

Case relating to concurrence:

Parties : P. Kadirvel Versus Government of Tamil Nadu, rep. by Secretary to Government & Others

Court : High Court of Judicature at Madras

Case No : W.A.Nos.162 and 163 of 2007

Judges: THE HONOURABLE MR. JUSTICE P. JYOTHIMANI & THE HONOURABLE MRS. JUSTICE ARUNA JAGADEESAN

Appearing Advocates : For the Appellant : C. Selvaraj, Sr. Counsel, S. Mani, Advocates. For the Respondents: R1, R2, S. Rajasekar, AGP [Edu], C. Chinnasamy, Sr. Counsel, R4, Haja Mohideen, Ezhilarasi, for TNPSC, R3, S.A. Hafiz, Advocates.

Date of Judgment : 23-04-2009

Head Note :-

Constitution of India – Article 226 – Service - Tamil Nadu State Subordinate Service Rules – Rule 10(a)(i) - Tamil Nadu Public Services Commission Regulation 1954 -Regulation 16(b) - Appointment made by way of transfer from one subordinate service to another such services - Prior consultation with Tamil Nadu Public Service Commission – Seniority - The appellant was undisputedly appointed by transfer from the Secretariat Services (Subordinate services) to the educational services (another such service) and it is not necessary for the appointing authority to consult Public Service Commission in view of regulation 16(c) of the Tamil Nadu Public Service Commission Regulation, 1954. It is not only that, his services has been regularized and was promoted as Professor pursuant to the upgradation of post w.e.f. 25.08.1984 and was appointed as Lecturer [Selection grade] w.e.f. 25.08.1989, whereas Dr.L.V was awarded selection grade only from 01.01.1990, at a later date - It is thus clear that the appellant was promoted on a regular basis made in accordance with Rules. Assuming for a moment that the initial appointment of the appellant was not made by following the procedure laid down by Rules since the appellant continued in the post uninterruptedly till the regularization of his service in accordance with the rules, his seniority has to be reckoned from the date of his regularization of his services - The appellant having been in services for more than thirty years, having satisfactorily completed probation and his services been regularized, subsequently he was conferred with consequent promotions such as Professor and Lecturer (Selection Grade), there is no meaning in saying that his services will have to be considered as temporary and he cannot claim seniority over the candidates directly selected through Tamil Nadu Public Service Commission, especially when regulation 16 (c) dispenses consultation with the Tamil Nadu Public Service Commission in case of transfer of candidates from one subordinate service to the other subordinate service -The order of the learned Single Judge holding that though the selection was completed in the year 1973, as regards the directly recruited Assistant Professors, normal and usual delay has caused in allotment of candidates and in that process, the appellant has entered through back door and has secured the present services by transfer which is purely temporary, and he

cannot compete with the directly recruited Assistant Professors, cannot be countenanced - The impugned orders. viz., proceedings in Pro.Na.Ka.No. 0513/B/2002 dated 01.07.2002 passed by the Principal, Presidency College; G.O.Ms.No.65 Higher Education (F1) Department, dated 04.03.2005, passed by the Secretary to Government, Higher Education Department; and the order passed by Director of Collegiate Education in his proceedings Rc.No.14041/D4/2005 dated 09.08.2005 are all set aside. We direct the respondents concerned to determine the seniority of the appellant in relation to the directly recruited officers after reckoning the date on which their services were regularized - The appellant has retired from service as also the other candidates. As the selection of Principal involves merit and ability, apart from seniority, claim of the appellant to promote him as Principal cannot be acceded to at this point of time.

Para 13 to 19

Cases Referred:

1. Direct Recruit Class II Engineering Officers' Assn. vs. State of Maharashtra, (1990) 2 SCC 715
2. Ajit Kumar Rath v. State of Orissa, (1999) 9 SCC 596
3. Jagdish Ch. Patnaik v. State of Orissa 1998 (4) SCC 4
4. State of Jammu and Kashmir and ors. v. Javed Iqbal Balwan and ors., in C.A.No.1801/2009 Supreme Court
5. State of U.P. v. R.K. Tandon (Dr), (1995) 3 SCC 616
6. State of Tamil Nadu and another vs. E.Paripooranam and ors 1992 Supp. (1) SCC 420
7. K.Madalaimuthi and another vs. State of Tamil Nadu and ors. 2006 SCC (L&S) 1451

Comparative Citation:

2009 (4) MLJ 945

Judgment :-

(Appeal filed against the order passed by this Court dated 09.01.2007 passed in W.P.Nos.8378 and 26125/2005.)

Common Judgment: Aruna Jagadeesan, J.

These writ appeals are directed against the common order dated 09.01.2007 passed by the learned Single Judge dismissing the writ petitions, by which the appellant sought to quash the orders passed by the third respondent in Pro.Na.Ka.No.0513/B/2002 dated 01.07.2002 and G.O.Ms.No.65 Higher Education (F1) Department, dated 04.03.2005 passed by the first

respondent, rejecting his plea to restore his seniority.

2. The facts identical in both the appeals are briefly stated as below :-The appellant was appointed as Junior Assistant on 14.06.1972 in Secretariat Service selected through Tamil Nadu Public Service Commission. He was promoted as Assistant in January 1973 and he satisfactorily completed his probation in the said post on 13.06.1974. As he possessed higher Educational qualification, he applied for appointment to the educational service and was appointed as Assistant Professor of Economics in Government Arts College by way of transfer from Secretariat service on 16.08.1974 and joined duty on 21.08.1974. His services were regularized on 23.08.1976 as Assistant Professor with effect from 21.08.1974 and his probation was also declared in the cadre of Assistant Professor on 20.08.1976. As the Government upgraded the post of Assistant Professor of Economics as Professor of Economics on completion of ten years of regular service as Assistant Professor, he was promoted as Professor w.e.f. 25.08.1984 on such upgradation. Subsequently on the basis of G.O.1785 and 1786 Education (H3) Department dated 05.12.1988, re-designating the nomenclature of teaching posts in Government Colleges and aided colleges, the Commissioner of Collegiate Education, Chennai and by his proceedings in Roc.No.76631/D4/91 dated 13.11.1992 issued orders whereby, the appellant was placed as Lecturer (Selection Grade) w.e.f. 25.08.1989.

3. The Fourth respondent in W.A.No.162/2007, Dr. Venkatasami, was selected through Tamil Nadu Public Service Commission as assistant professor of Economics and he joined duty on 30.06.1975 F.N. His services as such were regularized on 08.06.1976 with effect from 30.06.1975 F.N. So, according to the appellant, the fourth Respondent is junior to him as his services were regularized only from 30.06.1975 whereas services of the appellant were regularized in the said post w.e.f. the earlier date i.e. 21.08.1974. As per the order issued by the second respondent, redesignating the posts of Professors as Lecturer (Selection Grade), Dr. L. Venkatasamy was awarded Selection Grade only from 01.09.1990 as against the award of selection grade to the appellant on 25.08.1989 itself. The appellant continued to be senior to Dr. L. Venkatasamy till 30.06.2002 without any dispute whatsoever.

4. During the year 2002, there were four Lecturers [Selection Grade] in Economics Department in Presidency College, Chennai, including Dr.L.Venkatasamy. As the appellant was not placed as Head of Department [in-charge] during the leave vacancy, he made a representation to the third respondent, Principal on 21.06.2002 to which the third respondent for the first time informed the appellant that Dr. L. Venkatasamy was placed as Head of Department [in-charge] as he is senior to the appellant. Despite appeal preferred on 24.07.2002 and 12.12.2002 to the second respondent, his grievance to restore his seniority was not redressed. Therefore, he filed O.A.No.1122/2004 on the file of the State Administrative Tribunal and as there was no Presiding Officer from 03.06.2004, he preferred W.P.No.22952/2004 for issuance of certiorarified mandamus to call for the records and to

quash the order of the third respondent and to restore his seniority. This court by order dated 03.01.2005 issued direction to the first respondent to consider the case and pass orders on merits within a period of two months. Accordingly, the first respondent after consulting the fifth respondent Tamil Nadu Public Service Commission, declared that Dr.L.Venkatasamy was senior to the appellant vide G.O.Ms.No.65, Higher Education Department dated 04.03.2005.

5. Aggrieved against the said proceedings dated 01.07.2002, passed by the third respondent and G.O.Ms.No.65, Higher Education passed by the first respondent, the appellant filed W.P.No.8378/2005 to quash the said orders and to restore his seniority and further to promote him as Principal with retrospective effect. Pending Writ Petition, the second respondent has passed an order dated 09.08.2005, placing Dr.L.Venkatasamy, Thiru.Mohammed Ismail, Dr.Rudraban and Dr.Jyothi Murugan, directly selected through Tamil Nadu Public Service Commission, as seniors to the appellant and directed the Principal, Presidency College to take necessary further action accordingly. As against the said order of the Government dated 09.08.2005, appellant filed another Writ Petition in W.P.No.26125 for a writ of certiorari to call for and quash the order.

6. The learned Single Judge passed a common order negating the claim of the appellant on the ground that the appellant having been appointed under 10(a)(i) of the Tamil Nadu State Subordinate Service Rules, i.e. temporarily, ought to have been sent back to his parent department once regular candidate had been recruited, and he cannot claim seniority over regularly recruited candidate and further under regulation 16(b) of the Tamil Nadu Public Services Commission Regulation 1954, the appointing authority having failed to get concurrence from Tamil Nadu Public Service Commission before transferring the appellant to the Educational Services would make his regularization itself per se illegal and it does not give any right to the appellant and therefore, the question of fixing inter-se seniority in the cadre of Assistant Professor does not arise.

7. The main contentions put-forth by Thiru.C.Selvaraj, the learned Senior Counsel appearing for the appellant are as follows :-

(i)The appellant having been appointed by way of recruitment by transfer from the Secretariat Services to the Educational services, his services having been regularized in both the subordinate services, after the declaration that he has completed the period of probation satisfactorily he became entitled to be confirmed in a permanent post for which he was selected and that would be the relevant criteria for determining his seniority to the service to which he was transferred. In this case, the appointment of the appellant, his regularization and declaration of probation was earlier to that of Dr.Venkatasamy, as per rule 35 (a)(a) of General Rules of the Tamil Nadu State and Subordinate Services Rules, and therefore, the appellant has to be held senior to Dr.L.Venkatasamy and other directly selected Assistant Professors.

(ii) The question of obtaining concurrence of Tamil Nadu Public Service Commission, before transferring him to educational services does not arise in view of regulation 16(c) of Tamil Nadu Public Service Commission Regulation, 1954 which dispenses with the said concurrence in the case of candidates transferred from one Subordinate services to the other subordinate service.

(iii) The law is well settled that settled matter cannot be unsettled. In the instant case, after a lapse of thirty years, the impugned Orders which seek to disturb the seniority of the appellant that too, after conferment of two levels of promotion in such cadre is unsustainable in law.

8. Per contra, the respondents would contend that the services of the appellant were regularized in the educational service by the appointing authority without getting concurrence of the Tamil Nadu Public Service Commission, contravening regulation 16 (b) of the Tamil Nadu Public Service Commission Regulation, 1954 and no right has accrued to the appellant to claim seniority over the regularly recruited Assistant Professors who were all appointed by regular selection made through Tamil Nadu Public Service Commission during the year 1973. Further, they would contend that the appellant having been appointed under 10(a)(i) of the Tamil Nadu State Subordinate Service Rules, and the same is made without getting the concurrence of the Tamil Nadu Public Service Commission, it is futile to contend that all along he was placed above the directly recruited candidates. It is their contention that the appellant cannot rely on Rule 35(aa) of the Tamil Nadu State Subordinate Rules as it came into existence only in the year 1978 and the same has no relevance to the recruitment made which is earlier to the said rule.

9. There is no dispute that the appellant was appointed under rule 10(a)(i) in the post of Assistant Professor in the Tamil Nadu College Educational Services and it is a recruitment by transfer from the Secretariat Services to educational services. He joined duty on 21.08.1974 and his services were regularized from the said date and he had also satisfactorily completed the probation on 20.08.1976 in the said post. The fourth Respondent, Dr.L.Venkatasamy was selected by Tamil Nadu Public Service Commission for the recruitment year 1973 and was appointed as temporary Assistant Professor in Government college only on 30.06.1975 and the other candidates, Thiru.Mohammed Ismail, Dr.P.Rudrappan and Dr.A.Jothimurugan were appointed on 25.06.1975, 11.07.1975 and 02.07.1975 respectively. Their services were regularized as Assistant Professors with effect from the said dates. So, admittedly, the appointment and regularization of the services of the appellant is prior to the appointment of Dr.L.Venkatasamy and other candidates. For better appreciation, a comparative statement of services of the appellant and directly recruited candidates are given below: -

Table

10. Rule 4 of the Tamil Nadu State and Subordinate Services Rules states that all appointments made either by direct recruitment or by recruitment by transfer shall be made from a list of approved candidates prepared in the prescribed manner by the appointing authority or any other authority empowered in the Special Rules in that behalf. The appellant

was the lone person appointed to the educational service by transfer from the Secretariat Service and there is no dispute that he possessed requisite educational qualification for the said post. As per rule 27 of the said rules, if the probationer satisfactorily completes the period of probation, the appointing authority should consider his suitability for full membership and after declaration that he has completed the period of probation, he becomes an approved probationer and is entitled to be confirmed, that is, to become a full member in services in a permanent post or cadre for which he was selected as and when such permanent post is available for such confirmation. The appellant has become a full member in the educational services after his completion of probation period in the permanent post and was never treated as adhoc appointee, which could be seen from the further promotions given to him.

11. The learned Single Judge did not consider Regulation 16(c) which relaxes the condition of prior consultation with Tamil Nadu Public Service Commission in respect of the appointment made by way of transfer from one subordinate service to another such services.

12. Rule 16(c) reads thus : -It shall not be necessary for the Commission to be consulted : -(c) in regard to the suitability of candidates for appointment by promotion with the same service or recruitment by transfer from one subordinate service to another subordinate service or for transfer from one category to another category or from one class to another or class within the same service carrying identical scale of pay and with similar or different qualification, if any prescribed.

13. In this case, the appellant was undisputedly appointed by transfer from the Secretariat Services (Subordinate services) to the educational services (another such service) and it is not necessary for the appointing authority to consult Public Service Commission in view of regulation 16(c) of the Tamil Nadu Public Service Commission Regulation, 1954. It is not only that, his services has been regularized and was promoted as Professor pursuant to the upgradation of post w.e.f. 25.08.1984 and was appointed as Lecturer [Selection grade] w.e.f. 25.08.1989, whereas Dr.L.Venkatasamy was awarded selection grade only from 01.01.1990, at a later date.

14. It is thus clear that the appellant was promoted on a regular basis made in accordance with Rules. Assuming for a moment that the initial appointment of the appellant was not made by following the procedure laid down by Rules since the appellant continued in the post uninterruptedly till the regularization of his service in accordance with the rules, his seniority has to be reckoned from the date of his regularization of his services.

15. The Constitution Bench of the Honourable Supreme Court in Direct Recruit Class II Engineering Officers' Assn. vs. State of Maharashtra, (1990) 2 SCC 715 has laid down the following guidelines for fixing the seniority: -(A) Once an incumbent is appointed to a post according to rule, his seniority has to be counted from the date of his appointment and not

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

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

16. The appellant having been in services for more than thirty years, having satisfactorily completed probation and his services been regularized, subsequently he was conferred with consequent promotions such as Professor and Lecturer (Selection Grade), there is no meaning in saying that his services will have to be considered as temporary and he cannot claim seniority over the candidates directly selected through Tamil Nadu Public Service Commission, especially when regulation 16(c) dispenses consultation with the Tamil Nadu Public Service Commission in case of transfer of candidates from one subordinate service to the other subordinate service. The guidelines enunciated by the Honourable Supreme Court in the decision referred supra are very much applicable to the facts of this case.

17. In *Ajit Kumar Rath v. State of Orissa*, (1999) 9 SCC 596 on a similar set of facts wherein the directly recruited assistant engineers claimed seniority from the year 1970-71 on the ground that the advertisement in 1970-71 for direct recruitment on the basis of Assistant Engineer was issued by the Public Services Commission on 06.12.1971 and the results were thereafter published, however, the order of appointment was made only on 03.01.1972, the directly recruited Assistant Professors claimed seniority w.e.f. 1970-71, i.e. ante dated, from the date of advertisement on the ground that they were appointed against the vacancies of 1970-71 on regular basis. The said plea was rejected as without substance and merit, by the Honourable Supreme Court and it observed that the law on this question has already been explained by the Supreme Court in *Jagdish Ch. Patnaik v. State of Orissa* 1998 (4) SCC 456 wherein it has held categorically that appointment does not relate back to the date of vacancy.

18. In a recent unreported Judgment in *State of Jammu and Kashmir and ors. v. Javed Iqbal Balwan and ors.*, in C.A.No.1801/2009 the Honourable Supreme Court (three Bench judgment) has expressed similar view as under : - "In the present case we are, however, faced with a peculiar situation. The Naib Tahsildars were appointed as Tahsildars on temporary basis. They got appointed as they possessed the requisite qualifications for the post. They had qualified the departmental examination through the Commission. They continued to hold such posts for years together. The government took steps for their regularization through the Commission but the same did not materialise. Various cases were filed by the parties and interim directions passed by the Courts from time to time in such cases delayed the efforts of the Government to finalise the seniority lists. During this period most of the promotees got retired

from the service. Some of the promotees were further promoted as Assistant Commissioners while a few of them have even been inducted into the KAS. Now it appears not only difficult but practically impossible to get regularization of these promotees done through the Commission. We feel it will not be in the interest of justice to ask these officers to get their regularizations approved by the Commission at this stage. Following the principle laid down in *Narender Chadha v. Union of India (supra)*, we find that since the promotees have been allowed to function on higher posts for more than 15 years with due deliberation, it would be unjust to hold that they have no sort of claim to such posts. Treating the present case as an exception, in view of the circumstances indicated, we hold the regularization of the promotees in relaxation of the rule cannot be interfered with.

....

"(4) Whether the direct recruits could claim a retrospective date of recruitment from the date on which the post in direct recruitment was available, even though the direct recruit was not appointed by that date and was appointed long thereafter?"

21. This Court answered the question in paragraphs 78 and 79 of the judgment in the following terms:

Point 4: -Direct recruits cannot claim appointment from date of vacancy in quota before their selection".

19. In view of the categorical observations of the Honourable Supreme Court in the aforesaid decisions, the order of the learned Single Judge holding that though the selection was completed in the year 1973, as regards the directly recruited Assistant Professors, normal and usual delay has caused in allotment of candidates and in that process, the appellant has entered through back door and has secured the present services by transfer which is purely temporary, and he cannot compete with the directly recruited Assistant Professors, cannot be countenanced.

20. In another case reported in *State of U.P. v. R.K. Tandon (Dr)*, (1995) 3 SCC 616, the question of inter-se seniority arose between the Doctors originally appointed on temporary basis and the Doctors appointed through the Public Service Commission. The temporarily appointed Doctors successfully claimed seniority from the date of their initial appointment and three out of them including one H.C.Mathur, filed Writ Petitions before the High Court of Allahabad, which upheld their claim. In the SLP filed by the State, a Three Bench of the Honourable Supreme Court upheld the High Court's decision. Subsequently, a number of other similarly placed Doctors also filed Writ Petitions and obtained similar relief as against which also, the State unsuccessfully challenged before the Honourable Supreme Court. At the instance of the Doctors selected through Public Service Commission, as against the Judgment in State's

Appeal, reported supra, i.e., State of U.P. v. R.K. Tandon (Dr), (1995) 3 SCC 616, a Two Judges Bench of the Supreme Court modified the earlier order, which in effect ran contra to the Judgment of the Three Judges Bench and the matter was referred to Five Judges Bench in view of the conflicting Judgments. A Five Judges Bench of the Honourable Supreme Court held that the Judgment of the later Two Judges Bench does not lay down the correct law, being in conflict with the larger Bench. In the said case, it is relevant to point out that for determining seniority of the temporary appointed doctors, the date of appointment was taken into account.

21. Thiru.C.Chinnasami, the learned Senior Counsel relied on a judgment reported in State of Tamil Nadu and another vs. E.Pariipooranam and ors (1992 Supp. (1) SCC 420) to substantiate his contention that it is not open to the appellant to claim that his temporary service as Assistant Professor should be counted for the purpose of determining seniority in the cadre.

22. The said decision is distinguishable on facts as the order of regularization in the said case expressly stated that their inter se seniority would be in accordance with the ratings in the approved list without being affected by the date of regularization. In the said case, the regularization order itself expressly denied the counting of temporary service for the purpose of seniority.

23. In K.Madalaimuthi and another vs. State of Tamil Nadu and ors. [2006 SCC (L&S) 1451], it is held thus :-24. On a consideration of the submissions made on behalf of the respective parties and the decisions cited on their behalf, the consistent view appears to be the one canvassed on behalf of the appellants. The decisions cited by Mr.Rao have been rendered in the context of Rule 10(a)(i)(1) and the other relevant rules which are also applicable to the facts of the instant case. Apart from the above, the law is well settled that initial appointment to a post without recourse to the rules of recruitment is not an appointment to a service as contemplated under rule 2(1) of the General Rules, notwithstanding the fact that such appointee is called upon to perform duties of a post borne on the cadre of such service. In fact, Rule 39(c) of the General Rules indicates that a person temporarily promoted in terms of Rule 39(a) is required to be replaced as soon as possible by a member of the service who is entitled to the promotion under the Rules. It stands to reason that a person who is appointed temporarily to discharge the functions in a particular post without recourse to the recruitment rules, cannot be said to be in service till such time as his appointment is regularized. It therefore, follows that it is only from the date on which his services are regularized that such appointee can count his seniority in the cadre".

In the said case, it is held that a person who is appointed temporarily to discharge the function in a particular post without recourse to the recruitment rules, cannot be said to be in service till such time his appointment is regularized. It therefore follows that it is only from the date on which his services are regularized that such appointee can count his seniority in the cadre. If that be so, there is no difficulty in holding that in order to determine seniority, the date of

regularization of services of the appellant can be counted. In this case, regularization of the appellant was made on 21.08.1974 whereas, the regularization of Dr. Venkatasamy was on 30.06.1975.

24. The learned Counsel appearing for the appellant strongly placed reliance on Rule 35 (aa) of the Tamil Nadu State Subordinate Service Rules to stress that his seniority has to be determined with reference to the date on which he was appointed to the service. On the contrary, the learned Counsel appearing for the respondent contended that the said rule is inapplicable to the case of the appellant, as it came into effect only from 13.07.1978 and it has no retrospective effect. Their contention is that Rule 35 (aa) is not applicable to the facts of this case.

25. According to the principles stated in Rule 35(aa), seniority of a person in a service, class, category or grade, shall unless, he has been reduced to a lower rank as punishment, be determined by the ranks obtained by him in the list of approved candidates drawn by the Public Service Commission or other appointing authority, as the case may be and the date of commencement of his probation is the date on which he joined duty, irrespective of his seniority. In this case, till the issue was raised by the appellant claiming seniority, Dr.L.Venkatasamy, all along, appears to have been placed below the appellant. As regards the appellant, no approved list was prepared and till then the question of seniority did not arise.

26. Only in the year 2002, in letter dated 01.07.2002, by way of reply to the representation made by the appellant, questioning the department against appointment of fourth respondent Dr.L.Venkatasamy as Head of Department in the leave vacancy, Principal of the Presidency College stated for the first time that fourth respondent seem to be senior to that of the appellant. Thereafter, the appellant had sent representation to the Director of Collegiate Education to fix the seniority as per General rule 35(aa) and it appears that the Director of Collegiate Education in turn has addressed the Government in that regard. The Government in turn has sought for clarification from the Director of Collegiate Education by letter dated 20.12.2002 as to how the Principal has placed the fourth respondent as senior to that of the appellant.

27. In the meanwhile, the appellant had approached the High Court by way of Writ Petition in W.P.No.22952/2004, to quash the order of the Principal of the Presidency College dated 01.07.2002 by which he was informed that the fourth Respondent was placed above him. This court, by order dated 03.01.2005, directed the Government to consider the case on merits within a period of two months. Only in pursuance to the said direction, Director of Collegiate Education has stated that the appellant cannot claim seniority over the regularly selected Assistant Professors and it has further stated that Dr.Venkatasami was assigned S.No.234; Mohammed Ismail SI.No.260; Rudraban SI.No.263 and Jyothi Kumaran SI.No.293, in the approved list for recruitment made during the year 1973. The first respondent in Writ Petition in its counter admitted that seniority list involving the appellant has so far not been prepared

till impugned G.O.Ms.No.65, Higher Education dated 04.03.2005 was passed. It is further admitted that based on the above Government Order, the seniority of Dr.Venkatasamy, Thiru.Mohammed Ismail, Dr.Rudrappan and Dr.A.Jothikumaran was fixed. Prior to that, no necessity has arisen. Even according to the first Respondent in the Writ Petition, the seniority came to be fixed only in the year 2005 and as such, prior to 1978, there was no occasion for invoking any provision to determine seniority in the case of the appellant. In the said circumstances, to determine the seniority of the appellant, he can very well rely upon Rule 35(aa) which contemplates fixing of seniority by induction of service by more than one method of recruitment. Rule 35(aa) reads thus: -"The seniority of a person in a service, class, category or grade shall, where the normal method of recruitment to that service, class, category or grade is by more than one method of recruitment, unless the individual has been reduced to a lower rank as a punishment, be determined with reference to the date on which he is appointed to the services, class, category or grade."

In the instant case, the appellant was inducted into service by way of transfer and in order to determine his seniority, Rule 35(aa) is applicable. In view of the reason stated above, the contention of the learned Senior Counsel that the said rule is inapplicable to the case of the appellant cannot be countenanced.

28. The learned Single Judge has not gone into the above aspects and has dismissed the Writ Petitions mainly on the ground that the service of the appellant is purely temporary and he cannot claim seniority over the directly recruited Assistant Professors; that there is no concurrence obtained by the authorities while transferring the appellant to the educational service which does not reflect the correct position of law.

29. We therefore set aside the order passed by the learned Single Judge. The impugned orders. viz., proceedings in Pro.Na.Ka.No. 0513/B/2002 dated 01.07.2002 passed by the Principal, Presidency College; G.O.Ms.No.65 Higher Education (F1) Department, dated 04.03.2005, passed by the Secretary to Government, Higher Education Department; and the order passed by Director of Collegiate Education in his proceedings Rc.No.14041/D4/2005 dated 09.08.2005 are all set aside. We direct the respondents concerned to determine the seniority of the appellant in relation to the directly recruited officers after reckoning the date on which their services were regularized.

30. It is brought to our notice that the appellant has retired from service as also the other candidates. As the selection of Principal involves merit and ability, apart from seniority, claim of the appellant to promote him as Principal cannot be acceded to at this point of time.

31. The Writ Appeals are allowed accordingly. No costs.