

THE HIGH COURT OF SIKKIM : GANGTOK

(Civil Extraordinary Jurisdiction)

DATED : 26th JULY, 2018

SINGLE BENCH : THE HON'BLE ACTING CHIEF JUSTICE MRS. JUSTICE MEENAKSHI MADAN RAI

WP(C) No.35 of 2017

Petitioner : Mrs. Suman Rai,
W/o Shanker Pradhan,
GNM/Staff Nurse,
R/o Pani House,
Gangtok, East Sikkim.

versus

Respondents :

1. State of Sikkim
Through the Director General-cum-Secretary,
Health Care, Human Service and Family
Welfare Department,
Government of Sikkim,
Gangtok.
2. The Secretary,
Department of Personnel, Adm.
Reforms, Training and Public Grievances,
Government of Sikkim,
Gangtok.
3. Mrs. Paden Bhutia,
Staff Nurse, Batch 1996,
Presently posted at District Hospital at Mangan,
P.O. & P.S. Mangan,
North Sikkim.
4. Mrs. Pema Donka Bhutia,
Staff Nurse, Batch 1996,
Resigned from the service.
5. Mrs. Deepa Silwal,
Staff Nurse, Batch 1996,
Presently posted at District Hospital at STNM,
P.O. & P.S. Gangtok,
East Sikkim.
6. Mrs. Leena Rai,
Staff Nurse, Batch 1996,
Presently posted at District Hospital at Namchi,
P.O. & P.S. Namchi,
South Sikkim.

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7. Mrs. Chitrakala Sharma,
Staff Nurse, Batch 1996,
Presently posted at District Hospital at STNM,
P.O. & P.S. Gangtok,
East Sikkim.
8. Mrs. Durga Pokhrel Sharma,
Staff Nurse, Batch 1996,
Presently posted at District Hospital at Namchi,
P.O. & P.S. Namchi,
South Sikkim.
9. Ms. Kokila Sharma,
Staff Nurse, Batch 1996,
Presently posted at District Hospital at Singtam,
P.O. & P.S. Singtam,
South Sikkim.
10. Mrs. Palden Bhutia,
Staff Nurse, Batch 1996,
Presently posted at District Hospital at Singtam,
P.O. & P.S. Singtam,
South Sikkim.
11. Ms. Tsheten Donka Bhutia,
Staff Nurse, Batch 1996,
Presently posted at District Hospital at STNM,
P.O. & P.S. Gangtok,
East Sikkim.
12. Mrs. Tashi Doma Bhutia,
Staff Nurse, Batch 1996,
Presently posted at District Hospital at STNM,
P.O. & P.S. Gangtok,
East Sikkim.
13. Mrs. Ruma Tamang,
Staff Nurse, Batch 1996,
Presently posted at District Hospital at STNM,
P.O. & P.S. Gangtok,
East Sikkim.
14. Ms. Sandya Gurung,
Staff Nurse, Batch 1996,
Presently posted at District Hospital at STNM,
P.O. & P.S. Gangtok,
East Sikkim.
15. Mrs. Monika Chettri,
Staff Nurse, Batch 1996,
Presently posted at District Hospital at STNM,
P.O. & P.S. Gangtok,
East Sikkim.
16. Mrs. Nawang Doma Bhutia,
Staff Nurse, Batch 1996,
Presently posted at District Hospital at STNM,
P.O. & P.S. Gangtok,
East Sikkim.

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17. Mrs. Chundu Subba,
Staff Nurse, Batch 1996,
Presently posted at District Hospital at STNM,
P.O. & P.S. Gangtok,
East Sikkim.
18. Ms. Rupa Sharma,
Staff Nurse, Batch 1996,
Presently posted at District Hospital at STNM,
P.O. & P.S. Gangtok,
East Sikkim.

Application under Article 226 of the Constitution of India

Appearance

Mr. Zangpo Sherpa and Ms. Mon Maya Subba, Advocates for the Petitioner.

Mr. Karma Thinlay, Senior Government Advocate with Mr. Thinlay Dorjee Bhutia, Government Advocate, Mrs. Pollin Rai, Assistant Government Advocate and Ms. Neera Thapa (Legal Retainer, HC, HS & FWD) for the State-State-Respondents No.1 and 2.

Dr. (Mrs.) Doma T. Bhutia, Advocate for Respondents No.3, 5 to 14 and 16 to 18.

J U D G M E N T

Meenakshi Madan Rai, ACJ

1. The apple of discord between the parties herein is the alleged downgrading in the seniority of the Petitioner in her service, in which, on appointment she was placed at Serial No.3 vide Office Order No.896/M./H&FW dated 21-05-1996. Consequently, in the consolidated list indicating appointment of Nurses made from 1979 to 1996 vide communication No.277/H.&F.W. dated 19-11-1996, she found place at Serial No.68 while continuing to remain at Serial No.3 of the 1996 batch. However, vide Notification No.13/H&F.W. dated 09-09-2002, unbeknownst to her she was relegated to Serial No.75 in the consolidated list and to Serial No.17 of the batch of 1996, without notice to her of such action. Thus, claiming violation

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of her fundamental rights as guaranteed under Articles 14, 15, 16 and 21 of the Constitution of India, the Petitioner is before this Court seeking redressal, *inter alia*, as follows;

- (a) an order directing the Respondents to comply with the communication dated 19-11-1996 along with seniority list and to act strictly in accordance with the said Office Order in maintaining the seniority;
- (b) an order directing the Respondents to set aside the communications dated 22-09-2016 and 11-11-2016, along with provisional seniority list and Notification bearing No.13/H&F.W., dated 09-09-2002 of the Respondent No.1;
- (c) After perusal of the records, causes shown if any and upon hearing the parties to make the Rule Absolute and/or pass any other order/orders/ directions as deemed fit and proper for the ends of justice;
- (d) Direct the Respondents No.1 and 2 to pass necessary orders for publishing a fresh seniority list as per Rules by maintaining the *inter se* seniority of the 1996 batch according to the merit list.

2. For clarity, we may briefly advert to the facts of the case as per the Petitioner. Vide Office Memorandum bearing Memo No. 533/M/H&FW/M, dated 15-05-1996, the Petitioner was offered appointment to the post of General Nursing and Midwifery (for short "GNM"), by the Respondent No.1, as a direct recruit in the scale of pay of Rs.1410-30-1560/40-1800/50-2300, per month. Pursuant thereto on 21-05-1996 an Office Order bearing No.896/M./H&FW came to be issued by the Respondent No.1 appointing the Petitioner

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with sixteen others as Staff Nurses. The name of the Petitioner was placed at Serial No.3 in the seniority list in the said batch of appointments. On 25-05-1996 the Petitioner reported for duty at the District Hospital, Namchi, duly filing her joining report. Later, on 19-11-1996, letter No.277/H.&FW. was issued by the Respondent No.1 to the Petitioner along with a consolidated seniority list of Staff Nurses appointed from 1979 to 1996, placing the Petitioner at Serial No.68. The communication sought acceptance or objection of the seniority within fifteen days from the date of issuance of the letter failing which it would be presumed that the seniority therein was accepted and no future requests for alteration/addition or modification would be entertained. This seniority list came to be accepted by all the seventeen new employees who had joined service as Staff Nurses. In the year 2016, however, the Petitioner along with others came to learn that a new seniority list of Staff Nurses was to be prepared with no notice to them. The Petitioner on 12-09-2016 made a representation to the Respondent No.1 along with another Applicant, Sancha Maya Rai, seeking maintenance of their seniority in terms of the list of 1996. In response thereto, the Respondent No.1 vide letter dated 22-09-2016 informed her that the *inter se* seniority list appended with the letter, had been notified vide Notification No.13/H&F.W. on 09-09-2002 which was to be adhered to. That, while the Petitioner had been placed at Serial No.3 at the time of appointment in 1996, in the consolidated seniority list she had found place at Serial No.68, but in the list of 2002 she was relegated to Serial No.75. It is her contention that the alleged seniority list is not proper, neither is it as per Rules.

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Following the aforesaid response of the Respondent No.1 dated 22-09-2016, the Petitioner again preferred a representation on 26-09-2016 to the Respondent No.1 reiterating her request for maintenance of her seniority. However, on 11-11-2016, a letter came to be issued by the Respondent No.1 to the Chief Medical Officers of the four District Hospitals and the Director-cum-Medical Superintendent, STNM Hospital, informing therein that the Department was in the process of notifying *inter se* seniority list of Staff Nurses under the Sikkim Subordinate Nursing Service. The Officers were requested to circulate the enclosed provisional seniority list amongst the concerned Nurses to enable submission of their respective claims/objections, if any, in writing within fifteen days from the date of issuance of the letter. In the said list, for the 1996 appointments the Petitioner found herself listed at Serial No.16 (Respondent No.4 having resigned in the interim) instead of Serial No.3 as earlier, while those who had been placed below her now found place above her. Hence, she objected to the Provisional seniority list of 2016, vide communication dated 21-11-2016 to the Respondent No.1, in addition to which she preferred a representation before the Hon'ble Chief Minister of Sikkim who requested the Respondent No.2 to consider her case. She also filed an application under the Right to Information Act, 2005 to the State Public Information Officer (SPIO) of the Respondent No.1 on 02-05-2017 who, *inter alia*, informed of her that the concerned File could not be located in the Department the matter being twenty-one years old. Aggrieved, the Petitioner on 10-06-2017 sent a legal notice to the Respondent No.1 to which the Respondent No.1 expressed

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inability to correct the seniority list as notified on 09-09-2002. Hence, the instant Petition seeking the aforesaid reliefs.

3. Respondent No.1 and Respondent No.2 filed a joint Counter-Affidavit. While denying and disputing the claims of the Petitioner, *inter alia*, averred therein that the seniority list which was circulated vide Memo No.277/H.&F.W. dated 19-11-1996 was erroneous as the date of appointment of the Petitioner was wrongly recorded as "23-05-1996" instead of "21-05-1996". A fresh seniority list was thus prepared and notified on 09-09-2002 duly maintaining the *inter se* seniority with effect from the date of joining of duty by the appointees and circulated to them and the respective Chief Medical Officers of all the Districts. That, the said seniority list has been accepted for the last fifteen years based on which a series of promotions and redesignations have been effected besides assigning duty roster and higher responsibilities in the Hospital, to which the Petitioner till date had not objected. It was also averred that the seniority list of 1996 was not notified while the seniority list as per Notification of 2002 was circulated to all concerned. Admitting to issuance of letter dated 11-11-2016 it was pointed out that this letter has since been rescinded, as the Notification of 2002 pertaining to seniority was already in existence. That, as the grounds set out by the Petitioner are not sustainable in the eyes of law besides which the Petitioner has approached this Court belatedly, the Petition is liable to be dismissed outright.

4. Respondents No.3, 5 to 14 and 16 to 18 too filed a common Counter-Affidavit denying that the Office Order dated 21-

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05-1996 was ever a merit list. Seeking a dismissal of the Petition, it was averred that no written test or viva voce was conducted during such appointment which infact was made on account of a large number of vacancies of Staff Nurses at that point in time. Hence a common appointment order was issued by the Respondents No.1 and 2 for all the Staff Nurses including the Petitioner based on those who had a Certificate of Nursing Course. The list was prepared District-wise in order to ascertain the number of staff belonging to various Districts to facilitate transfers to the concerned District Hospitals. That, the said Respondents joined their duties 2-3 days prior to the Petitioner who joined only on 25-05-1996, and it is a settled principle of law that the initial date of joining is the criteria for basing *inter se* seniority. In the event that the date of joining is identical then the age of the person would be taken into consideration, placing the older person at a higher rank in seniority. That, the Sikkim State Nursing Service Rules, 1997 (hereinafter "Nursing Service Rules"), categorically lays down that the *inter se* seniority of the members of the service shall be determined in accordance with the Sikkim State Services (Regulation of Seniority) Rules, 1980 (hereinafter "Regulation of Seniority Rules"). That, under the Regulation of Seniority Rules it is provided that the seniority of persons who are appointed to the service by a method other than by selection or by examination shall be determined *ad hoc* by the State Government by a special order. No such special order was issued nor was the seniority list notified in a Government Gazette or Circular. That, infact due to several errors appearing in the list of 1996 necessary rectifications were made by preparation of

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the list in 2002. Following the *inter se* seniority list of 2002 the Attendance Register of the Nurses are maintained as per the Wards attended to by them. The Respondents are thus in the Special Neonatal Care Unit (SNCU) and the Dialysis Unit, indicative of their seniority. That, infact a Screening Test of all Staff Nurses was done by the State-Respondents based on the *inter se* seniority list of 2002 whereupon Office Order dated 14-11-2016 was issued which remained unassailed by the Petitioner thereby waiving her right to challenge the *inter se* seniority list of 2002. A number of promotions of the batch of 1996 have been effected based on the *inter se* seniority list of 2002, hence, the Petition is liable to be dismissed also on the grounds of estoppel, waiver and acquiescence.

5. In Rejoinder, the Petitioner would draw the attention of this Court to Rule 8(a) of the Sikkim Government Establishment Rules, 1974 (hereinafter "Establishment Rules") and aver that in consideration of the said Rules the Petitioner having been selected as Staff Nurse by direct recruitment would be placed in the *inter se* seniority on the basis of the selection list. Assistance was also taken of Rule 4(d) of the Regulation of Seniority Rules. That, infact the Petitioner had applied for the post of Staff Nurse after it was advertised by the Respondent No.1 as evident from their RTI response, followed by an interview of applicants, marks awarded by the Selection Committee and their names arranged in accordance with the marks obtained by them. To buttress this point, reliance was placed on a letter dated 23-02-1995 issued by the Respondent No.1 calling one Sanchamaya Rai for an interview, on her

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application for appointment as GNM. Thus, the seniority so settled cannot be withdrawn without operation of a valid law and a mere fortuitous chance of reporting for duty earlier would not alter the ranking given by the Selection Board, hence the prayers in the Writ Petition be granted.

6. Canvassing his arguments on behalf of the Petitioner, Learned Counsel while drawing attention to the Notifications of 1996 and 2002 referred to hereinabove, would contend that the Respondents had acted arbitrarily and contrary to law by placing the Petitioner below her actual position in the seniority list. That the Respondents are required to strictly adhere to the provisions of the Establishment Rules, Regulation of Seniority Rules and Nursing Service Rules. Infact, the Establishment Rules clearly lays down at Rule 8(d) that once the *inter se* seniority of a Government Servant in one grade is determined, it shall not be disturbed unless and until he is either promoted to the next higher post or is reduced in rank under the provisions of the procedure for disciplinary action. That, the Petitioner joined duty at Namchi Hospital within the time limits prescribed by the Authority and as there was no gross delay her *inter se* seniority cannot be affected. The Petitioner had never been informed by the Respondent No.1 that seniority would be on the basis of the date of joining and they cannot now take the said plea when merit was the criteria considered for placing the Petitioner at Serial No.3 of the list of 1996. It was urged that where a statute requires a particular act to be done in a particular manner, the act has to be done in that manner alone and every word of the statute

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has to be given its due meaning. Support was garnered from the ratio in ***Competent Authority vs. Barangore Jute Factory and Others***¹. While contending that the Rules ought to be strictly complied with by the concerned Department, attention of this Court was drawn to the decision in ***State of Kerala and Others vs. K. Prasad and Another***². While relying on ***P. Mohan Reddy vs. E.A.A. Charles and Others***³ it was canvassed that the Petitioner has the right to her seniority being determined in accordance with the Rules which existed when she entered service. That the question of re-determination of the seniority in the cadre did not arise as there was no amendment to the Rules pertaining to seniority. Assailing the contention of the Respondent No.1 that seniority was based on the date of joining, strength was drawn from ***Chairman Puri Gramya Bank and Another vs. Ananda Chandra Das and Others***⁴ and ***Suresh Chandra Jha vs. State of Bihar and Others***⁵. Drawing succour from ***Rajasthan State Industrial Development and Investment Corporation vs. Subhash Sindhi Cooperative Housing Society, Jaipur and Others***⁶ it was argued that Notification of 2002 which had no legal sanction cannot override the Rules pertaining to seniority which are already in place. While fending of the argument of the Respondents that the Petitioner has approached the Court belatedly and was therefore not entitled to the reliefs, the attention of this Court was invited to ***R. M. Ramual vs. State of Himachal Pradesh and Others***⁷. That, the Petitioner was in

¹ (2005) 13 SCC 477

² (2007) 7 SCC 140

³ (2001) 4 SCC 433

⁴ (1994) 6 SCC 301

⁵ (2007) 1 SCC 405

⁶ (2013) 5 SCC 427

⁷ (1989) 1 SCC 285

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ignorance of the seniority list of 2002 as it was not notified in the Government Gazette and only the letter dated 11-11-2016 brought this fact to the notice of the Petitioner. It was further contended that the response dated 29-05-2017 of the ASPIO of the Respondent No.1 would clearly indicate that the promotion of Staff Nurses of the 1996 batch has not been effected although it is proposed to be, based on the seniority list of 09-09-2002, which reveals that the averment of the Respondents No.3, 5 to 14 and 16 to 18 that promotions have taken place is misleading. Hence, the prayers in the Writ Petition be granted.

7. Countering the arguments of Learned Counsel for the Petitioner, Learned Senior Government Advocate would contend that 17 candidates were appointed in the year 1996 as against 43 vacant posts of GNM that year thereby implying that the appointments were made without any interview or Selection Test, the qualification of the candidates being the sole consideration. Merely because the name of the Petitioner appeared at Serial No.3 it could not be interpreted as her *inter se* seniority. Moreover, seniority would be reckoned from the date of joining and evidently the Petitioner joined service only on 25-05-1996 as against others who admittedly joined prior to her in time. Besides, should the date of joining be the same then the date of birth and thereby the age of the candidate would be the factor for consideration while fixing seniority. That, infact in the year 1996 there were no Rules to follow for guidance on seniority and the list was prepared at random, apart from which seniority is not a fundamental right, but merely a civil right. Support on these

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aspects was drawn from ***Bimlesh Tanwar vs. State of Haryana and Others***⁸. Forwarding the argument that the Petition was filed belatedly rendering the Petitioner guilty of laches, attention was drawn to ***P. S. Sadasivaswamy vs. State of Tamil Nadu***⁹. That, in the instant case despite knowledge of the re-fixation of *inter se* seniority in 2002 the Petitioner has approached this Court only in the year 2017, fifteen years after such exercise. While arguing that the Court can only enquire into whether the Rule laid down by the State is arbitrary and irrational leading to inequality of opportunity amongst employees belonging to the same class, reliance was placed on ***Reserve Bank of India vs. N. C. Paliwal and Others***¹⁰. It was urged that in view of the grounds put forth, the Petition be dismissed.

8. Learned Counsel for the Respondents No.3, 5 to 14 and 16 to 18, while reiterating the averments made in her Counter-Affidavit would refute the stance of the Petitioner strenuously and contend that the Petition is liable to be dismissed, firstly on account of the delay and laches, towards this end reliance was placed on ***Vijay Kumar Kaul and Others vs. Union of India and Others***¹¹. That the Petitioner cannot claim ignorance of the Notification of 2002 being undeniably aware that several Nurses of the same batch, some of whom were working with her, have been redesignated and consequently given higher responsibilities on the basis of the said

⁸ (2003) 5 SCC 604

⁹ (1975) 1 SCC 152

¹⁰ (1976) 4 SCC 838

¹¹ (2012) 7 SCC 610

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Notification. That the averments made by the Respondents be given due consideration and the Petition be dismissed.

9. Submissions made at the bar were heard *in extenso* and given anxious consideration. The pleadings and all documents appended thereto have been carefully perused. What falls for consideration before this Court is,

- (i) Whether the seniority of the Petitioner is to be determined by the Office Order No.896/M./H&FW dated 21-05-1996 followed by letter bearing No.277/H.&F.W. dated 19-11-1996, or would it be determined by Notification No.13/H&F.W. dated 09-09-2002.
- (ii) Whether the Petition is liable to be dismissed on account of delay and laches.

10. Addressing the first question, a perusal of the Office Order bearing No.896/M./H&FW, dated 21-05-1996 (Annexure P-2), appointing the Petitioner as Staff Nurse with sixteen others, places her name at Serial No.3 of the list of appointed candidates. Indubitably the Petitioner joined on 25-05-1996 as against some others who joined prior in time. Nevertheless, this Office Order was followed by a letter to the Petitioner bearing No.277/H&F.W., dated 19-11-1996, which reads, *inter alia*, as follows;

“.....

I am forwarding herewith the seniority list with relevant details for your perusal and acceptance thereof.

Your acceptance or objection of any should be submitted within 15 days from the date of issue of this letter else it will be presumed that you have accepted your seniority maintained by the Department and no

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future request for alteration/ addition, modification of the same will be entertained.

.....”

The seniority list was appended to the letter addressed to the Petitioner, for perusal and acceptance and included the names of Staff Nurses appointed from 06-04-1979 to 18-08-1996. In the batch of 1996 alone, of the said list, the Petitioner's name found place at Serial No.3 whereas in the overall rank in seniority she was listed at Serial No.68. The objection of the Petitioner was to be submitted within fifteen days, if no such objection was forthcoming it would be presumed that the seniority listed therein had been accepted. It is no one's case that there was any objection from any quarter within the given period of fifteen days, hence it would not be erroneous to assume that the *inter se* seniority was decided in terms of the list appended to the letter. At this juncture, it would be worthwhile considering whether the argument of the Respondents that the date of joining would be the basis for computing seniority can be countenanced. It would be advantageous to extract Rule 8 of the Establishment Rules which provides as follows;

“8. Seniority.-

(a) Direct recruits.-

(i) While making selection for direct recruitment, the authority concerned while making recommendations shall arrange the names of the selected candidates in the order of merit assigned to them by the authority. If all the candidates join duty or training courses, as the case may be, within the time limits prescribed, inter-se seniority will be fixed in the same order in which their names are placed at the time of selection. Extension of the period of training or probation in any individual case by the Government shall not affect the inter-se seniority.

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.....

(ii)

(b)

(c)

(d) Once the inter-se seniority of a Government Servant in one grade is determined, it shall not be disturbed unless and until he is either promoted to the next higher post or is reduced in rank under the provision of the procedure for disciplinary action."

[emphasis supplied]

11. The aforestated Rule at 8(a)(i) clearly lays down that the names of the selected candidates shall be in the order of merit assigned to them by the Authority. The Rule also provides that if all the candidates joined duty within the time limit prescribed the *inter se* seniority will be fixed in the same order in which their names are placed at the time of selection. On examining Annexure P1 which is a Memorandum bearing Memo No.533/M/H&FW/M dated 15-05-1996 and Office Order No.896/M./H&FW dated 21-05-1996 the documents nowhere prescribe the time limit by which date the Petitioner or her colleagues were to join duty. The order of appointment having been issued on 21-05-1996 and the Petitioner having joined duty on 25-05-1996 appears to have been considered as reasonable time since the Authorities raised no objection. Rule 8(d) of the same Rules provides that the *inter se* seniority so arranged shall not be disturbed unless the concerned person is promoted or reduced in rank. What needs to be pointed out here is that none of the seventeen appointees of 1996 objected to the name of the Petitioner being placed at Serial No.3 in terms of Office Order dated 21-05-1996 and communication dated 19-11-1996. Pausing

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here for a minute, it would be appropriate to distinguish between "merit" and "date of joining". Merit as per the Cambridge English Dictionary would be "*the advantages something has compared to something else*" while the date of joining obviously is the date on which a person would join duty. Merely because a person who is placed lower in the merit list joins duty promptly on issuance of appointment letter would not entitle that person placement at a higher position than what he/she was placed on selection on merit. Although it is the stance of the State-Respondents that seventeen candidates were appointed as against a vacancy of forty-three qualification being the sole consideration, no document to substantiate this contention finds place in the records. The Petitioner for her part has submitted a letter issued to one Sancha Maya Rai in 1995 calling her for an interview for the Post of GNM. Although this is indeed a tenuous argument, but it raises a reasonable probability that an interview could similarly have been held for the 1996 batch.

12. In ***Chairman Puri Gramya Bank (supra)*** the Hon'ble Supreme Court held that;

"12. It is settled law that if more than one are selected, the seniority is as per ranking of the direct recruits subject to the adjustment of the candidates selected on applying the rule of reservation and the roster. By mere fortuitous chance of reporting to duty earlier would not alter the ranking given by the Selection Board and the arranged one as per roster. The High Court is, therefore, wholly wrong in its conclusion that the seniority shall be determined on the basis of the joining reports given by the candidates selected for appointment by direct recruitment and length of service on its basis. The view, therefore, is wrong."

[emphasis supplied]

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13. In **Suresh Chandra Jha** (*supra*) the Hon'ble Supreme Court while considering whether seniority ought to be based on merit or according to the date of joining held that;

"6. There is no dispute that the appellant was ranked higher to Respondent 8. There is also no dispute that in the appointment letter the appellant was given six weeks' time to join. Merely because Respondent 8 joined earlier that did not in any way affect the merit placement." [emphasis supplied]

14. We may now beneficially turn to Rule 4(d) and 4(f) of the Regulation of Seniority Rules, which provides as follows;

"4. Determination of seniority.-The seniority of the members of the Service shall be determined separately in respect of each Service in the manner specified below,-

- (a)
- (b)
- (c)

(d) The relative seniority inter-se of persons recruited by selection shall be determined on the basis of the order in which their names are arranged in the selection list prepared in consultation with the Commission:

Provided that where persons promoted initially on a temporary basis are subsequently appointed to the Service on a substantive basis in an order different from the order of merit indicated at the time of their temporary promotion, seniority shall follow the order of subsequent appointment and not the original order of merit.

.....

(f) The seniority of persons who are appointed to the Service by a method other than by selection or by examination shall be determined ad-hoc by the State Government by a special order." [emphasis supplied]

These Rules in addition to the Establishment Rules *supra*, elucidate the method of determining seniority. It was contended by

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Learned Counsel for Respondents No.3, 5 to 14 and 16 to 18 that Rule 4(f) of Regulation of Seniority Rules *supra* was applicable herein, requiring a special order by the Government to determine seniority as the Petitioner was appointed neither by way of selection nor examination, but on possession of qualification. That as no special order issued her seniority could not have been determined in 1996. It would be apposite to reiterate here that the Respondents have not been able to establish absence of interview or selection test for appointment of the Petitioner. While considering the response given by the ASPIO of the Respondent No.1, to a question put by the Petitioner vide her letter dated 02-05-2017 as follows;

"7(i) What are the provision/Rules under which the Staff Nurses were appointed as per the O.O. NO.895/M/H&FW dated 21.05.1996?"

The response dated 29-05-2017 of the ASPIO was as follows;

"01. The basis of appointment is the rules prevalent at the time and as per the advertisement notice issued. The matter being of 21 years old (sic), the department is unable to locate file, hence, note sheets are unavailable."

[emphasis supplied]

It goes without saying that the response being from the ASPIO of the Respondent No.1 given under an RTI Application of the Petitioner is deemed to be correct. Since the appointment was made in response to an advertisement, it can safely be assumed that some semblance of a selection process was complied with. This therefore sets to rest the speculation that the appointment was not on merit consequently Rule 4(f) of the Regulation of Seniority Rules could not be applicable.

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The law enunciated in the above extracted ratio sets to rest the arguments of the Respondents on this aspect, inasmuch as the date of joining cannot be reckoned for computing seniority.

15. The argument advanced by Learned Senior Government Counsel urging that no Rules were available to guide the Respondents on the question of seniority deserves no consideration and cannot be countenanced in view of the truth that stares one in the face in the form of the Regulation of Seniority Rules 1980 and the Establishment Rules 1974, while the appointments admittedly were of the year 1996. Undoubtedly the aforesaid Rules ought to have guided the Respondent on determination of seniority even in the absence of the Nursing Service Rules which came to be enacted only in 1997 and applied in *proprio vigore* with regard to the *inter se* seniority of the persons selected.

16. In *K. Prasad* (*supra*) the Hon'ble Supreme Court while considering the sanctity of Rules would hold as follows;

"10. In view of such comprehensive procedure laid down in the statute, an application for upgradation has necessarily to be made and considered strictly in a manner in consonance with the Rules. It needs little emphasis that the Rules are meant to be and have to be complied with and enforced scrupulously. Waiver or even relaxation of any rule, unless such power exists under the rules, is bound to provide scope for discrimination, arbitrariness and favouritism, which is totally opposed to the rule of law and our constitutional values. It goes without saying that even an executive order is required to be made strictly in consonance with the rules. Therefore, when an executive order is called in question, while exercising the power of judicial review the Court is required to see whether the Government has departed from such rules and if so, the action, of the Government is liable to be struck down."

[emphasis supplied]

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In terms of the aforesaid observation it is clear that the State-Respondents were required to abide by the mandate of law pertaining to seniority in terms of the Rules and principles of law extracted hereinabove and discussed.

17. In *P. Mohan Reddy (supra)* the Hon'ble Supreme Court held that;

"17. A conspectus of the aforesaid decisions of this Court would indicate that even though an employee cannot claim to have a vested right to have a particular position in any grade, but all the same he has the right of his seniority being determined in accordance with the Rules which remained in force at the time when he was borne in the cadre."

We may look for succour to Rule 8(d) of the Establishment Rules which dealing with this facet which provides that *inter se* seniority cannot be meddled with once determined as already discussed and which is not being reiterated here to prevent prolixity.

18. In *R. M. Ramual (supra)* the Hon'ble Supreme Court has held that;

"17. It is true that the final seniority list was sent to the Central Government and presumably it was approved, but because a seniority list has been approved by the Central Government, it cannot be laid down as a rule of law that even though it has been illegally prepared in violation of the directions of the Central Government itself to the prejudice of the officer or officers concerned, it cannot be challenged. Normally, when a seniority list has been made final, it should not be allowed to be challenged. But when a seniority list is prepared ignoring all just principles and also the rules framed or directions given by appropriate authority, seriously affecting any officer, it is always liable to be examined and set aside by the court. We are, therefore, unable to accept the contention of the learned counsel for Respondent 4 that the seniority list having been made final after the approval of the Central Government cannot be challenged by the appellant."

[emphasis supplied]

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The observation *supra* would urge the Authorities to ensure that seniority list is prepared keeping in view "just" principles.

19. In ***Rajasthan State Industrial Development and Investment Corporation*** (*supra*) the Hon'ble Supreme Court held that;

"27. Executive instructions which have no statutory force, cannot override the law. Therefore, any notice, circular, guidelines, etc. which run contrary to statutory laws cannot be enforced. [Vide *B.N. Nagarajan v. State of Mysore* [AIR 1966 SC 1942] , *Sant Ram Sharma v. State of Rajasthan* [AIR 1967 SC 1910] , *State of Karnataka v. Umadevi (3)* [(2006) 4 SCC 1 : 2006 SCC (L&S) 753 : AIR 2006 SC 1806] and *Mahadeo Bhau Khilare (Mane) v. State of Maharashtra* [(2007) 5 SCC 524 : (2007) 2 SCC (L&S) 194].]"

While on this point, it is relevant to consider that in the first instance after the seniority list was maintained in terms of the letter dated 25-11-1996 there appears to be no amendment to the Rules nor was there any Circular pertaining to change in the seniority, besides which it needs no reiteration that executive instructions cannot override the law. The argument of the Respondents No.1 and 2 that the list of 1996 required rectification as the Petitioner's date of appointment was recorded as "23-05-1996" instead of "21-05-1996" is rather fragile and incredulous. Inarguably a letter dated 11-11-2016 was issued by the Respondent No.1 informing the concerned officials of the intention of the Department to prepare an *inter se* seniority list of Staff Nurses in 2016. No such communication or intention of resettlement of seniority appears to have been issued in 2002.

20. That, having been said a meticulous scrutiny of the Nursing Service Rules, at Rule 13, clearly contemplates as follows;

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"13. The inter-se-seniority of the member of the service shall be determined in accordance with the Sikkim State Service (Regulation of Seniority) Rules, 1980."

This Rule needs no further clarification suffice it to state that the *inter se* seniority of the Nurses was to be determined in terms of the Regulation of Seniority Rules which has already been discussed.

21. It also becomes imperative to mull over the averment of the Respondents No.3, 5 to 14 and 16 to 18 which was as follows;

"13. That the Screening Test of all the Staff Nurses was done by the State Respondents based on the Inter-Se-Seniority list of 2002, thereafter Office Order 14/11/2016 was issued. The said Screening Test was also neither challenge (sic) nor protested by the petitioner. Said fact the petitioner has waive her right (sic) to protest & challenge the inter-se-seniority list of 2002 and not knowing the seniority list of 2002 is incorrect."

No evidence exists of a screening test neither is it averred or argued by the Respondents No.1 and 2. The Office Order dated 14-11-2016 is bereft of allusion to any screening test. This averment thus appears to be a figment of the imagination of the answering Respondents, in the absence of substantiation by documentary evidence. Another averment of the Respondents No.3, 5 to 14 and 16 to 18 that draws the attention of this Court is that the seniority of the Respondents is evident from the fact that they are in charge of the SNCU and Dialysis Ward. On this count, Annexure P7 would reveal that even the Petitioner is posted at the SNCU/NICU, would this therefore bring her at par with the Respondents despite their arguments to the contrary? That apart, the averments of the said Respondents clearly indicate that Respondents No.7 and 18, have

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been redesignated as "Sister-in-Charge" of different Wards not promoted. As per the Concise Oxford English Dictionary, Twelfth Edition, Oxford University Press, the meaning of 'redesignate' would be "give (someone or something) a different official name, description or title" While, the meaning of 'promotion' would be "the action of raising someone to a higher position or rank". Redesignation is surely not equivalent to promoting a person and there ought not to be any confusion on the nomenclature employed.

22. The contention of the Respondents *supra*, that the Nurses of the 1996 batch have been promoted has to be taken with a pinch of salt, as a careful perusal of the documents on record would reveal that promotions have been given to Staff Nurses employed in the year 1981 up to 1994 which by no stretch of the imagination included the 1996 batch. It is pertinent to mention here that on 27-10-2017, this Court in I.A. No.02 of 2017 on a prayer of the intervenors being Staff Nurses of 1995, *inter alia*, ordered as follows;

"5. In view of the detailed submission reflected herein, it is evident that promotion with regard to the Intervenors/Applicants who were appointed in the year 1995 is not in contest and if steps are taken for their promotion, no prejudice will be caused to the Petitioner. Accordingly, the State-Respondents No.1 and 2, if so advised, may proceed with the promotional matter of the Intervenors/Applicants. The Order dated 14.7.2017, is modified accordingly"

Towards this, we may also rely on the response of the ASPIO dated 29-05-2017 to the query of the Petitioner which states as follows;

"08. The promotion of staff nurse (sic) has not been executed. However, the promotion of Staff

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Nurses is proposed to be based as per Seniority List published vide Notification No.13/H&FW; Dated 09.09.2002. (Copy enclosed at flag 'B')"
[emphasis supplied]

The argument *supra* of the Respondents thus merits no consideration, being fallacious.

23. It is the specific argument of the Respondent No.1 that Notification of 2002 having been duly notified in the Department would have precedence over the 1996 Notification and the Petitioner cannot now claim ignorance. Having perused the Notification No.13/H&F.W. dated 09-09-2002, it emerges therein that a copy each of the Notification has been made over to "*All persons concerned in the enclosed list*" and to Authorities listed therein and, File and Guard File. What the Respondent No.1 has failed to establish is whether all concerned persons had ever received the said Notification. For that matter, Respondents No.3, 5 to 14 and 16 to 18 have also failed to substantiate by any documentary evidence or averment in that context that a copy of the Notification of 2002 was made over to them or received by them at any point in time. The process of Departmental Notification has not been elucidated by Learned Counsel for the Respondents No.1 and 2. Over and above the aforesaid circumstances there is also no prior correspondence, Office Circular or Notice to the concerned persons informing them that *inter se* seniority was being restructured in the year 2002 as against the seniority existing in 1996, thereby depriving them an opportunity to put forth their stance. As already pointed out the rescinded letter of 11-11-2016 has offered such an opportunity when such a process was being considered in 2006. Hence, on the

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existence of such lacuna and the foregoing discussions, in my considered opinion, the Notification of 2002 cannot be said to have any precedence over the Notification of 1996.

24. While addressing the question of laches, reliance was placed by the Respondents No.3, 5 to 14 and 16 to 18, on **Vijay Kumar Kaul** (*supra*), which enumerates the proposition that a litigant who invokes the jurisdiction of a Court claiming seniority has to approach the Court at the earliest. In the matter at hand it emerges with clarity that the Petitioner learnt of resettlement of seniority only in 2016 which fact could not be countered by the Respondents. Respondents No.1 and 2 have issued Notification of 2002 unbeknownst to the Petitioner, they cannot therefore impute knowledge of their act to her. Since she learnt of the resettlement of seniority in 2016 which is supported by the letter of 11-11-2016, which admittedly has been rescinded by the Respondents No.1 and 2, the conclusion thereof is that there has been no delay in the Petitioner invoking the jurisdiction of this Court. We may usefully recall the ratiocination in **R. M. Ramual** (*supra*) already extracted hereinabove observing, *inter alia*, that a seniority list illegally prepared to the prejudice of Officer or Officers is always liable to be examined and set aside by the Court.

25. In conclusion, assuming a restructuring of the seniority was necessitated on account of the error on the part of the Respondent No.1 as claimed, such change ought not to prejudice the Petitioner who was placed at Serial No.3 of the seniority in her batch prior to the change made by the Notification of 2002. Indeed

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the power that vests on the Respondents No.1 and 2 to fix *inter se* seniority is not being questioned, but such an exercise cannot be arbitrary or discriminatory and thereby offend the constitutional safeguards. In ***Anil Kumar Vitthal Shete and Others vs. State of Maharashtra and Another***¹² the Hon'ble Supreme Court observed as follows;

"33. From the above decisions, it is clear that it is always open to an employer to adopt a policy for fixing service conditions of his employees. Such policy, however, must be in consonance with the Constitution and should not be arbitrary, unreasonable or otherwise objectionable."

26. In the instant matter, the determination of seniority in terms of Notification No.13/H&F.W. dated 09-09-2002 in view of the foregoing detailed discussions is evidently unreasonable and arbitrary.

27. Consequently, Notification No.13/H&F.W. dated 09-09-2002 is set aside as also the communication dated 22-09-2016.

28. The Respondents No.1 and 2 shall comply strictly with the seniority as laid out vide communication bearing No.277/H.&FW. dated 19-11-1996.

29. No order need issue for communication dated 11-11-2016 or the consequences that would have flown from it, in view of the correspondence having been rescinded by the Respondent No.2.

¹² (2006) 12 SCC 148

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30. Writ Petition is allowed and stands disposed of accordingly.

31. No order as to costs.

Sd/-
(Meenakshi Madan Rai)
Acting Chief Justice
26-07-2018

Approved for reporting : **Yes**

Internet : **Yes**