engineers.

(2) In column (2) and (3) of the Table under Rule 4 against the category of Junior Engineers the following entries shall be added at the end namely-

:-

Recruitment Must possess B.E. or A.M.I.E. by transfer (India) qualification in civil or Mechanical Engineer.

(3) After Note (2) below the Table under Rule 4 the following shall be inserted namely:-

Note :--(3) A Supervisor who is appointed by transfer as Junior Engineer on or after 28.2.1972 shall be entitled to count 1/3rd of the service

rendered as Supervisor before appointment as Junior Engineer subject to a maximum of 4 years weightage for the purpose of computing the

service as Junior Engineer, which will render eligible for consideration for promotion as Assistant Engineer, and subject to the following conditions:-

(i) The seniority of a Supervisor, who is appointed as Junior Engineer shall be fixed in the category of Junior Engineers with reference to the

notional date arrived at after giving weightage of service aforesaid;

(ii) A Supervisor who is appointed as Junior Engineer shall put in a minimum service of one year on duty as Junior Engineer, after such

appointment, and a total service of five years as Junior Engineer, inclusive of the period given as weightage to become eligible for promotion as

Assistant Engineer;

(iii) No Supervisor shall ordinarily be eligible for appointment as Junior Engineer, unless he has put in a minimum service of three years as

Supervisor;

(iv) A Supervisor with less than three years of service, who is appointed as Junior Engineer for any special reasons, shall not be entitled to any

weightage of his past service as Supervisor.

70. The petitioners herein had not questioned the validity of entire G.O. Ms. No.54 dated 15.2.1983. They, however, contend that the weightage

rule should be confined to the eligibility and the same should not be considered for the purpose of seniority.

71. By reason of weightage rule, seniority of others cannot be affected. G.O.Ms.No.54 was made in terms of the proviso to Article 309 of the

Constitution. The principle of granting weightage, however, as noticed hereinbefore, was the subject matter of various executive instructions. By

reason of such executive instructions, accrued seniority of any other person had not been affected.

72. The rule made under the proviso to Article 309 of the Constitution of India may be given retrospective effect. But it is trite that retrospectivity

granted thereby must pass the test of Articles 14 and 16 of the Constitution of India.

73. In UNION OF INDIA v. P.V. SUBBA RAO [Writ Petition No.4766 of 2006, dated 14.8.2001] two of us (S.B.SINHA. CJ &V.V.S.

RAO, J) considered the decisions in A.K.NIGAM v. SUNIL MISRA 1994 (4) SLR 20 (SC), Devendra Narayan Singh and others Vs. State of

Bihar and others, , UNION OF INDIA v. VIPINCHANDRA HIRALAL SHAH [1997 (1) SLJ 69, UNION OF INDIA v. N.R. BANERJEE

1997 SCC (L&S) 1994 and H.S. GREWAL v. UNION OF INDIA, 1998 (1) SLJ 259, and inter alia the following principles have been laid

down:

(i) The principle of weightage has to be applied having regard to other principles of seniority and cannot be construed or applied in a straight jacket

formula;

(ii) The principle of weightage has to be applied by giving due weightage of service of five years from the date of substantive appointment and not

from the year of allotment;

(iii) If the principle of giving five years of weightage in service in the promoted category is reckoned with reference to year of allotment, the same

would violate the principle of equity in Articles 14 and 16 of the Constitution of India, in that, even a person whose claims were rejected earlier or

who was not qualified or who was not within the zone of consideration would get the benefit of weightage of five years of service which is illogical

and illegal.

74. Seniority is not a fundamental right, but it is a civil right. A person, however, has a fundamental right to be considered for promotion. Such a

right to be considered for promotion largely depends upon seniority.

75. The principle of giving weightage of 1/3rd service rendered by the upgraded Supervisors before appointment as Junior Engineer shall be

calculated subject to a maximum of four years, which would be considered for the purpose of promotion as Assistant Engineer. By reason of G.O.

Ms.No.559 dated 18.7.1977, four years" weightage had been given. However, the upgraded Supervisors were to be considered for promotion as

Assistant Engineer only after rendition of one year service as Junior Engineer. Clauses (ii) and (iii) of the said G.O. 559 are as follows:

(ii) A Supervisor who is appointed as Junior Engineer shall be entitled to count 1/3rd of the service rendered by him as Supervisor, before his

appointment as Junior Engineer, subject to a maximum of four years, for the purpose of computing the service as Junior Engineer, which will render

him eligible for consideration for promotion as Assistant Engineer.

(iii) The seniority of the Supervisors who are appointed as Junior Engineers, shall be fixed with reference to the notional date arrived at after giving

weightage of service.

76. It is not in dispute that the upgraded Supervisors were entitled to be consideration for promotion. But by reason of the said G.O.Ms.No.285,

dated 22.2.1967, they could be considered for promotion after rendition of ten years of service, whereas the Junior Engineers could be considered

for such promotion after rendition of five years of service. In K.S. MURALIDHAR, clauses (ii) and (iii) of the said G.O. Ms. No.559, which had

no adverse effect on seniority, had been upheld. So far as appointees under G.O.Ms.No.647 are concerned, in terms of the decision in

G.S.VENKAT REDDY their seniority had also been fixed. The rule was amended on 15.6.1972 by G.O.Ms.No.893.

77. How the accrued seniority of some of the petitioners would be affected if G.O.Ms.No.54 is given effect to may be noticed from the following

particulars furnished in Writ Petition No.6360 of 1999, which arises out of O.A.No. 6533 of 1993:

Sl. Name of the Year of passing Appoinlment date as AEE Notional date as Asst.

No. respondent degree by transfer Ex. Engineer

1. Md.Sirajuddin. 1986 7.5.1986 6.5.1982

2. B.Seval 1986 6.5.1986 6.6.1982

3. Md. 1986 31.7.1986 31.7.1982

Zinullabuddin

4. G. Uppalaiah 1987 4.10.1987 19.11.1983

5. V.T.Venatesnwau 1987 4.10.1887 26.2.1984

6. K.Bhaskar 1988 8.9.1988 2.6.1985

7. P. Maheedar Raj 1988 3.3.1989 30.10.1985

8. A. Gopal 1988 31.3.1989 26.10.1985

78. From the aforesaid particulars, it would appear that the notional date, has been fixed for the purpose of seniority without reference to existing

vacancies. Services rendered in the years 1986-87 by the upgraded Supervisors has been considered for the purpose of grant of seniority at a

point of time when the upgraded Supervisors did not have the requisite qualification to hold the post. The Supervisors, who were at that point of

time, were holding the non-gazetted posts were being governed by the A.P. Engineering Subordinate Service and thus they could not have been

treated on par with those who are occupying the gazetted post. Although the Rules were amended in the year 1982, the same had been given a

retrospective effect from 1972. If the said rules are to be given effect to, other statutory rules which were governing the field would be set at naught

as a result whereof the appointments deemed to have been made by reason of the impugned order would be de hors the rules.

79. Further more, those who have been appointed regularly cannot be subjected to loss of seniority at the instance of those whose services had

been regularized subsequently.

80. It is in the aforementioned background, the validity of the said rules is required to be considered. In B.S. YADAV v. STATE OF HARYANA, a Constitution Bench of the Apex Court struck down the retrospective effect given to the rule as it affected the rights of the existing

personnel as on that date. The decision in B.S. YADAV was considered and followed in K.C. ARORA (supra), P.D. AGARWAL (supra) and

K.V. SUBBA RAO (supra). The said decisions apply on all fours in the present case inasmuch as by reason of retrospective amendment even

though no Supervisor was appointed between 28.2.1972 and 10.6.1976, they would be held to have been appointed as Junior Engineers. The

Supervisors would claim to have become Junior Engineers with effect from 28.2.1972 as a result whereof those regular Junior Engineers who were

appointed between 28.2.1976 and 15.2.1983 would be affected. It is also trite that regularization is not a mode of appointment. For a valid

appointment, it is absolutely necessary to follow the rules which were governing the field at the relevant point of time. In R.N. NANJUNDAPPA

(supra), it was held that no appointment could be made in contravention of Article 309 of the Constitution of India. The Apex Court opined:

If the appointment itself is in infraction of the rules or if it is in violation of the provisions of the Constitution illegality cannot be regularised.

Ratification or regularisation is possible of an act which is within the power and province of the authority but there has been some noncompliance

with procedure or manner which does not go to the root of the appointment. Regularisation cannot be said to be a mode of recruitment. To accede

to such a proposition would be to introduce a new head of appointment in defiance of rules or it may have the effect of setting at naught the rules.

....the contention on behalf of the respondents that the regularisation was itself a mode of appointment under Article 162 of the Constitution is

unsound. The Rules came into existence in the present case in 1964. The regularisation was made in the year 1967. The regularisation was made

with effect from 1958. Therefore, the Rules became applicable. The regularisation in the present case was also bad because even without specific

methods of recruitment appointments could be made only by selection or promotion or transfer from equivalent grade. The method of recruitment

and qualification for each State Civil Service was to be set forth in the rules of recruitment of such service specially made in that behalf.

Article 162 does not confer power on the government to make rules for the recruitment or conditions of service. There can be rule for one person

or one post but rules are meant for recruitment and conditions of service. Rules are not for the purpose of validating an illegal appointment or for

making appointments or promotions or transfers. Rules under Article 309 are for the purpose of laying down the conditions of service and

recruitment. Therefore, the regularisation by way of rules under Article 309 in the present case by stating that notwithstanding anything in the rules

the appointment of the respondent was being regularised was in itself violation of the rules as to appointment and as to cadre and also as to the

proper selection. If the respondent were to be appointed by direct recruitment, there should have been "advertisements". Then others would have

the opportunity of applying. That would be proper selection,

81. The said principles have been applied by the Apex Court in V. Sreenivasa Reddy and others Vs. Govt. of Andhra Pradesh and others, .

82. In GOVT. OF ANDHRA PRADESH v. A.P. JAISWAL(2001) 1 SCC 748 : AIR 2001 SCW 101, the apex Court while considering the

question whether it was permissible for the Tribunal to ignore its earlier order validating the retrospective regularisation of cadre officers, held:

We have already noticed that there is no room for coming to such conclusion and that the finding of the earlier Bench of the tribunal was a

conclusive finding and what was said to be provisional in that judgment was only the question of applying the effects of the said retrospective

regularisation while considering the allotment of seniority in the gradation list to be prepared. In other words, with reference to such Telangana

Engineers who had not acquired any right to hold any particular post prior to 1.11.1956, they will be placed below the Andhra Engineers who got

an earlier date of entry into service because of the retrospective regularisation. Therefore, in our opinion, the subsequent Bench of the tribunal

could not have reopened the main question of retrospective regularisation by the impugned judgment.

83. The matter now stands squarely covered by a decision of the Apex Court in K. NARAYANA v. STATE OF KARNATAKA (supra). The

Apex Court therein considered the validity of the Karnataka Public Works Engineering Department Service (Recruitment) (Amendment) Rules,

1985. On the question of validity as well as reasonableness of Retrospectivity, the Apex Court held:

What the rules contemplate is that once a Junior Engineer acquires a degree qualification then he automatically should be deemed to have become

an Assistant Engineer. An employee occupying a higher post in different cadre may on regularisation be entitled to claim his seniority from the date

he was holding the post but giving a higher post in different cadre in which the employee has never worked either as officiating or temporary or

even ad hoc because the employee became eligible earlier would be violative of the right of equality. The methodology adopted in the rules by

transferring such a person and placing him in the category of direct recruits from the date of acquiring the degree the government in our opinion

violated the basic norms of appointment and recruitment to any particular service. The government may appoint all the Junior Engineers en bloc

after framing of the rule and place them below all those who were working as Assistant Engineers on that date but they cannot be so appointed as

to get precedence over those who are working from before. It would result in artificially making unequals as equals. Any person entering the

service can justly feel secure of equality in continuance, promotion etc. Any executive action violating it cannot be upheld. Seniority is an incident of

service which cannot be eroded or curtailed by a rule which operates discriminately.. . Devi Prasad was upheld by this court because it was found,

"as reasonable and in the circumstances fair". The dispute was between non-graduate diploma holders working as supervisors etc., and graduates

working as Junior Engineers. Since the court found that there was functional parity between supervisors and Junior Engineers the rule framed by

the government giving weightage of four years to supervisors to make them eligible for appointment as Assistant Engineer was not invalid. But there

can be no functional parity between employees of two different cadres. It would be too dangerous to accept such assumption.

Rules operate prospectively. Retrospectivity is an exception. Even where the statute permits framing of rule with retrospective effect the exercise of

power must not operate discriminately or in violation of any constitutional right so as to affect vested right. The rule-making authority should not be

permitted normally to act in the past. The impugned rule made in 1985 permitting appointment by transfer and making it operative from 1976

subject to availability of vacancy in effect results in appointing a Junior Engineer in 1986 with effect from 1976. Retrospectivity of the rules is a

camouflage for appointment of Junior Engineers from a back date. In our opinion the rule operates viciously against all those Assistant Engineers

who were appointed between 1976 to 1985.

84. In DEVI PRASAD (supra), a case of only one category of Supervisors was considered. No issue as regards seniority was involved therein. In

K.S. MURALIDHAR also one issue, as regards the seniority dispute between candidates who were selected in special qualifying test and the

upgraded Supervisors, was involved. As regards weightage, it was observed:

In our view the G.O.Ms.No.559 makes it abundantly clear that the appointments of these upgraded Supervisors who acquired the graduate

qualification while in service, would be prospective only and that they would be entitled to the weightage of four years of service rendered before

the appointment. The G.O.Ms, does not anywhere indicate that the weightage should be from the date of acquiring the degree qualification. It must

be borne in mind that it is only after acquiring such degree qualification that a Supervisor is appointed as Junior Engineer and having regard to the

service rendered by him the government as a policy decided to give weightage of four years for the purpose of considering the eligibility for

promotion as Assistant Engineer.

.....The question to be considered is from which date the weightage of four years" service should be given to the upgraded Junior Engineers namely

the Supervisors. Is it the date of acquiring the degree qualification or the date of their appointment? Having given our earnest consideration and for

the reasons stated above we hold that the weightage can be given only from the date of their appointment.

85. In R.P.No.799 of 1977 no declaration was made that G.O.Ms.No.559 was valid, out of which the case of K.S. MURALIDHAR arose. In

K.S. MURALIDHAR, the upgraded Junior Engineers and directly recruited Junior Engineers was not in issue.

86. We may notice that K.S. MURALIDHAR was decided on 22.1.1992 in relation to the cases of engineers of Irrigation Department. Therein a

direction had been given as to how to prepare a seniority list keeping in view only two batches. In G.S.VENKAT REDDY unfortunately the

decision in K.S. MURALIDHAR had not been referred to although the same was disposed of on 16.7.1993. In both K.S. MURALIDHAR and

G.S. VENKAT REDDY the upgraded supervisors and the State were parties. If K.S. MURALIDHAR had not been brought to the notice of the

Supreme Court in G.S. VENKAT REDDY, the State and the upgraded supervisors are to be blamed therefor.

87. The decision in K. NARAYANAN was rendered on 2.9.1993 by a larger bench wherein both DEVI PRASAD and K.S. MURALIDHAR

have been pointedly referred to. NARAYANAN"s dicta admittedly runs counter to the DEVI PRASAD and K.S.MURALIDHAR. Only

because it had not been expressly overruled or held to have been rendered per incuriam the same would not mean that the decision of the apex

court does not run contrary to its earlier decision.

88. At this juncture, we may also notice that in S. RAJAMALLAIAH (supra), as the Tribunal had overruled the preliminary objection to the effect

that it had no jurisdiction to examine the controversy in view of the decisions in DEVI PRASAD and K.S. MURALIDHAR, the Apex Court had

remitted the matter back to the Tribunal as it found that the decision of Tribunal dated 1.8.1983 had not been brought to its notice. In P.B.

CHOWDHARY (supra), the only issue in the words of the Supreme Court was:

The submission that candidates such as the respondents 7 to 9 would have to slide down in seniority if the decision in Venkat Reddy's case is so

applied although they too were selected by the Public Service Commission, cannot be entertained, for that would be seeking a review of the

decision in Venkat Reddy's case which has since become final and had been applied. The ration of that decision must apply to all those covered

under those categories and it is no argument to say that respondents 7 to 9 were not parties to that petition. We are, therefore, clearly of the view

that the decision in Venkat Reddy's case must be applied to all those falling within the three categories set out in the summary of that case.

89. Therein again, the decision in G.S. Venkat Reddy and others etc. etc. Vs. Government of Andhra Pradesh and others, , was followed. There

exists a laudable object behind the weightage rule. Such weightage rule is given so as to recognize the services of an officer in the lower category

when he acquires a higher qualification to occupy the higher post. His experience while doing similar nature of work is given due recognition. But

the same would not mean that thereby right of others would be taken away. Principles of weightage having been made in terms of a statutory rule

must conform to the provisions of Articles 14 and 16 of the Constitution of India. It must conform to the well recognized principles of seniority.

90. it may be that nature of work of the upgraded supervisors and the junior engineers may be similar but the same would not mean that

educational qualification has no role to play. The very fact that educational qualification is considered to be essential for holding the post of Junior

Engineer, it is idle to contend that only because the nature of the job is similar, the posts are functionally identical. Classification on the basis of

educational qualification has been held to be valid. See The State of Jammu and Kashmir Vs. Shri Triloki Nath Khosa and Others, . In MOHD.

SHUJATH ALT whereupon Mr. P. Balakrishna Murthy has placed strong reliance itself is an authority to show that such classification is valid one.

In Mohammad Shujat Ali and Others Vs. Union of India (UOI) and Others, , it has been held:

To permit discrimination based on educational attainments not obligated by the nature of the duties of the higher post is to stifle the social thrust of

the equality clause. A rule of promotion which, while conceding that non-graduate Supervisors are also fit to be promoted as Assistant Engineers,

reserves a higher quota of vacancies for promotion for graduate Supervisors as against non-graduate Supervisors, would clearly be calculated to

destroy the guarantee of equal opportunity. But even so, we do not think we can be persuaded to strike down the Andhra Pradesh Rules in so far

as they make differentiation between graduate and non-graduate Supervisors. This differentiation is not something brought about for the first time

by the Andhra Pradesh Rules. It has always been therein the Engineering Services of the Hyderabad and the Andhra States. The graduate

Supervisors have always been treated as a distinct and separate class from non-graduate Supervisors both under the Hyderabad Rules as well as

the Andhra Rules and they have never been integrated into one class.

91. For finding out functional identities many factors are to be taken into consideration. Similarity of work alone would not render posts equal nor

make the functional identity equal.

92. In STATE OF A.P. v. J.P. CHAURASIA AIR 1989 SC 19, it has been held:

The answer to the question whether two posts are equal or should carry equal pay depends upon several factors. It does not just depend upon

either the nature of work or volume of work done. Primarily it requires among others, evaluation of duties and responsibilities of the respective

posts. More often functions of two posts may appear to be the same or similar, but there may be difference in degrees in the performance. The

quantity of work may be the same but quality may be different. That cannot be determined by relying upon affidavits of interested parties. ...

93. In AIR 1989 29 (SC) , it has been held:

The nature of work and responsibilities of the posts are matters to be evaluated by the management and not for the court to determine by relying

upon the averments in the affidavits of interested parties. If the management for good reasons have classified the posts into two categories with

different pay scales, the courts generally must accept unless it is demonstrated that it is patently erroneous either in law or on facts.

94. It is one thing to say that having regard to DEVI PRASAD and K.S. MURALIDHAR that weightage rule is not arbitrary but it is another thing

to say that it is violative of Articles 14 and 16 of the Constitution of India in so far as it seeks to take away the accrued and/or vested right of

others who had been holding a higher position from before. The apex court has laid down several criteria for determining seniority, The apex court

has also laid down a law to the effect that a person cannot hold a post anterior to the date when the post fell vacant and/or he acquired the

requisite qualification to hold the same. Keeping in view entry in the service from various sources, the law laid down by G.S.VENKAT REDDY

(supra) has been acted upon. It has been followed in many subsequent decisions. We are, therefore, of the opinion that the impugned rule to the

extent challenged is violative of Articles 14 and 16 of the Constitution of India in so far as vested right of the junior engineers who are senior to

them is sought to be taken away.

95. The contention of Mr P. Balakrishna Murthy is to the effect that by reason of a subsequent event the effect of an earlier judgment cannot be

taken away. A judgment is rendered having regard to the fact situation obtaining at that point of time. if subsequent legislation comes into being, it is

trite, that the court can take a view different from its earlier one. In AIR 1997 3127 (SC) , a rule, which was made contrary to the decisions of the

apex court was upheld as having been validly made.

96. For the foregoing reasons the Writ Petitions are allowed as above. There shall be no order as to costs.