

**IN THE WEST BENGAL ADMINISTRATIVE TRIBUNAL
BIKASH BHAVAN, SALT LAKE CITY
K O L K A T A – 7 0 0 0 9 1**

Present :-

Hon'ble Justice Ranjit Kumar Bag,
Judicial Member

-AND-

Hon'ble Dr. Subesh Kumar Das,
Administrative Member

J U D G M E N T

-of-

Case No. : O.A. 137 of 2016 : Sambhu Ranjan Dutta & Others

..... Applicants.

-Versus-

State of West Bengal & Others.

..... Respondents.

And

Case No. : O.A. 1270 of 2016 : Milan Kumar Santra & Others

..... Applicants.

-Versus-

State of West Bengal & Others.

..... Respondents.

For the Applicants:-

(In both the cases)

**Mr. Amales Roy,
Mrs. M. Bhowal,
Mr. Arnab Roy,**
Learned Advocates.

For the State Respondents:-

(In both the cases)

**Mr. Goutam Pathak Banerjee,
Mrs. Sunita Agarwal,**
Learned Advocates.

For the Private Respondents:-

(In both the cases)

**Mr. Anindya Lahiri,
Mr. S.K. Mondal,**
Learned Advocates.

Judgment delivered on: 02.08.2019

JUDGEMENT

OA-137 of 2016 and OA 1270 of 2016 were taken up for hearing analogously with the consent of Learned Counsel representing all parties. Since the facts and circumstances and the reliefs claimed in both the original applications are similar and both the original applications can be disposed by a common judgment, we have taken up both the applications together for disposal by this composite judgment.

2. The applicants in both the original applications OA-137 of 2016 (three applicants) and OA 1270 of 2016 (four applicants) initially joined as District Statistical Officers belonging to West Bengal Junior Statistical Service (in short WBJSS) under Bureau of Applied Economics and Statistics on different dates during the period 1988 to 1995. Subsequently they were appointed in the posts of Assistant Director in the West Bengal Statistical Service (in short WBSS).

3. By submitting the two original applications the applicants have sought for direction upon the Respondents to cancel the Gradation List of the WBSS Officers published by the Department of Statistics and Program Implementation on September 30, 2015 and to revise the Gradation List by considering the dates of up-gradation and re-designation of the applicants as the dates of their appointment in the WBSS and by considering them as senior to the Direct Recruit Officers of the 1998 batch in the WBSS Cadre. They have also prayed for direction upon the state respondents not to give any effect to impugned Gradation List dated September 30, 2015.

4. On the basis of recommendation of the Pay Review Committee, the Finance Department, vide Memo No. 11140-F dated November 09, 1995, upgraded 17 posts of District Statistical Officers in the WBJSS to the posts of Assistant Directors in the WBSS. This was in partial modification of the Finance Department Notification No. 430-F dated January 12, 1990 by which the WBS (ROPA) Rules, 1990 was published. The Development and Planning Department issued Memo No. 2604 dated

August 30, 1996 with the concurrence of the Finance Department, where it clarified the principle to be followed for filling up the seventeen upgraded posts. Accordingly, it was decided that all the seventeen upgraded posts of Assistant Directors in the WBSS shall be filled up by the existing officers of the WBJSS strictly according to their seniority. It was also clarified that the seniority of all the WBJSS officers now upgraded to the posts of Assistant Directors in the WBSS shall be placed below the officers who were already holding the posts in the WBSS either by direct recruitment or by promotion during the period up to November 9, 1995. There is no dispute on the issue of up-gradation of 17 posts in the WBJSS cadre to 17 posts in the WBSS cadre as the order was issued by the Finance Department on the basis of recommendation of the Pay Review Committee. The complications arose when the additional posts created were filled up by the officers of the WBJSS cadre without consulting the Public Service Commission, West Bengal and without following the recruitment rules. Subsequently, when the Administrative Department approached the Public Service Commission (PSC) for post facto approval of appointments, the Commission did not give concurrence. Even though concurrence of the PSC, West Bengal could not be obtained, the Administrative Department continued to appoint more officers in the WBJSS in the posts of Assistant Directors in the WBSS. The matter was again referred to the Commission in the year 2003, but the commission reiterated its view communicated earlier and did not agree to post-facto approval of the appointments.

5. As PSC, WB did not give concurrence to the regularisation of the upgraded officers, the Development and Planning Department referred the matter to the Finance Department for moving the Cabinet for regularisation of appointment of 60 (sixty) officers to the West Bengal Statistical Services from the West Bengal Junior Statistical Services. The matter was placed before the Cabinet in its meeting dated August 30, 2005 and the Cabinet approved the regularisation of appointments of 60 (sixty) officers to the WBSS from the WBJSS. After receiving approval of the Cabinet, the Development and Planning Department issued G.O.No.3130/DP/O/30E-2/99-SB dated October 19, 2005, whereby the appointments of the applicants in the

WBSS Cadre were regularised with retrospective effect. Subsequently, the applicants of OA-137 of 2016 were allowed benefits of Career Advancement Scheme under ROPA 1998 (CAS) on completion of 8 years of service in the years 2007/2008 and the applicants of OA-1270 were allowed CAS benefits on completion of 8 years and 16 years of service in the years 2007 and 2015. In allowing the CAS benefits the length of their service were counted from the dates of their appointments in the upgraded posts.

6. The Department of Statistics and Programme Implementation published a final gradation list of West Bengal Statistical Services Officers on September 30, 2015. In the said gradation list, the direct recruit officers of the 1998 batch were placed in higher position in relation to the applicants whose services were regularised with retrospective effect on the basis of decision of the Cabinet dated August 30, 2005. In the said gradation list, it is mentioned that the appointments of the applicants in the West Bengal Statistical Services were regularised as direct recruit with effect from October 19, 2005, which is the date of issue of the order of regularisation after approval of the Cabinet.

7. Appearing on behalf of the applicants, Mr. Amalesh Roy, Learned Counsel assisted by Ms. M. Bhowal and Mr. Arnab Roy, submitted that the impugned gradation list dated September 30, 2015 should be set aside and directions may be issued to the state respondents to revise the gradation list on the following grounds:

(i) That the G.O. No. 3130/DP/O/30E-2/99-SB dated October 19, 2005 was issued by the erstwhile Department of Development & Planning, Government of West Bengal to regularise appointments of the applicants in the WBSS as direct recruits with effect from the dates of their up-gradation in WBSS which ranged from January 1, 1990 to June 1, 1996. On the basis of the aforesaid exercise of regularisation of appointments, it is amply clear that the present applicants were appointed in the posts of WBSS prior to the direct recruit officers appointed in the year 1998 and, therefore, should be considered as senior to them.

(ii) That the applicants have been allowed the benefits of Career Advancement Scheme under ROPA 1998 on completion of 8 years and 16 years (applicants of OA-1270 of 2016) of service and in awarding such benefits the length of their service was counted from the dates of their up-gradation in the WBSS, and now the Government cannot consider different dates as the dates of their appointments.

(iii) That the date of regularisation is to be from the date of up-gradation as mentioned in the order dated October 19, 2005 and cannot be the date of issuance of the order. That the seniority position of the applicants was crystallised by the department vide its memo dated October 19, 2005 and the department now cannot question the previous decision of the Government. The department was wrong in placing the private respondents above the applicants in the gradation list published on September 30, 2015.

(iv) That the applicants were uplifted and accommodated in the post of Assistant Director with effect from the dates from January 1, 1990 to June 1, 1996 on the basis of the Memorandum of the Finance Department dated November 9, 1995 issued on the basis of recommendations of the Pay Review Committee. That the applicants were never direct recruits in the WBSS, but became Assistant Directors in the WBSS by getting the “benefit of up-gradation” by virtue of relevant administrative decision taken by the Government following the recommendation of the Pay Review Committee. The applicants accordingly cannot be subsequently treated either as direct recruits or promotees in the WBSS for any purpose. That the applicants were upgraded from the posts in the WBJSS by well considered administrative decision taken by the competent authorities way back in 1995 and 1996 by duly allowing them the “benefits of up-gradation” and going beyond the recruitment rules. So, the applicants can never be treated either as direct recruits or as irregularly appointed to WBSS.

(v) That the Cabinet Decision dated August 30, 2005 was thoroughly misconceived and unnecessary exercise as the same was contrary to the facts as the applicants were never recruited as Assistant Directors in the WBSS but were uplifted and accommodated to the up-graded posts of Assistant Directors and re-designated as

such. As a result, whenever they were uplifted to the upgraded posts of WBSS, they were re-designated as Assistant Director in the WBSS with effect from the same date.

(vi) That the applicants were appointed by virtue of administrative decision of the State Government on the basis of recommendation of the Pay Review Committee and going beyond the scope of the recruitment rules framed under Article 309 of the Constitution of India and in such case, for giving “benefit of up-gradation”, there is no obligation of any prior consultation with the PSC, WB. That for appointing any person in the existing vacancy through any known method of appointment by way of direct recruit or promotion, a prior consultation with the PSC, WB is necessary for the State Government under Article 320 of the Constitution of India. However, such consultation is not necessary for accommodating a duly recruited serving employee from a lower post to an up-graded post in a higher service through executive decision by converting a post in the lower service and re-designating the same as a post belonging to the higher service.

(vii) That though seniority amongst regular direct recruits, promotes, and transferees may be regulated by rules framed under Article 309 of the Constitution of India, but administrative instruction may be issued by the Government to supplement the rules in case of contingencies not contemplated under any provisions of the said service rules. That there can be no question of applying the provisions of rule 4 of the West Bengal Services (Determination of Seniority) Rules, 1981 for determination of seniority of the applicants from the date of regularisation not from the date of appointment.

(viii) That even if it is ultimately held that prior consultation with the PSC, WB was required in the present case, for any failure on the part of the Government, the applicants cannot be made to suffer by downgrading their due seniority after a long lapse of time.

8. Learned Counsel for the applicants further submitted that the State Government should not be allowed to take back any service benefits already confirmed upon the applicants in the absence of any fault on their part, particularly

when they were confirmed in the posts of Assistant Director before regularisation of service with the approval of the Cabinet.

9. Appearing on behalf of the private respondents, Mr. A. Lahiri, Learned Counsel assisted by Mr. S.K. Mondal, Learned Advocate submitted that both the applications should be dismissed on the following grounds:

(i) The Memo. No. 11140-F dated November 9, 1995 was restricted to 17 posts, but the benefits were erroneously extended to more than 17 officers and posts and the benefits were provided to persons who are not eligible for such benefits. The applicants are not amongst those first 17 incumbents who were appointed to WBSS.

(ii) The Memorandum dated August 30, 1996 is related to inter-se seniority of those first appointed 17 officers who were holding the post of West Bengal Junior Statistical Service and is not applicable in respect of the applicants, but it was applied erroneously and with a misconceived notion.

(iii) That after realising that there has been illegality committed while upgrading the incumbents several endeavours were made on behalf of the Development & Planning Department to get post facto approval of the illegal upgradation from the PSC, WB, but on each and every occasion, the PSC turned down their request.

(iv) That after not being successful in procuring concurrence from the PSC, the matter was referred to the Finance Department. The Finance Department at that relevant point of time has observed that the up-gradation of the 17 posts of WBSS was regular, but the promotions should have been from the date of issue of the order instead of any retrospective effect.

(v) That the order dated October 19, 2005 did not contemplate on the face of such order that the regularisation would be from any retrospective date. The date of effect of regularisation was not in accordance with the Cabinet Decision and also not in accordance with the note of the Finance Department dated January 24, 2005 by which the Finance Department concurred for placing the matter before the Cabinet.

(vi) That the right of the applicants, if any, is flowing from the Cabinet Decision which does not contain any retrospective date. That if the applicants go

beyond the Cabinet Decision dated August 30, 2005, their appointments would be construed as illegal. With the above submissions, Learned Counsel concluded that the original applications are liable to be dismissed.

10. Appearing on behalf of the state respondents, Mr. G.P. Banerjee, Learned Counsel assisted by Mrs. S. Agarwal, submitted that the application should be dismissed on the following grounds:

(i) The Finance Department Memorandum No. 11140-F dated November 9, 1995 is only about upgradation of 17 posts of District Statistical Officer to 17 posts of Assistant Directors belonging to West Bengal Statistical Service. This order does not speak about how the upgraded posts are to be filled up which is to be only guided by recruitment rules in force at the relevant point of time.

(ii) The order issued by the Development & Planning Department vide No. 2604 dated August 30, 1996 clarifies that the seniority of all WBJSS Officers upgraded to the post of Assistant Director in the WBSS shall be placed below the officers who were already holding the post of WBSS during the period upto November 9, 1995. This does not mention anything about how the seniority of directly recruited officers or otherwise appointed officers after November 9, 1995 will be determined.

(iii) When the issue of giving date of effect of regularisation of the officers appointed in the up-graded posts was referred to the Finance Department on December 28, 2015, the Finance Department observed that the officers who were not promoted to WBSS on regular basis through WB, PSC but were allowed promotion to WBSS due to up-gradation may be allowed to draw pay in the pay scale of WBSS with effect from the actual date of assumption of charge and may not be allowed CAS/MCAS benefits till they are confirmed in the WBSS after their regularisation on October 19, 2005. It was also observed by the Finance Department that the retrospective effect of promotion due to up-gradation, if allowed to any such officer, should be disallowed and over drawn amount to be recovered. This observation of the Finance Department confirms that the date of appointment of the applicants in the regular posts of WBSS cannot be before October, 19, 2005 and thus the directly

recruited officers appointed in the year 1998 are senior to the applicants and the Final Gradation list published by the Administrative Department conforms to Government rules and norms.

(iv). That the appointments of the applicants were regularised only after the order dated October 19, 2005, which was issued on the basis of the approval of the Cabinet on August 30, 2005. Had this approval of the Cabinet not been given, the officers irregularly appointed would have still continued to be as irregularly appointed officers. The applicants, therefore, are to be considered to be in regular appointment only with effect from the date of issue of the order on October 19, 2005.

(v) That the appointments of the 60 officers in the WBSS were regularised as direct recruits on the basis of the said Cabinet approval and there is no mention about the date of effect of the up-gradation and, therefore, the officers are to be treated as direct recruits only from the date of issuance of the order i.e. October 19, 2005. As the applicants were initially appointed otherwise than in accordance with the relevant recruitment rules and their appointments were subsequently regularised, their seniority is to be determined considering Rule 4 of the West Bengal Services (Determination of Seniority) Rules, 1981. As a result of which, the ranking of the petitioners in the final gradation list is to be shown below the directly recruited officers who joined in 1998.

(vi) That the order dated October 19, 2005 issued on the basis of the Cabinet approval dated August 30, 2005 is in relaxation of the recruitment rules which was in force at the time of their appointments. The order only mentions about relaxation of recruitment rules that does not apply to relaxation of determination of seniority rules based on which the final gradation list has been published. That the provisional gradation list of WBSS officers as on March 31, 2012 was published and circulated and objections were invited on May 2, 2012 after publication of the said provisional gradation list and after taking into consideration the claims and objections and representations submitted by the officers, the department published the final gradation list on September 30, 2015. Therefore, the final gradation list was published by following the due procedure.

Learned Counsel concluded with the submission that the applications OA-137 of 2016 and OA-1270 of 2016 should be dismissed.

11. On consideration of the reliefs sought for by the applicants in the two original applications and on consideration of the submissions of the Learned Counsel for the applicants, we are of the view that in this Judgment, we should first examine the issues relating to validity of the gradation list, if any correction/ modification is required in the gradation list, and if any directions need to be given as prayed for.

12. In order to examine the issues involved in the two applications, we first examine whether there was any irregularity in the initial appointments of the applicants in the WBSS, which was subsequently regularised in the Cabinet Meeting on August 30, 2005. When the Administrative Department approached the Finance Department for placing the matter of regularisation of appointments of the applicants along with others before the Cabinet in 2005, the Finance Department observed that up-gradation of the 17 posts from WBJSS to WBSS was very much regular, but gross irregularity took place in filling up subsequent vacancies of the upgraded posts. In the said note, the observation of the Finance Department about irregular appointment as disclosed by the state respondents at page 42 of the reply in OA-137 of 2016 is presented below:

“ 17 posts of West Bengal Junior Statistical Service so upgraded and included in the West Bengal Statistical Service should have been filled up on the recommendation of the P.S.C., West Bengal as per recruitment rules of W.B.S.S. and also as per the observation of the Pay Review Committee. But the Administrative Department avoided consultation with the P.S.C., West Bengal in the matter of filling up those posts both at the initial stage and on subsequent occasions. Thus the whole matter has been fraught with the irregularities.

As the posts in question belong to State Service the effect of abolition of certain posts from one Junior State Service and inclusion of those posts in another State Service should have been given from the date of issue of the order instead of with retrospective effect from 1.1.1986.”

In short, the observation of the Finance Department is that the up-gradation of the 17 posts from WBJSS to WBSS was regular, but there were irregularities in the appointments in the up-graded posts. Learned Counsel for the applicants has submitted that the applicants were appointed in the WBSS by virtue of administrative decision of the State Government on the basis of recommendation of the Pay Review

Committee and in such case prior consultation with the PSC is not necessary. Their appointments were very much regular as they were appointed by giving the “benefits of up-gradation”. He has also argued that the applicants’ appointments were regular and the Cabinet decision dated August 30, 2005 was misconceived and an unnecessary exercise. We are unable to accept the submissions of Learned Counsel for the applicants that consultation with the PSC is not necessary; it has been clearly explained by the Public Service Commission, West Bengal in its letter addressed to the Secretary to the Government of West Bengal dated May 12, 1999 (Page 41 of the reply of the state respondents in OA-137 of 2016) that consultation with the PSC is essential in the instant case. Under such circumstances, we are unable to accept that there was no irregularity involved in the initial appointment of the applicants in the WBSS. Further, the different communications between the Administrative Department and the Finance Department as well as between the Administrative Department and the PSC during the period 1995 to 2005 in connection with regularisation of appointments indicate that the attempts were made for regularisation of irregular appointments. If there was no irregularity in the appointments, there was no need for their regularisation. In our view the initial appointments of the applicants were irregular till those were regularised by issuing the order dated October 19, 2005 on the basis of Cabinet Decision dated August 30, 2005.

13. Learned Counsel for the applicants submitted that the entire process for filling up of those 17 upgraded posts of Assistant Director in the WBSS would not amount to promotion, on the contrary, it is a case of upgradation of posts and scale in simpliciter. Learned Counsel referred to the judgment of the Hon’ble Supreme Court in “Union of India v Pushpa Rani” reported in (2008) 9 SCC 242 and “Bharat Sanchar Nigam Limited v R.S. Velusamy & Others” reported in (2011) 9 SCC 510, and “B. Thirumal v Ananda Sivakumar and Others” reported in (2014) 16 SCC 593. In all the three referred cases, distinction has been made between “upgradation” and “promotion” which are almost similar. An extract from paragraph 29 of the judgment in “Bharat Sanchar Nigam Limited v. R.S. Velusamy & Others” (supra) is reproduced below:

“(iii) Therefore, when there is an advancement to a higher pay scale without change of post, it may be referred to as upgradation or promotion to a higher pay scale. But there is still difference between the two. Where the advancement to a higher pay scale without change of post is available to everyone who satisfies the eligibility conditions, without undergoing any process of selection, it will be upgradation. But if the advancement to a higher pay scale without change of post is as a result of some process which has elements of selection, then it will be a promotion to a higher pay scale. In other words, upgradation by application of a process of selection, as contrasted from an upgradation simpliciter can be said to be a promotion in its wider sense, that is, advancement to a higher pay scale.”

In “Bharat Sanchar Nigam Limited v. R.S. Velusamy & Others” (supra), a biennial cadre review scheme (BCR Scheme) was introduced vide Circular dated October 16, 1992. Under the scheme the employees who were in regular service as on January 1, 1990 and completed 26 years of satisfactory service were to be upgraded in the higher scale and such upgradation was restricted to 10% of the posts in Grade-III. In this case, Hon’ble Apex Court observed that it was upgradation simpliciter without creation of any additional post or involving any process of selection for extending the benefits and the scheme did not involve the rules of reservation. The facts and circumstances of this referred case are not similar to that of the present case.

In “B. Thirumal v. Ananda Sivakumar and Others” (supra), Hon’ble Apex Court observed that re-designation of Junior Engineers in Tamil Nadu Engineering Subordinate Service as Assistant Engineer in Tamil Nadu State Engineering Service on acquiring degree qualification does not tantamount to promotion to the cadre of Assistant Engineer which is governed by separate set of rules. Hon’ble Apex Court identified this referred case as a case of “upgradation” where the candidates continued to hold same post without any change of duties and responsibilities but they merely received a higher scale of pay which was available to everyone who satisfied eligibility conditions without undergoing any process of selection. In this referred case, the Junior Engineers, on acquisition of higher qualification were re-designated as Assistant Engineers but it cannot be said that they have become full-fledged members of any other service. In the instant case, the applicants were appointed in the posts in WBSS from the post of WBJSS. In our view, the facts and circumstances of the referred case are not applicable in the instant case.

In “Union of India v. Pushpa Rani” (supra), as a result of cadre restructuring exercise two additional posts of Personal Inspector Grade-I became available in Baranasi Division of Northern Railway and the legal issue involved in this case was whether the reservation rule will be applicable. In this case, the Apex Court observed that it was a case of promotion and reservation rule will be applicable. If we apply the principles of the referred case to the present case, then the appointments of the applicants were appointment on promotion and cannot be accepted as upgradation.

14. We now examine whether there was any irregularity in appointments of the 60 officers in the WBSS as “direct recruits”. Learned Counsel for the applicants has submitted that the applicants were never considered to be appointed as “direct recruits” in the WBSS. On scrutiny of records, we find that before up-gradation of 17 posts of WBJSS to WBSS, there were 25 posts in WBSS cadre and with the up-gradation of the 17 posts the total number of posts in WBSS were increased to 42. Once the 17 posts were added to the existing 25 posts, one cannot and should not make any distinction between the old posts and the up-graded posts and the recruitments to all these posts should follow the same rules and norms. On examination of gradation list, we find that both promotion quota posts and direct quota posts in the WBSS cadre were filled up by the officers in the WBJSS on the pretext of up-gradation and these appointments were both in case of vacancies in the 25 old posts (existing prior to November 19, 1995) and in the 17 up-graded posts. The Recruitment Rules published in the Calcutta Gazette vide no. 973F.T. dated May 4, 1951 is to be applicable in this case. The said Rules provide for recruitment both by direct recruitment and promotion, but “of the posts vacant in this cadre not more than 50 per cent will be filled up by promotion”. This means that out of the 42 posts in the WBSS cadre, not more than 21 posts can be filled up by promotion. It appears that the ratio of promotion quota and direct recruit quota was not followed in the appointments of the applicants and there were irregularities in this account also. If the appointments of the applicants in WBSS were not regularised in the Cabinet Meeting on August 30, 2005; the appointments of the applicants would have remained irregular. With the above discussions, we can only conclude that the appointments of

the applicants in the WBSS were irregular, but the same was regularised by the notification dated October 19, 2005.

15. The proposal for regularisation of appointments of 60 officers to the WBSS from the WBJSS was placed before the Cabinet in its meeting dated August 30, 2005 after getting concurrence of the Finance Department. The Finance Department in its note as disclosed in the reply of the state respondents at page 43 of the reply in OA-137 of 2016 has concurred for placing the matter before the Cabinet with the following observation:

“However, to solve the problem, appointment of first 17 incumbents (of W.B.J.S.S.) made straightway to the upgraded posts in the W.B.S.S. may be treated as direct recruitment. Regularisation of their cases may be considered accordingly.

As the P.S.C., West Bengal had no objection to treat first 17 incumbents appointed to W.B.S.S. as direct recruit subject to judging their suitability and as at this stage there being no scope of judging their suitability, the appointment of all the incumbents may be treated as fait accompli and the appointment of those incumbents, who are in service till now may be regularised with the approval of Cabinet. In case there happens to be any case of promotion to the W.B.S.S. after 9-11-95 made irregularly otherwise than in accordance with the relevant Recruitment Rules or beyond the quota prescribed thereunder, regularisation thereof should be taken up separately in consultation with the P.S.C., West Bengal or this Department where necessary.

The Administrative Department may take action accordingly.”

The Administrative Department placed the matter before the Cabinet for regularisation of appointments of 60 (sixty) Officers in the WBSS from the WBJSS. The Cabinet approved the proposal contained in para-6 of the Cabinet Memo on August 30, 2009, which was for regularisation of appointments of 60 officers to the WBSS as direct recruits. This approval was for relaxation of provisions of the recruitment rules as the appointments were given without consulting PSC, West Bengal, but there was no relaxation in application of the Seniority Rules.

16. We now examine whether the applicants are to be considered as senior to the private respondents who were directly recruited in the year 1998. In determining the issue, we need to examine Para 2 of Rule 4 of the West Bengal Services (Determination of Seniority) Rules, 1981, which is reproduced below:

“Provided that where appointment of persons initially made otherwise than in accordance with the relevant recruitment rules is subsequently regularized in

consultation with the Commission, where necessary, seniority of such person shall be determined from the date of regularisation and not from the date of appointment.”

In the instant case the appointments of the applicants have been made otherwise than in accordance with the relevant recruitment rules and those have been subsequently regularised with the approval of the Cabinet, where the Cabinet has given relaxation from consultation with PSC, West Bengal. According to this provision in the Rules, the seniority of the applicants shall be determined from the date of regularisation of their appointment which is October 19, 2005 and not from the dates of their initial appointments in the WBSS from WBJSS. Under such circumstances, the directly recruited officers should be considered to be senior to the applicants.

17. In view of our findings in the previous paragraph indicating that the direct recruit officers appointed in 1998 are senior to the applicants, we do not find any irregularity in the gradation list published on September 09, 2015 and accordingly we do not want to issue any direction for correction or cancellation of the final gradation list. The interim order issued by this Tribunal dated March 16, 2017, by which it is ordered that promotion of any of the Private Respondents to the post of Deputy Director in West Bengal Higher Statistical Service shall not be given effect without obtaining leave of the Tribunal in OA-1270 of 2016, is vacated.

18. The prayers of the applicants at the time of filing the original application were to challenge the wrongful seniority given to the private respondents over the applicants in the impugned gradation list. No prayer was made in the original application about the entitlement to enjoy the financial benefits with retrospective effect without refund of any financial benefit. The validity of the Finance Department U.O. dated March 15, 2016 was also not questioned even at the time of filing rejoinder. However, on prayer of the applicants, this Tribunal allowed to revise their prayers by order dated June 10, 2019, when the following prayer was added :

“(cc) A direction, order or command be issued upon the respondents, their men, agents, servants and/or assigns to forthwith rescind, recall, revoke, set aside and cancel the UO (Unofficial) note being No. Group P1/2015-2016/0444 dated 15.03.2016, issued by the concerned authority of Finance Department, Government of West Bengal.”

In the above background, we now examine whether the financial benefits allowed to the applicants were in accordance with the existing rules or not and whether the overdrawn amounts, if any, are to be recovered from the applicants and more specifically whether the Finance Department U.O. dated March 15, 2016 is justified or not.

19. The issue whether the officers who did not get promotion to WBSS through regular promotion are entitled to enjoy the financial benefits before their services were regularised on January 19, 2005 was referred to the Finance Department on December 28, 2015. The Finance Department made the following observations in its U.O. dated March 15, .2016:

“The officers who were promoted to WBSS on regular basis through the WBPSC would avail such benefit of promotion from the date of such promotion, retrospective benefit of upgradation from 01.01.88 (actual effect) should be disallowed and overdrawals be recovered.

The officers who did not get promotion to WBSS on regular basis through the WBPSC but were allowed promotion to WBSS due to upgradation may be allowed to draw pay in the pay scale of WBSS with effect from the actual date of assumption of charge of the post belonging to WBSS as they actually rendered service as such and such officers may not be allowed CAS/MCAS benefit till they are confirmed in WBSS after their regularization on 19.10.05. Retrospective benefit of promotion due to upgradation if allowed to any such officer should be disallowed and overdrawals be recovered.

The cases of the officers who have either retired or resigned or died before 19.10.2005 after getting the benefit of promotion to the upgraded posts may be treated as fait accompli and need not be re-opened at this stage.

Further promotional benefits to higher posts in WBSS from 19.10.05 onwards may be made as per the Gradation List corrected up to 08.02.2016 after the same is published through as Memo. No.”

20. We have already observed that there were irregularities in the appointment of the applicants in the WBSS Cadre which were subsequently regularised by the notification issued on the basis of Cabinet decision on October 19, 2005. Their appointments were irregular till their appointments were regularised on October 19, 2005. The Finance Department in its note dated March 15, 2016 observed that the officers who did not get promotion to WBSS on regular basis through WPSC, but were allowed promotion to WBSS may be allowed to draw pay in the pay scale of WBSS with effect from the actual date of assumption of charge of the posts belonging to WBSS as they actually rendered services as such. The Finance Department also observed that such officers may not be allowed CAS/MCAS benefit till they were confirmed in WBSS after their regularisation on the basis order dated October 19, 2005 and that the retrospective benefit of promotion due to up-gradation if allowed to any such officer should be disallowed and overdrawals be recovered. It is to be noted that the administrative department continued to give them benefits on the basis of earlier orders of the department, which were issued prior to this observations of the Finance Department dated March 15, 2016. In our view, since the applicants have actually worked in the posts belonging to WBSS from the dates of joining in the upgraded posts, they should be given CAS/MCAS benefits on the basis of date of joining in the WBSS posts. The Cabinet note and order of regularisation of appointments of the applicants issued on October 19, 2005 does not speak anything about the dates of regularisation of their appointments, nor does the order speak about withdrawal of any benefit extended to the applicants; it is only in the order of the Finance Department dated March 15, 2016 argument has been put forward for withdrawal of the benefits enjoyed by the applicants on the basis of cabinet decision

in the year 2005. Accordingly, we are of the view that the observation of the Finance Department in its U.O. dated March 15, 2016 may not be given effect to the extent as mentioned above.

21. It appears from the note of the Finance Department that the case of the officers who have either retired or resigned or died before October 19, 2005 after getting the benefit of promotion to the upgraded posts may be treated as fait accompli and need not be reopened at this stage. On scrutiny of records, we find that on date of observation of the Finance Department, out of 60 officers whose appointments were regularised by the Cabinet in 2005; at least 47 officers have either retired, died or resigned from the service. In the two original applications, there are only seven applicants. It will be unfair if the seven applicants are not allowed the benefits while such benefits have been allowed to the majority of the similarly placed officers whose services were regularised on the basis of Cabinet decision in 2005. Accordingly, the benefits extended to the applicants may not be withdrawn and any amount of salary may not be recovered as excess payment with the condition that the pay and allowances already allowed to the applicants may be considered as personal to them.

22. We have already observed that the private respondents are to be considered as senior to the applicants. However, as the pay and allowances of the applicants are to be considered as personal to them and the private respondents of the two original applicants even being senior to the applicants will not be eligible to get pay protection.

23. With the above observations and decisions both OA-137 of 2016 and OA-1270 of 2016 are disposed of.

24. The urgent Xerox certified copy of the judgment and order may be supplied to the parties, if applied for, subject to compliance of necessary formalities.

(Dr. Subesh Kumar Das)
MEMBER(A)

(Ranjit Kumar Bag)
MEMBER (J).