

**IN THE MAHARASHTRA ADMINISTRATIVE TRIBUNAL
MUMBAI BENCH**

ORIGINAL APPLICATION NOS 236 & 237 OF 2021

DISTRICT : MUMBAI

ORIGINAL APPLICATION NO. 236 OF 2021

Mr. K. Suryakrishnamurthy)...**Applicant**

Versus

The State of Maharashtra & Ors)...**Respondents**

ORIGINAL APPLICATION NO. 237 OF 2021

Mr. A.N Padwal)...**Applicant**

Versus

The State of Maharashtra & Ors)...**Respondents**

Mr. Atul Rajadhyaksha, learned Senior Counsel with Mr. Akhilesh Dubey, learned Counsel for the Applicants.

Mr. R.S Apte, learned Senior Counsel with Smt. K.S. Gaikwad, learned Presenting Officer for the Respondents No 1, 2 & 3.

Mr. Atul Damle, learned Senior Counsel a/w. Mr. Pandurang Gaikwad, learned Advocate i/b. Mr. B.S Shinde, learned Advocate for the Respondents No.4, 6 and 7 in O.A.No.236/2021.

Mr. Prasad Dhakephalkar, learned Senior Counsel a/w. Mr. Pandurang Gaikwad, learned Advocate i/b. Mr. B.S Shinde, learned Advocate for Respondents No.5 to 10 in O.A.No.237/2021

Ms. Punam Mahajan, learned Advocate for Respondents no.11 in O.A.No.237/2021.

CORAM : **Justice Mridula Bhatkar (Chairperson)**
Mr. P.N Dixit (Vice-Chairman) (A)

RESERVED ON : **16.07.2021**

PRONOUNCED ON : **27.07.2021**

PER : **Justice Mridula Bhatkar (Chairperson)**

J U D G M E N T

1. The date of continuous officiation should be from the actual date of joining to the post of Deputy Collector or three years thereafter the date fixed by the Respondent-State is the issue. In both the Original Applications the promotee Applicants challenge the final common seniority list of Deputy Collectors published by Government Circular dated 31.12.2020.

2. The applicant Mr. K. Suryakrishnamurthy, in O.A 236/2021 is working as Under Secretary, Disaster Management from the cadre of Deputy Collector, Selection Grade and he is recruited through Maharashtra Public Service Commission (M.P.S.C). He had joined the cadre of Tahsildar on 29.3.1995 and by order dated 30.8.2001 the applicant came to be promoted to the post of Deputy Collector and on 19.9.2001 he joined as Deputy Collector in Chandrapur District. However, in the seniority list of 31.12.2020,

his seniority is not shown from the year 2001 but was shown from 1.11.2003.

3. The Applicant, Mr. A.N Padwal, in O.A 237/2021, working as Additional Collector, joined the service in the year 1994 as Tahsildar directly through M.P.S.C and he was promoted to the post of Deputy Collector by order dated 8.7.1999. However, in the seniority list of Deputy Collectors, his date of appointment is shown as 2003. Thus, both the applicants have challenged the seniority list dated 31.12.2020 as there is gross violation of rules framed under the Maharashtra Deputy Collectors (Recruitment, Fixation of Seniority and Confirmation) Rules, 1977 (hereinafter referred to as 'the Rules of 1977' for brevity) and also the list is contrary to the findings of the Judgment of the Tribunal in **O.A.No.526/2004**, Mr.Rajendra Nimbalkar & Ors. Versus. The State of Maharashtra & Ors, dated 17.04.2008.

4. The applicants pray that the seniority list dated 31.12.2020 and Government Resolution (G.R.) bearing No.Misc-1220/CR-152/E-2, dated 31.12.2020 is to be declared as illegal, and quashed and set aside. The applicants also seek direction that the Respondent-State be directed to prepare a combined seniority list of the cadre of Deputy Collectors in accordance with the date of continuous service of the applicants, i.e. 19.09.2001 in the case of applicant in O.A 236/2021 and from 08.07.1999 in the case of

applicant in O.A 237/2021, in terms of Rules 13 & 14 of the Rules of 1977. By way of interim relief status quo is prayed and it is also prayed that the Respondents be restrained from issuing further orders of promotion on the basis of the seniority list which is the subject matter of the challenge.

5. Rules of Maharashtra Deputy Collector (Recruitment, Fixation of Seniority and Confirmation) Rules, 1977 dated 21.05.1977 are for the appointments, recruitments and promotions of the Deputy Collectors. Though the Maharashtra Civil Services Rules (M.C.S. Rules) about the service conditions of the Government servants in the State of Maharashtra and the Rules of 1977 are made under Article 309 of the Constitution, being special Rules for the Deputy Collectors, the Rules of 1977 shall prevail over the M.C.S. Rules, unless the Rules of 1977 are silent on a particular aspect.

6. On interim relief the matter was argued at length by the learned Counsel for the Applicants. However, the State has filed the affidavit-in-reply only for this interim stage, the private Respondents have not filed affidavit-in-reply at interim stage. So by consent the matter was heard without their reply. We are considering the major points and the law laid down by the Hon'ble Supreme Court on this ever burning issue of common seniority list between the promotees and the direct recruits. At the outset we

are constrained to mention that this chaotic situation is created only because of the inaction and omission to take decisions on time regularly as provided in the Rules of 1977 by the Respondent-State.

7. The matter entirely hinges on the interpretation of the Rules of 1977 and therefore for ready reference we find it essential to reproduce the relevant portion of the Rules of 1977 in the beginning.

2 (d) "Continuous service", in relation to any cadre, means service continuously rendered by an officer in that cadre or in any higher scale without an interruption by way of reversion to a lower cadre: Provided that, where an officer is continuously officiating in a cadre from a deemed date under the provisions of these rules, such officer shall be deemed to have rendered continuous service with effect from such deemed date;

(i) "fortuitous service" means that service which is rendered by a person during the period commencing on the date of his actual continuous officiation in a cadre and ending on the deemed date of continuous officiation in that cadre (such deemed date being later than the date of the actual continuous officiation of such person in the said cadre);

(m) "review" means the review of the merits of officers whose names are included provisionally in a select list to decide their suitability to continue in that list, whether unconditionally or provisionally but does not include any such review made before the 1st November 1956;

(n) "select list" means the initial list of officers who are fit to be appointed as Tahsildars or, as the case may be, of Tahsildars who are fit to be appointed as Deputy Collectors, in the order of seniority assigned to them in such respective list (each such list being drawn up by Government in consultation with the Commission)."

4. *Mode of recruitment to post of Deputy Collector. –*

(1) Appointment to the post of Deputy Collector may be made either by nomination in the manner provided by rule 5 or by promotion of Tahsildars as provided by rule 10 or by transfer on deputation of officers holding the posts of Under Secretary to Government:

Provided that the appointment by nomination shall be made in such manner as to ensure that the total number of directly recruited Deputy Collectors in the cadre of Deputy Collectors shall

not, at any time, be less than 35 per cent and not more than 50 per cent of the total number of permanent posts in that cadre.

(2) For the purpose of complying with the proviso to sub-rule (1), Government shall determine in advance the number of nominations to be made in each year.

9. Constitution of Selection Committee and preparation of select list of Tahsildars.-

(1) For the purpose of preparing a select list of Tahsildars Government shall constitute a Selection Committee consisting of –

- 1 Secretary, Revenue and Forest Department of Government or, where there are two or more Secretaries in that Department, one of them nominated by Government.*
- 2 Secretary (Personnel) in the Administration Department of Government.*
- 3 Two Revenue Commissioners nominated by Government.*
- 4 Desk Officer in charge of the subject in the Revenue and Forest Department of Government.*

(2) The Committee shall meet in the month of September or as soon as possible thereafter every year; and subject to the provisions of sub-rule (5), prepare a select list as provided in this rule, of Tahsildars fit to be promoted to the cadre of Deputy Collector.

(3) The Committee shall consider the cases of all Tahsildars including.-

(i) those whose names are already included in the select list prepared earlier but orders regarding whose promotion to cadre of Deputy Collectors have not been issued till the date of the meeting.

(ii) those who, after being provisionally promoted to the cadre of Deputy Collectors, have been reverted as Tahsildars, and

(iii) those whose names are included in the final seniority list of Tahsildars prepared under sub-rule (4) of rule 8 in the order in which their names appear in that list.

(4) The number of Tahsildars to be included in the select list shall be, as nearly as may be equal to the vacancies in the cadre of Deputy Collectors which are likely to arise during the next twelve months (i.e. from 1st September to 31st August).

(5) The Committee shall take into consideration all confidential reports about the officer in the cadre of Tahsildar and then assess the merit of that officer.

(6) Those officers who are considered to possess outstanding merit, exceptional ability or positive merit and have achieved tangible result and show promise of being able to discharge efficiently the duties and responsibilities of a Deputy Collector shall alone be ranked amongst the first 25 per cent of the total number of officers to be included in the select list. The officers to be ranked thereafter shall be selected from amongst those who are considered fit for the post of a Deputy Collector.

(7) The select list drawn up by the Committee shall be submitted to Government together with all the relevant material including the confidential reports about the officers concerned. Government shall, thereafter, in consultation with the Commission, determine the final select list of Tahsildars fit to be promoted as Deputy Collectors.

10. *Provisional promotion to Deputy Collector's cadre.-*

(1) *The Tahsildars whose names are included in the final select list determined by Government under sub-rule (7) of rule 9 shall be provisionally promoted to a post in the cadre of Deputy Collectors in the order of their ranking in that list as and when vacancies occur in that cadre:*

Provided that, where such final select list is exhausted and the exigencies of administration require the vacancies in that cadre to be filled up immediately. Government may, purely as a stop gap arrangement, appoint.-

(i) *where the fresh select list is yet to be prepared, Tahsildars included in the final seniority list of Tahsildars prepared under rule 8 in the order of their seniority in that list and who are considered fit by it for promotion to the cadre of Deputy Collectors after considering up-to-date confidential report about them.*

(ii) *where the Committee has drawn up a select list but Government has not determined the final select list in consultation with the Commission as provided in sub-rule (7) of rule 9, the Tahsildars included in the select list drawn by the Committee in the order of their ranking in that list.*

(2) *The appointment made as a stop-gap arrangement under the proviso to sub-rule (1) shall be deemed to be a regular provisional appointment under sub-rule (1) shall be deemed to be a regular provisional appointment under sub-rule (1) when the officer in question is included in the final select list determined by Government under sub-rule (7) of rule 9. Where the officer appointed as a stop-gap arrangement under the proviso to sub-rule (1) is not included in such final select list, he shall be reverted immediately after such final select list is determined by Government under sub-rule (7) of rule 9.*

(3) *The promotion under sub-rule (1) or under sub-rule (2) shall continue to be provisional until the officer has been considered fit to be continued in the cadre of Deputy Collectors in the review made under rule 12:*

Provided that it shall be competent to Government to revert any Deputy Collector even before the completion of the review under rule 12 if his work is considered unsatisfactory or for any other reason considered sufficient by Government for such reversion; and in such cases, the Commission shall be consulted within six months of the reversion.

11. *First appointment to post of Deputy Collector and appointment in temporary vacancies of that post.- The first appointment to a post in the cadre of Deputy Collectors, whether by nomination or by promotion, shall be made by Government. The Commissioners shall make local arrangement in vacancies which are not likely to last for more than four months, as far as possible, by appointing the senior-most locally available Tahsildar whose name appears in the final select list determined by Government under sub-rule (7) of rule 9.*

12. *Review of Deputy Collectors promoted provisionally.-*

(1) *Whenever the Selection Committee constituted under rule 9 meets as required by sub-rule (2) of that rule, it shall also consider*

the cases of the officers who have been provisionally promoted as Deputy Collectors under rule 10 and have so officiated for a continuous period of not less than three years for determining whether they are fit to be continued in the cadre of Deputy Collectors.

(2) The Committee shall, after considering the confidential reports of the officers for the period during which the officers had officiated in the cadre of Deputy Collectors, prepare a list of officers who are fit to be continued in the Deputy Collector's cadre and also a list of officers who are not so fit.

(3) The two lists drawn up by the Committee under sub-rule (2) shall be submitted to Government together with all the relevant material including all the confidential reports about the officers concerned, Government will, therefore, in consultation with the Commission, finalize the two lists.

(4) The officers who are not found fit for continuing in the cadre of Deputy Collectors shall be reverted immediately, and their names removed from the select list determined by Government under sub-rule (7) of rule 9.

13. *Principles according to which seniority of Deputy Collectors shall be determined.-*

(1) The seniority inter-se of the promoted Deputy Collectors shall be in the same order in which their names appear in the final select list determined by Government under sub-rule (7) of rule 9:

Provided that the seniority of the promoted Deputy Collectors appointed as a stop-gap arrangement under the proviso to sub-rule (1) of rule 10, shall be deemed to be provisional till his appointment becomes regular under sub-rule (2) of that rule.

(2) Where the dates of continuous service of the promoted Deputy Collectors in the cadre of Deputy Collectors are not chronologically in conformity with their inter-se seniority as provided in sub-rule (1) due to the seniority of any Deputy Collector being revised subsequent to his promotion as Deputy Collector in order to remove an injustice done to him in fixing his seniority in the cadre of Deputy Collectors or Tahsildars or, as the case may be, Awal Karkuns, or Naib Tahsildars, or for rectifying an error made in the fixation of such seniority, the dates of continuous service as Deputy Collectors shall be assigned to the promoted Deputy Collectors in such manner as to be chronologically in conformity with their order of seniority (that is to say the senior officer will have the earlier date of continuous service than his junior in the seniority list). The dates so assigned shall be called "the deemed dates" of continuous service in the Deputy Collectors' cadre, and shall be taken into consideration for the purpose of this rule.

(3) The inter-se seniority of the directly recruited Deputy Collectors, selected in one batch by the Commission shall be determined in accordance with the order of preference recommended for them by the Commission irrespective of the dates of their joining the cadre of Deputy Collectors, subject to the condition that they join the cadre within one month of their appointment order or, where an extension of the period for joining the cadre is sanctioned by Government, within such extended period; and if they join such cadre after the expiry of the period of

one month or, as the case may, of the extended period, then such seniority shall be determined according to the dates of their joining the cadre.

(4) Where the dates of appointment of directly recruited Deputy Collectors are not chronologically in conformity with their inter-se seniority as provided in sub-rule (3), such dates shall be assigned to them in such manner as to be chronologically in conformity with their order of seniority. The dates so assigned shall be called "the deemed dates" of appointment on probation of the directly recruited Deputy Collectors and shall be taken into consideration for the purposes of this rule.

(5) After having determined the seniority of promoted Deputy Collectors and directly recruited Deputy Collectors in the manner provided in sub-rules (2), (3), (4) and (5), Government shall determine the seniority of all the Deputy Collectors according to the date of continuous service in the cadre of Deputy Collectors or, as the case may be, according to the deemed dates assigned to them under sub-rule (2) or sub-rule (4):

Provided that,-

- (a) any service rendered in a fortuitous appointment shall be excluded,*
- (b) where the dates of continuous service or, as the case may be, of joining the cadre of Deputy Collectors of any two or more officers are identical, the officer senior in age shall be considered as senior for the purpose of determining such seniority."*

8. Learned Senior Counsel Mr. Rajadhyaksha with learned Counsel Mr. Dubey has submitted that the applicants have a continuous service without any interruption or break in the cadre of Deputy Collector since their joining date. The cadre includes permanent as well as temporary posts. For the purpose of recruitment to the post of Deputy Collector, the Rule of 1977 are required to be followed strictly as per the precise meaning of the words used therein. The posts of Deputy Collectors are to be filled in either by promotion or by nomination or by deputation by maintaining the quota of direct recruits. Not less than 35% and not more than 50% candidates are to be appointed by nomination.

After working for 5 years, in the post of Tahsildar, the said incumbents become eligible for consideration for promotion to the post of Deputy Collectors. Learned Senior Counsel has further submitted that the challenge to the seniority list dated 31.12.2020 is based mainly on four counts. Firstly, the Government did not follow proper procedure and has violated the Rules of 1977. Secondly, the principle in the Rules of 1977 of continuous officiation in the cadre is not applied. Thirdly, it is contrary to the several decisions of the Hon'ble Supreme Court on the point of integrated seniority list of promotees and direct recruits. Fourthly, this Tribunal has earlier decided the same issue in **O.A 526/2004** by judgment dated 17.4.2008 (supra) wherein the quota is made applicable to only direct recruits and not promotees. The said decision given by the earlier Division Bench of the Tribunal is not challenged by the Respondent-State and therefore, it holds the field and hence the said judgment of the Division Bench is binding on this Bench. Learned Senior Counsel has further submitted that the preparation of the seniority list and the entire process should be set aside for want of non-application of mind. The Applicants were appointed as Deputy Collectors by the Respondents to meet the exigency of time. Labeling the initial three years service as fortuitous in the impugned G.R. is erroneous and illegal when the applicants were neither reverted or given any break. Learned Senior Counsel took us through the entire later part of the

judgment in O.A.No.526/2004 and pointed out the relevant paragraphs supporting his contention in respect of continuous service, maintaining the quota of direct recruits and submitted that the Division Bench has held that Quota is not for the promotions of the promotees but only for the appointments of the direct recruits.

9. The learned Counsel argued that the words used in the definition Clause of 2(d) Continuous service and 2(i) Fortuitous service of the Rules of 1977 should be read strictly in that sense only. On interpretation of Statute he submitted that the word used, 'means' is not to be read as 'includes'. It is defined by the Hon'ble Supreme Court in case of **Feroze N. Dotivala Versus P.M. Wadhwani and Ors. reported in (2003) 1 SCC 433**, that the words 'means' and 'include' are different. The word 'mean' restricts the definition or meaning of a word and it is to be read by taking into account the said restriction. Thus, it is a continuous service without break in the cadre and cadre includes both permanent as well as temporary service.

10. Learned Senior Counsel Mr. Rajadhyaksha, on the point of seniority has relied on the landmark judgment of the Hon'ble Supreme Court in the case of **S.B Patwardhan & Anr Vs. State of Maharashtra & Ors, reported in (1977) 3 SCC 399**. He submitted that the Hon'ble Supreme Court in the said case has

decided this issue of a common seniority of the direct recruits and the promotees. He further submitted when the qualifications, duties, functions and responsibilities, everything is same between the direct recruits and the promotees, then the continuous officiation cannot be treated as fortuitous service. Mr. Rajadhyaksha further argued that in the case of ***Rudra Kumar Sain and Ors. Versus Union of India and Other reported in (2000) 8 SCC 25*** various terms such as 'ad-hoc', 'stop-gap arrangement' and 'temporary' are explained. The appointments of the applicants from the beginning were provisional and not temporary. The Government has erroneously used the term temporary. The word 'provisional', which is used in Rule 10, is not mentioned in any affidavit of the Respondent-State.

11. On the point of fortuitous appointment Mr. Rajadhyaksha relied on the definition of 'fortuitous service' in the Rules of 1977 that in every fortuitous appointment the deemed date of appointment is given. The learned Counsel argued that if there is no deemed date of appointment then there is no fortuitous service. The deemed date of appointment was never given to the applicants and therefore their service was never fortuitous service. The applicants who are of 1999 and 2001 though were given promotions only on account of exigency, when the exigency was over they have not been put back to their positions, instead the Government continued them to the posts of Deputy Collector.

12. The learned Senior Counsel Mr. Atul Rajadhyaksha appearing for the Applicants relied on the following judgments :-

1. S.B Patwardhan & Anr Vs. State of Maharashtra & Ors, reported in (1977) 3 SCC 399.
2. Direct Recruit Class II Engineering Officers' Association Vs. State of Maharashtra & Ors, reported in (1990) 2 SCC 715.
3. G.S. Lamba & Ors. Vs. Union of India & Ors. reported in (1985) 2 SCC 604.
4. Union of India Versus Somasundaram Vishwanath reported in (1989) 1 SCC 175
5. Wander Ltd. & Anr. Vs. Antox India P. Ltd., 1990 (Supp) SCC 727.
6. Rudra Kumar Sain and Ors. Versus Union of India and Other reported in (2000) 8 SCC 25.
7. Feroze N. Dotivala Versus P.M. Wadhvani and Ors. reported in (2003) 1 SCC 433.
8. State of Karnataka & Ors. Vs. C. Lalitha reported in (2006) 2 SCC 747.
9. Union of India & Anr. Vs. Hemraj Singh Chauhan & Ors. (2010) 4 SCC 290.

13. Mr. Rajadhyaksha and Mr. Dubey both have pressed the point that though the Tribunal had directed the Government while disposing off O.A.No.526 of 2004 to conduct the review, the Government did not do it till today and therefore the applicants who were meritorious, competent and have rendered the service of 20-21 years on the same post and were never reverted, their service therefore is a continuous service from the date of their actual appointment and thus under Rule 13(5) from their date of joining in the cadre of Deputy Collector that period being

continuous service should be taken into account while fixing the seniority which was rightly fixed prior to 2018. By way of interim relief Mr. Rajadhyaksha submitted that order of status quo to the seniority list be passed as the applicants have established prima facie case in view of the balance of convenience, hardship and irreparable loss. Mr. Rajadhyaksha and Mr. Dubey have submitted that the applicants are pushed down in the final seniority list of 30.12.2020 and therefore they will not be considered for further promotion to the post of Additional Collector or to IAS cadre. Therefore, till the decision of these OAs the list is to be kept in abeyance. On the point of granting status quo Mr. Rajadhyaksha relied on the judgment of Hon'ble Supreme Court in ***Wander Ltd. & Anr. Vs. Antox India P. Ltd., 1990 (Supp) SCC 727.***

14. The learned Counsel Mr. Dubey appearing in O.A.No.236/2021 has submitted that the Applicant, Mr. K. Suryakrishnamurthy earlier had filed O.A.No.464 & O.A.No.99 of 2020 challenging the order of 19.09.2009 on giving adhoc promotions to Respondents No.4 to 7 who are junior to the Applicant. In O.A.No.236/2021 at page 415, the Respondents No.4 to 7 had given table showing the date of joining of the 5 officers where the date of joining and seniority schedule as per the earlier seniority list and the present seniority list is placed for comparison :-

Table showing the commencement of the date of continuous service of the Applicant and the Respondents :-

Sr No	Name of the officer	Position in provisional seniority list published on 24.9.2009 (1.1.1980 to 31.12.2008)		Position in provisional seniority list published on 12.5.2014 (1.1.2001 to 31.12.2005)		Position in provisional seniority list on 3.3.2018 (1.1.1999 to 31.12.2003)		Position in final seniority list published on 31.12.2020 (1.1.1999 to 31.12.2003)	
		S. No.	Date	S. No	Date	S. No	Date	S. No	Date
1	K. Suryakrishnamurthy	401	19.09.01	5	19.09.01	119	01.02.03	581	01.11.03
2	Abhay Kargutkar	432	05.12.01	36	05.12.01	33	17.11.01	478	17.11.01
3	Smt. Manjusha Miskar	451	22.11.01	55	22.11.01	51	22.11.01	496	17.11.01
4	Pradeep Kulkarni	460	02.11.02	64	02.11.02	88	02.11.02	509	02.11.02
5	Devdutt Kekan	488	18.12.02	92	18.12.02	115	18.12.02	537	18.12.02

The learned Counsel submitted that Respondents No.4 & 5 are actually given adhoc promotions though they are junior to the applicants and Respondents No.6 & 7 are not yet given adhoc promotions. The promotees were always more in numbers than the posts sanctioned and they were always more than quota, but their appointments were made temporarily time to time as per the exigencies. He further submitted that in the judgment in O.A.No.526/2004 the Tribunal had directed the Respondents to prepare the final seniority list and also follow the procedure. Instead of doing that the direct recruits filed O.A.No.916/2016 and

thereafter filed O.A.No.1099/2016 and prayed that the adhoc promotions be given. By way of interim relief subject to the disposal of the said O.A. the permission to issue ad-hoc promotion was granted by this Tribunal by order dated 14.09.2018. However, the Respondents thereafter filed another O.A.No.1099/2016 and after obtaining interim orders for ad-hoc promotions, the Applicants in O.A.No.916/2016 with O.A.No.1099/2016 mischievously withdrew the said Original Applications, though the Private-Respondents had opposed for withdrawal. The Respondent-State thereafter challenged the said order dated 29.08.2019 before the Hon'ble High Court in **Writ Petition No.11368 of 2019 & Ors., Ajinkya Natha Padwal and Ors. Versus State of Maharashtra, through Chief Secretary & Ors. dated 18.12.2019** and the Hon'ble High Court struck down the interim relief of ad-hoc promotions on stating that as the O.A. is withdrawn all the interim reliefs also should go. Hence, the adhoc promotions which were given they all are to be withdrawn at this interim stage. He submits that the Applicant was given time bound promotion after 12 years as per the policy of the State and as per the seniority list of 2020, if his date of appointment was fixed as 2003, hence he should have given time bound promotion not in 2013, but in 2015. But he was rightly given time bound promotion on 30.09.2013 as per his appointment on 2001. He submitted that final select list of the Tahsildars is not prepared in

consultation with M.P.S.C., though selection list was prepared by the selection committee. He argued that it is not correct to say that the applicants have not suffered any injustice as complained before the Court, and they will be losing their future chances of further promotions.

15. Mr. R.S. Apte, learned Senior Counsel has submitted that the promotees were considered as regularly/substantively employed after completing their 3 years on the post of Dy. Collector as the period of 3 years is mentioned for the purpose of review. Ld. Counsel has submitted that though the procedure of review was not followed the respondent-State found it necessary to fix the date after 3 years from the date of provisional appointment of Dy. Collectors which was a temporary appointment. The services of Dy. Collector are required from time to time depending upon the situation like famine, drought, elections, urgent implementation of any scheme etc. Hence, many Tahsildars were given temporary promotions to the post of Dy. Collectors. They also go on deputation in ex-cadre posts. However, there are permanent sanctioned posts and the appointment to that sanctioned posts can be made only on the basis of quota which is 35:65 or 50:50 between direct recruits and promotees respectively. The quota is not fixed, it is variable. Unless a candidate comes in the quota he cannot be considered in the seniority. He relied on the affidavit in reply of Shri Madhav Veer, Under Secretary dated 16.4.2021. The

learned Senior Counsel submitted that OA No.916/2016 and OA No.1099/2019 were admittedly withdrawn. However, the Hon'ble High Court gave directions to give promotions to the post of Dy. Collector so that the administration would not be stalled. He submitted that certain terms are not defined in the Rules of 1977 so help of Maharashtra Civil Services Rules, 1982 can be taken. He relied on the Maharashtra Civil Services (Regulation of Seniority) Rules, 1982 to explain the term 'fortuitous appointment'.

Mr. Apte has submitted that the appointment of the applicants is rightly considered as 'fortuitous appointment' as timely review was not taken by the Respondent-State. Admittedly, there is inaction on the part of the Government. However, there was confusion due to various judgments by the Hon'ble Supreme Court and Hon'ble High Court so also the Tribunal regarding fixing the seniority of direct recruits and promotees. However, there were many vacancies so the promotees were promoted as well as the posts were filled-up by nomination. Thus in 2003 total 744 Deputy Collectors were appointed against 514 posts. Today, nearly, 83 posts of the Additional Collectors are vacant only because they are to be filled-in through the common seniority list of the Deputy Collectors. Therefore the Government in his authority has regularized the appointments of these applicants. This policy decision in view of the confusion was required.

Mr. Apte has argued that the seniority list and the G.R., both are consistent with the Rules of 1977. At this stage, no status quo be granted as other officers who are likely to affect are not made party Respondents.

16. The learned Senior Counsel Mr. Apte relied on the following judgments :

1. Keshav Chandra Joshi & Ors. Vs. Union of India & Ors. reported in 1992 Supp (1) SCC 272.
2. Sultana Begum Vs. Prem Chand Jain reported in 1997 SCC (1) 373 on interpretation of the Statute he relied on.
3. Anwar Hasan Khan Vs. Mohd. Shafi & Ors. (2001) 8 SCC 540.

17. Mr. Dhakephalkar has submitted that the appointments till today are not in accordance with the Rules. The Government has promoted the applicants as stop-gap arrangements and their names were never included in the final select list of Tahsildars under Rule 9(2) of Rules of 1977. The learned Senior Counsel further submitted that unless the officer finds place in the final select list of Tahsildar he cannot be appointed as Deputy Collector. Moreover M.P.S.C. is required to be consulted twice, firstly at the time of preparation of final select list and secondly at the time of review. He further submitted that the quota is to be fixed in respect of permanent post and unless the person completes more than 3 years, he cannot enter the permanent post. As on today there are 514 posts of the Deputy Collectors. However 744 Deputy

Collectors are actually appointed and working. Hence 230 appointments are beyond the posts. The temporary service may not necessarily create temporary post. The seniority of an employee depends on the nature of appointments firstly whether the appointment is as per the Rules and secondly whether it is as per the Rules considering the quota in the cadre. He further argued that the case of the Applicants that no quota is provided for promotee, tahsildars in the cadre of Deputy Collector is incorrect and to be discarded. He relied on the relevant paragraphs of the affidavit dated 10.05.2021 filed by Respondent No.5, through Mr. Pankaj Santosh Deore, Deputy Commissioner of Kokan Bhavan, office of Divisional Commissioner, so also rejoinder of the applicant Mr. Ajinkya Natha Padwal, Applicant in O.A.No.237/2021. He read the relevant paragraphs. There are no averments made in the application as to when the final select list was prepared and when the applicants' names were included in the final select list.

18. The learned Senior Counsel has further argued that the judgment of the Tribunal in O.A.No.526/2004 is distinguishable from the present case on facts. He submitted that in O.A.No.526/2004, the seniority list from 1980 to 1999 and also list of 1993 were challenged. However, in the present case the seniority list of 1999 to 2003 is under challenge. There was no issue before the Tribunal in O.A.No.526/2004 of preparation of final select list which is contemplated under Section 9(7) of the

Rules of 1977. That was neither much agitated nor any finding was given on the said point. However, in the present case, the Respondents are seriously challenging the failure of the Government in following the procedure of preparation of final select list as required under Section 9(7) of the Rules of 1977. Secondly, in the said judgment the quota available to the direct recruits was followed and the Division Bench rather has observed that the quota is required to be maintained in the seniority list. He read over paragraphs 62, 63, 64, 65, 74 and 75 of the said judgment. In the said judgment the Division Bench has specifically mentioned about following the procedure like quota and review. He further referred to G.R. dated 07.03.1996 where the employees who continued for three years then 80% of the temporary posts to be made permanent. The learned Counsel also relied on paragraph 13 to 18 of the affidavit of Mr. Madhav Veer. He submitted that the strength of the cadre was not an issue before the Tribunal in O.A.NO.526/2004. However, in the present case the applicants are promotees and while fixing common seniority list the strength of the cadre has to be taken into account on quota basis. He further submitted that the Government has not made any fixed statement about the preparation of the final select list of Tahsildars, but in the short reply given by Mr. Veer by referring the G.R. dated 24.06.2010 it was erroneously referred that final select list was prepared. There is a difference in select

list and the final select list. The learned Counsel also relied on ***Keshav C. Joshi (supra)*** on the point of quota.

19. The learned Senior Counsel Mr. Damle submitted that the ratio laid down in the case of ***S.B Patwardhan, (supra)*** is not supporting to the promotees for want of their regular appointments as per the Rules of 1977. He and learned Counsel Ms. Punam Mahajan appearing for Respondent No.11 in O.A 237/2021 adopted the submissions of Mr. Dhakephalkar. The learned Counsel Ms. Punam Mahajan has submitted that the Applicant, Mr. Padwal was not appointed as Tahsildar. There is vague statement as the date of appointment is very significant. If at all he was appointed on 08.03.1994, then after 5 years he is eligible for the promotion. He was granted promotion on 12.07.1999. However, selection committee which is constituted under Rule 9(2) of the Rules of 1977 cannot consider the names of the applicant immediately for want of confidential reports of that year. Continuous officiation is not available from joining date to the post of Deputy Collector in view of the decision in Writ Petition No.2758/2004 the Bombay High court on 14.06.2018.

20. By way of reply Mr. Rajadhyaksha relied and referred following cases :-

1. G.S. Lamba & Ors. Vs. Union of India & Ors. reported in (1985) 2 SCC 604.

2. Keshav Chandra Joshi & Ors. Vs. Union of India & Ors. reported in 1992 Supp (1) SCC 272.
3. Devidas Bhiku Borker & Ors. Vs. State of Maharashtra & Anr., reported in 2011(6) Mh.L.J. 331.
4. Punjab And Haryana High Court Versus State Of Punjab, Civil Appeal Nos.5518-5523/2017, dated 03.10.2018.

He argued that in the case of ***Devidas Bhiku Borker & Ors. Vs. State of Maharashtra & Anr. reported in 2011(6) Mh.L.J. 331***, the Hon'ble Bombay High Court held that in any case Tribunal is bound by another decision of the same Tribunal, hence the Tribunal cannot take different stand from the decision given by the earlier Division Bench in O.A.No.526/2004. The learned Senior Counsel Mr. Rajadhyaksha vehemently submitted that the appointment of applicants cannot be considered as there is no provision of the 'fortuitous appointment' in the Rules of 1977. The word 'fortuitous service' is used and defined under Rule 2(d) of the Rules of 1977 and the word 'fortuitous appointment' is used in Maharashtra Civil Services (Regulation of Seniority) Rules, 1982 which states that 'fortuitous appointment' is different than 'fortuitous service'. He pointed out that the Division Bench in the judgment of O.A.No.526/2004 has also taken into account this difference. Mr. Rajadhyaksha submitted that in the judgment of the Hon'ble Supreme Court in ***G.S. Lamba & Ors. Vs. Union of India & Ors. reported in (1985) 2 SCC 604*** has considered if there is absence of reference to M.P.S.C. then it is not to be affected the service of the Government servant.

21. Considered the submissions of learned Counsel of both the sides.

Let us capsize the procedure for the promotions of the promotees from Tahsildar to the Deputy Collectors in the Rules of 1977 with some relevant comment in bullet points :-

* The Rule 7 of the Rules of 1977 states about *inter se* seniority of promotee Tahsildars to be prepared as their names are appearing in the select list of Tahsildars prepared in that particular division. Under Rule 8 combined seniority list of promotees and direct recruits of Tahsildar to be prepared. The Government thereafter shall prepare the final seniority list of Tahsildars. A selection committee is constituted of the officers to prepare the select list of Tahsildars under Rule 9. The select list prepared by the selection committee will be submitted to the Government and the Government after consultation with the Maharashtra Public Service Commission will determine the final select list of the Tahsildars who are fit to be promoted as Deputy Collectors under sub Rule 7 of Rule 9.

* The State answered in negative to our question as to whether in this final select list of Tahsildars was prepared and the names of the applicants were included in it after the

consultation of the Commission. We could gather from the order dated 17.11.1999 in O.A.No.573/1999, (Mr. Jayram Vinayak Deshpande V/s. The State of Maharashtra & Ors.) that only selection list was prepared by the selection committee on 15.04.1999. Thus the final select list, is the list of the Tahsildars who are fit to be promoted as Deputy Collectors, was not prepared, when applicants were promoted.

* Under Rule 10 the Tahsildars whose names are included in the final select list are to be provisionally promoted to the post in the cadre of Deputy Collector as per their ranking in the final select list as and when the vacancies occur in that cadre. It is to be noted that no Tahsildar can be regularly appointed from the first date of joining but initial appointment must be a provisional. The term 'as and when the vacancies occur in the cadre' means all the Tahsildars who are in the final select list cannot be given provisional promotion to the post of Deputy Collector though they are meritorious and found fit to be promoted to the post of Deputy Collector, but only after vacant post is available. Thus, whenever there is a vacancy in the cadre means in the permanent as well as temporary posts of the Deputy Collector, the Tahsildar from the final select list is to be provisionally promoted to the post of Deputy Collector.

* The proviso of sub Rule 1 of Rule 10 states the situation where the final select list is exhausted and still the vacancies in that cadre are available, then those vacancies also can be filled-up immediately by the Government purely on stopgap arrangement from the select list. However, these Tahsildars must be included in the final select list subsequently on following due procedure, otherwise they should be reverted. Thus, the preparation of the final select list of Tahsildars after recommendation of the Commission is the condition precedent to provisional appointment and also for Tahsildars appointed as stop-gap to continue further. If the name of Deputy Collector is not included in the final select list then he is to be reverted immediately.

* Review of the performance, functioning competency of the provisionally appointed Deputy Collectors under Rule 12 shall be taken after three years and thus until review takes place appointments continue to be provisional. For the preparation of the final select list and in case of reversion under proviso of Sub Rule 3, a consultation with the Maharashtra Public Service Commission is specified. Neither the terms 'temporary' nor 'ad hoc' are used, but the stop-gap arrangement is used though it is very difficult to segregate the appointments on temporary, stop-gap or ad-

hoc. Thus, first provisional appointment and if more vacancies beyond final select list are available, then to be filled up by stop-gap arrangement from select list.

* The Rule 12 states of fulfillment of two criteria. Provisional appointment under Rule 10 is the first test to be passed and secondly the officer should be a Deputy Collector officiated continuously for three years. Thus, the officers who might have continued in the service for 3 years and more and if they are not appointed under Rule 10 then, their case cannot be considered in the review. The Committee also is required to go through the Confidential Reports of the officers and prepare two lists. After assessing their performance two lists, (i) fit officers and (ii) unfit officers is to be prepared. The said lists are to be sent to the Government for approval and thereafter those lists are to be finalized and officers who are not fit shall be reverted immediately and their names are also to be removed from the select list which is the final select list prepared under sub rule 7 of Rule 9. Weeding out the incompetent officers by reversion to maintain standard in the cadre, though they had worked for three years is possible only under Rule 12.

* Rule 13 states about the procedure for preparation of the *inter se* seniority of the direct recruits and promotees and then how to prepare final common select list.

* Under Rule 13 the *inter se* seniority of the promoted Deputy Collectors to be prepared whose names are appearing in the final select list which is prepared as per Rule 9(7) by the Government. The proviso of Rule 13 is important for us which states that the seniority of the promoted Deputy Collectors who are appointed as a stopgap arrangement under Sub Rule (1) of Rule 10 unless it is made regular under Sub Rule (2) of Rule 10 cannot be considered.

* The common seniority list is prepared under Sub Rule 5 of Rule 13. Thus, it opens with the words 'after having determined with the seniority'. As mentioned earlier the regularization of these Tahsildars by way of determining final select list as per Rule 9(7) and Rule 12 of the Rules of 1977 is contemplated.

* The words used that 'according to the date of continuous service in the cadre or according to the deemed dates assigned to them as per the sub rule 2 or sub rule 4'. Thus, the only criterion applied for common seniority is the

date of continuous service or deemed date as the case may be in the cadre.

* For preparation of the final seniority list of the promoted Deputy Collector Rule 13(2) enables the Government to rectify the mistakes or remove injustice done to any promotee while preparing *inter se*.

22. Let us advert to Rule 4, where the provision of QUOTA is stated. The post of Deputy Collector to be filled up either by nomination as provided by Rule 5 or by promotion of Tahsildars provided by Rule 10 or by transfer on deputation of the officers holding the posts of Under Secretary to the Government. The proviso of Rule 4 states that the appointment by nomination shall be made on ensuring that the total number of direct recruits, Deputy Collector shall not at any time be less than 35% and not more than 50% of the total number of permanent posts on that cadre and for that purpose the Government is required to determine in advance the number of direct recruits to be made in each year. Percentage is always measured in total number of 100% . There should be fixed figure of total number. No posts other than 100 i.e. 101 or 102 or 103 can be counted in total number of permanent posts. The Rules were framed in 1977. The Government in its administrative authority has created some temporary posts of Deputy Collector to meet the need of the time,

but they all remained temporary or stop gap arrangement as they are beyond the permanent posts.

23. Along with the seniority list of 30.12.2020 the applicants also challenge the G.R. dated 30.12.2020 issued by the State. The judgment delivered by this Tribunal in O.A.No.526/2004 on 17.04.2008 in the case of Direct Recruits Versus the Promotees is also another basis of challenge. In the said case, the direct recruits have challenged the joint seniority lists of 1993 and 1999 mainly on the point that the requisite Quota of the direct recruits was not maintained every year. The issue was different than the present case, however findings of the said Division Bench are binding on us. The interpretation of the terms 'provisional', 'stop-gap appointment', 'permanent post', 'cadre' and 'quota' are required to be understood in the light of the Rules. The Rules are specific and exhaustive and lay down the procedure in detail. Tahsildar is the feeder cadre to the post of Deputy Collector therefore the procedure to decide the seniority of Tahsildars is also mentioned in the Rules of 1977.

24. Aptly observed by the Hon'ble Justice Mr. Chandrachud Y.V. in the judgment of Hon'ble Supreme Court **S.B. Patwardhan (supra)** that it is the continuous and unsolved issue between the direct recruits and the promotees in all the posts in the Government service. Repeatedly this problem emerges because the

rules for each and every service are different, but the argument advanced by the promotees is one and common i.e. their seniority is to be counted as soon as they are appointed or they actually start working in that particular cadre.

25. In the present case the issues emerged and agitated that in absence of the final select list and the review, can the stop-gap appointments made under Rules 10 (1) proviso of the promotees be regularized ? While fixing the seniority on the basis of continuous service the Quota is also a determinant ? How to maintain the residuary quota between 50% to 65% respectively matching the 50% to 35% of the direct recruits ? Relying on the ratio laid down by the Hon'ble Supreme Court in following judgments we answer these issues, prima facie.

26. In **S.B Patwardhan (supra)** the Deputy Engineers, promotees were shown below the direct recruits in the common seniority list and their seniority was not counted from the date of their appointment. The Service Rules were made by the Government of Bombay with a view to avoid the administrative difficulty. The main contention raised before the Hon'ble Supreme Court that whether promotees and direct recruits appointed as Deputy Engineers in the Engineering Service of Government of Maharashtra and Gujarat belong to the same class so that they must be treated with an even hand or whether they belong to

different class or categories and can be justifiably treated unequally. The promotee Engineers were confirmed later and not within time. Where the Hon'ble Supreme Court held that instead of adopting an intelligible differentia, Rule 8(iii) leaves seniority to be determined on the sole touchstone of confirmation which seems indefensible. The Hon'ble Supreme Court made it clear and held as under :-

“We however hope that the Government will bear in mind the basic principle that if a cadre consists both permanent and temporary employees, the accident of confirmation cannot be an intelligible criterion for determining seniority as between direct recruits and promotees. All other facts being equal, continuous officiation in a non-fortuitous vacancy ought to receive due recognition in determining rules of seniority as between persons recruited from different sources, so long as they belong to the same cadre, discharge similar functions and bear similar responsibilities. Saying anything beyond this will be trespassing on a field which does not belong to the courts.”

Keeping this on the background and considering the ratio laid down by the Hon'ble Supreme Court in other cases, we assess the decision of the Government. In the present case, the appointment of the applicants is treated as 'fortuitous' hence regularized by giving a date as and when the applicants entered the permanent posts.

27. In the case of **Rudra Kumar Sain (supra)**, it is held that if the appointment order itself indicates that the post is created to meet a particular temporary contingency and for a period specified in the order, then the appointment to the said post can be described as ad hoc or stopgap. It is also observed that it is not

possible to lay down any straight jacket formula nor give an exhaustive list of circumstances and situation in which the said appointment i.e. ad hoc or fortuitous or stopgap can be made.

However, it is also held that,

“in service jurisprudence, a person who possesses the requisite qualification for being appointed to a particular post and then he is appointed with the approval and consultation of the appropriate authority and continues in the post for a long period, then such appointment cannot be held to be stopgap or fortuitous or purely ad hoc.”

In the case in hand, admittedly the applicants have been working on the post of Deputy Collector for nearly 20-21 years. As per the ratio laid down in ***Rudra Kumar Sain (supra)*** it is not sufficient for the Government servant to be in continuous officiation only but it is also necessary that the appointment of such Government servants to that post should be made with the approval and consultation of the appropriate authority. In the present case the appointment of these officers to the post of Deputy Collector is not as per the Rules of 1977 as there is complete absence of preparation of final select list of Tahsildars under Rule 9(7) in consultation with the commission wherein the names of the applicants should have been included so also the review under Rule 12 of the Rules of 1977.

28. The ratio laid down in ***S.B Patwardhan's case (supra)*** was subsequently challenged before the 5 Judges Bench in the case of ***Direct Recruit Class II Engineering Officers' Association Vs.***

State of Maharashtra & Ors, reported in (1990) 2 SCC 715.

The Hon'ble Supreme Court held:-

“Fixing rigid quota with retrospective effect, attempt was made to neutralize the decision and rob the promotees the benefit of their continuous officiation.”

“We were taken through the judgment by the learned counsel for the parties more than once and we are in complete agreement with the ratio decidendi, that the period of continuous officiation by a government servant, after his appointment by following the rules applicable for substantive appointments, has to be taken into account for determining his seniority; and seniority cannot be determined on the sole test of confirmation, for as was pointed out, confirmation is one of the inglorious uncertainties of government service depending neither on efficiency or the incumbent nor on the availability of substantive vacancies.”

The period of their continuous officiation was directed to be counted for seniority as it was held that any other view would be arbitrary and violative of Articles 14 and 16. There is considerable force in this view also. We, therefore, confirm the principle of counting towards seniority the period of continuous officiation following an appointment made in accordance with the rules prescribed for regular substantive appointments in the service.

Both the learned Counsel have relied on the ratio laid down in the ***Direct Recruit Class II (supra)*** wherein the Hon'ble High Court extensively dealt with the same issue of seniority between the promotees and the direct recruits which was earlier decided in the case ***S.B. Patwardhan (supra)***. In the case of direct recruits the quota Rules were not followed at all continuously for number of years and it became impossible to adhere to the same. The direct recruits were not available in adequate number for appointment and the appropriate candidates in the feeder cadre who were competent to discharge of the duties of Deputy Engineers were waiting in the queue. The State required the experienced and efficient hands and hence those all vacancies were filled up by the

promotions in excess of quota, only after subjecting the necessary to test prescribed by the Rules. In the case of direct recruits all the eligible candidates were considered and the opinion of the Public Service Commission was also obtained. It was held,

“The unavoidable situation brings about its natural demise, and there is no meaning in pretending that it is still vibrant with life. In such a situation if appointments from one source are made in excess of the quota, but in a regular manner and after following the prescribed procedure, there is no reason to push down the appointees below the recruits from the other source who are inducted in the service subsequently.”

In the present case, throughout the years 1999 to 2003 the quota of direct recruits is maintained between 35% to 50%. However, promotions were given to the Tahsildars to the stop-gap posts of Deputy Collectors irrespective of observing appropriate procedure as we have mentioned above earlier. The Hon'ble Supreme Court has summed up the ratio in A to J points out of which the point D & E are relevant to the present case.

“(D) If it becomes impossible to adhere to the existing quota rule, it should be substituted by an appropriate rule to meet the needs of the situation. In case, however, the quota rule is not followed continuously for a number of years because it was impossible to do so the inference is irresistible that the quota rule had broken down E. Where the quota rule has broken down and the appointments are made from one source in excess of the quota, but are made after following the procedure prescribed by the rules for the appointment, the appointees should not be pushed down below the appointees from the other source inducted in the service at a later date.”

Thus to follow the procedure prescribed by the Rules for the appointment is a condition precedent for maintaining same seniority which is absent in the present matter.

29. In the case of ***Narender Chadha Vs. Union of India reported in (1986) 2 SCC 157*** the Hon'ble Supreme Court has evolved the 'rule of deemed relaxation of the relevant rules' and directed to regularize the services giving the entire length of temporary service from the date of initial appointment for seniority in order to obviate unjust and inequitable results

30. The Three judges Bench of the Hon'ble Supreme Court in the case of ***Keshav Chandra Joshi & Ors. Vs. Union of India & Ors. reported in 1992 Supp (1) SCC 272*** while distinguishing the case of ***Narender Chadha (supra)*** expressed that they cannot travel beyond the ratio in direct recruits case. Later the Hon'ble Supreme Court further held that Government servants must become member of the relevant services in which his appointment must be according to rules and within prescribed quota and unless these conditions are satisfied his appointment will be treated as ad hoc and cannot be considered for seniority or promotion. The submissions of the learned Senior Counsel for the applicants that as there was no reversion then it amounts to continuous officiation to the post of Deputy Collector from the actual date of joining; though apparently appealable, however after close scrutiny of the Rules of 1977, it does not stand to reason, hence not convincing. The appointments of the Applicants basically were not made from final select list as per Rule 9(7) which requires approval of the M.P.S.C. for fit and unfit tahsildars. After review under Rule 12

the approval of the M.P.S.C. for fit and unfit lists of the candidates is again required. It is a sorry state of affair that the respondent government did not get time to follow the procedure and to carry out review though there was specific order of the Tribunal in O.A.No.526/2004. In the case of Government it is often difficult to fix the responsibility of inaction to a particular person and that omission to do the duty is bound to affect adversely not only the promotees but also direct recruits. It is to be noted that after the judgment in O.A.No.526/2004 neither the State nor the promotees nor the direct recruits took further recourse for implementation of the direction of review by the Government. In the case of **Keshav Chandra Joshi (supra)** the petitioners have rendered 5 to 12 years ad hoc service as Assistant Conservator of Forest. The ad hoc promotions were in excess of quota. It is further held that :-

“24. It is notorious that confirmation of an employee in a substantive post would take place long years after the retirement. An employee is entitled to be considered for promotion on regular basis to a higher post if he/she is an approved probationer in the substantive lower post. An officer appointed by promotion in accordance with Rules and within quota and on declaration of probation is entitled to reckon his seniority from the date of promotion and the entire length of service, though initially temporary, shall be counted for seniority. Ad hoc or fortuitous appointments on a temporary or stop gap basis cannot be taken into account for the purpose of seniority, even if the appointee was subsequently qualified to hold the post on a regular basis. To give benefit of such service would be contrary to equality enshrined in Article 14 read with Article 16(1) of the Constitution as unequals would be treated as equals. When promotion is outside the quota, the seniority would be reckoned from the date of the vacancy within the quota, rendering the previous service fortuitous. The previous promotion would be regular only from the date of the vacancy within the quota and seniority shall be counted from that date and not from the date of his earlier promotion or subsequent confirmation. In order to do justice to the promotees it would not be proper to do injustice to the direct recruits. The rule of quota being a

statutory one it must be strictly implemented and it is impermissible for the authorities concerned to deviate from the rule due to administrative exigencies or expediency. The result of pushing down the promotees appointed in excess of the quota may work out hardship but it is unavoidable and any construction otherwise would be illegal, nullifying the force of statutory rules and would offend Articles 14 and 16(1). Therefore, the rules must be carefully applied in such a manner as not to violate the rules or equality assured under Article 14 of the Constitution. This Court interpreted that equity is an integral part of Article 14. So every attempt would be made to minimize, as far as possible, inequity. Disparity is inherent in the system of working out integration of the employees drawn from different sources, who have legitimate aspiration to reach higher echelons of service. A feeling of hardship to one, or heart burning to either would be avoided. At the same time equality is accorded to all the employees.”

31. In **Union of India & Anr. Vs. Hemraj Singh Chauhan & Ors. (2010) 4 SCC 290**, the respondents, State Civil Servants were expecting promotion to IAS under promotion quota. The cadre review was not taken for 2 years and in the meantime respondents crossed the upper age limit of 54 years and became ineligible for consideration of promotion. The contention raised by the respondents was, had cadre review taken 2 years back they would have been promoted. The Hon'ble High Court held that though actual review was done in 2005 it should have been done in 2003 and accordingly the promotions should have been given. The Hon'ble Supreme Court confirmed the view. The Hon'ble Supreme Court held that the guarantee of a fair consideration in matters of promotion under Article 16 virtually flows from guarantee of equality under Article 14 of the Constitution. The promotees having legitimate expectations for being considered for promotion defeated due to inaction on the part of the State. In the said

judgment the Hon'ble Supreme Court fixed the responsibility of the State as a model employer who has to be consistent with the role in a welfare State. Therefore, by invoking powers under Article 142 of the Constitution the date of review notionally brought back to 2003 and was given effect prospectively. In the present case there is unjustifiable delay, lack of sense for responsibility and inaction on the part of Government in not preparing final select list and not conducting review. Tahsildars who were promoted as stop-gap are required to pass two tests, firstly entry in the final select list and secondly of the review. The object of this filtering is to maintain the quality and standard in the cadre of the Deputy Collectors. However, today the State has forgiven the two tests and continued them as Deputy Collectors but has specified a particular date as and when they enter the group of permanent posts.

32. We do agree with the learned Senior Counsel Mr. Dhakephalkar that the judgment in O.A.No.526/2004 is distinguishable on facts though common issue of seniority of the direct recruits and promotees, Deputy Collectors was involved. Mr. Dhakephalkar has rightly pointed out that firstly in the judgment in OA No.526/2004 the list of 27.5.1993 was challenged wherein the seniority of the direct recruits and promotees was fixed from 1980 to 1993, in case in hand from 1999 to 2003. Secondly, whether the quota during the period was distributed due to excess

promotions and has adversely affected the direct recruits was the issue. Thirdly, there was no issue of regularizing appointments of the promotee, Tahsildars. The Tribunal has also mentioned that if promotions are given by following the rules then it cannot be illegal or fortuitous as understood in general parlance. The applicants in O.A.No.526/2004 direct recruit, Tahsildars have pleaded that promotees were given promotions to the post of Deputy Collector in excess of their quota. The issue whether the final select list was prepared wherein the names of the promotees were included was never raised and addressed. In the judgment the Division Bench of the Tribunal has stated as follows:-

73. One aspect cannot be lost sight of. The rule makers have used different phrases for appointment of Deputy Collector. As regards appointment by nomination is concerned, the appointments are to be made against total number of permanent posts in the cadre and that too as determined in advance, the number of nominations are to be made in the year. As against this for the purpose of promotion, sub-rule (4) of rule 9 says that the number of Tahsildars to be included in the select list shall be as nearly as may be equal to the vacancies in the cadre of Deputy Collector which are likely to arise during next twelve months i.e. from 1st September to 31st August. Thus, the list is to be prepared having regard to the vacancies that may arise during next twelve months. Thus, promotions are linked with vacancies in the cadre and nominations for purpose of proviso to rule (4) being against permanent post. Thus, the rule makers have made this provisos authorizing the State Government to make appointments to the cadre of Deputy Collector as a whole which in our view the term 'cadre' includes both permanent and temporary post. In this aspect we find substance in the contention of Shri Khaire, Ld. C.P.O. who contended that term cadre includes permanent and temporary post also. For this purpose, he brought to our notice G.R. dated 17.9.1981."

Nowhere the Division Bench has stated that the quota is irrelevant while fixing the seniority. It held that promotees are to be promoted on the basis of vacancies, which is entirely correct as

per Rule 10 of the Rules of 1977. Rather in paragraph 74 of the judgment while dealing with the contention of the direct recruits the Division Bench has, after referring the charts of filling up vacancies as per quota, stated that they are satisfied that respondents no.1 to 3 have ensured that the appointment by nomination was not less than 35% of the total numbers

33. In the case of **G.S. Lamba (supra)** while deciding the seniority of direct recruits and promotees of Indian Foreign Services (IFS) where quota was not followed and therefore it was held that Rota (rotation) rule would break down under weight of massive departure from the quota rule and the seniority rule being inextricable intertwined with the quota rule if given effect it would be unjust, unfair and iniquitous and would be violative of Article 14 of the Constitution. We make clear that **G.S. Lamba (supra)** is applicable in the present case, only to the extent of finding that seniority and Quota are inextricable intertwined, and not further; though there are excess appointments by promotions than the permanent posts of 514, but those all appointments are stop-gap for want of the eligibility of the applicants regarding entry in final select list. The Hon'ble Supreme Court in **G.S. Lamba (supra)** has dealt with the effect of non-consultation with Commission but however, in that given situation Rule 29-A wherein approval to relax the rules was available and no such approval is available in the Rules of 1977. Thus we need to take, not pedantic but

pragmatic approach to make the system workable and for smooth functioning, without causing much injustice to both the direct recruits and the promotees. In the case of **Anwar Hasan Khan (supra)**, the paramount object of the Court should be to discover what the legislature intended. The observations of Justice Hand are also relied in *Anwar Hassan Khan's* judgment. "Statutes should be construed, not as theorems of Euclid, but with some imagination of the purposes which lie behind them." (*Lenigh Valley Coal Co. v. Yensavage*, 218 FR 547, 553).

34. In the present case the Government has given promotions to the promotees by crossing figure of permanent posts of 541. The appointments of the applicants to the post of Deputy Collector are legal on account of the fact that they were promoted to meet the exigencies of services beyond the permanent post. However, it is mandatory to consider the Quota while preparing the common seniority list. Quota necessarily relates to permanent posts so in the present case all who are in Quota of 514 posts are equal. The Deputy Collectors having temporary posts in the cadre are outside the permanent posts. Seniority can be prepared among the equals and not with unequals. Seniority is a comparative concept between who are equally circumstanced. In the case of **State of Karnataka & Ors. Vs. C. Lalitha reported in (2006) 2 SCC 747**, the Hon'ble Supreme Court held that, service jurisprudence

postulates that all persons similarly situated should be treated similarly. Indeed this law is applicable in all the cases including the present one. Thus, the promotees and direct recruits who are included in the number of 514 permanent posts as a one specie comes first to other species of temporary posts. Remaining i.e. from 515 to 744 Deputy Collectors who fall out of 514 and are occupying the temporary posts will be ranked below them on the basis of their continuous officiation. The applicant in O.A.No.237/2021 has become Additional Collector in 2020 and applicant in O.A.No.236/2021 has got the Selection Grade on 04.10.2017. The review could not be prior to three years after the date of joining. The Government has tried to stitch its inaction. In the case of ***Union of India & Ors. Versus Somasundaram Vishwanath & Ors. reported in (1989) 1 SCC 175*** that the Rules regarding recruitment and promotion of officers in the Civil Services can be made either by the law of the Legislature or by the Rules made under the proviso to Article 309 of the Constitution of India or sometimes it is regulated by the executive instructions issued under Article 73 of the Constitution of India. In case of conflict between the executive instructions and the Rules then the Rules will prevail. In the present case, the Respondent-State issued G.R. as per the Rules of 1977. Prima facie, G.R. is verbose and not worded precisely. However, its validity can be examined at the time of final hearing. If directions are given strictly to follow

and implement Rules 9(7), 10 and 12 of the Rules of 1977 at this stage, then the applicants will lose entire period as the time will start running from today. It will have cascading effect on the officers who are not before us and also the Applicants. Instead the Government after their entry in permanent posts fixed the date of regular service because their stop-gap appointments were never regularized by requisite procedure. This method adopted by the Government is commonly valid. In the case of rectification of any mistake the seniority is often fixed on the basis of 'deemed date'. It is notional fixation of a particular date though the Government servant is actually may or may not be rendering the service in that particular cadre. The said service is fortuitous.

35. The submissions of Mr. Rajadhyaksha that the Government cannot treat the appointment of the applicants as fortuitous is not acceptable for following reasons :-

The term 'fortuitous service' as defined in Rule 2(i) "means that service which is rendered by a person during the period commencing on the date of his actual continuous officiation in a cadre and ending on the deemed date of continuous officiation in that cadre such deemed date being later than the date of the actual continuous officiation of such person in the said cadre." Thus, the fortuitous service contemplates the particular period between the two dates, i.e. the date of actual working, joining and upto the deemed date. However, in Rule 13(5) in proviso the word

used is not fortuitous service, but 'fortuitous appointment' which is not defined in the Rules of 1977. Hence we refer and rely on the definition of MSC Rules :-

Definition of 'fortuitous appointment' given in M.C.S. (Regulation of Seniority) Rules, 1982

Rule 3(f)

'fortuitous appointment' means a temporary appointment made pending a regular appointment in accordance with the provisions of the relevant recruitment rules.

Definition of 'fortuitous service' given in Maharashtra Deputy Collectors (Recruitment, Fixation of Seniority and Confirmation) Rules, 1977

Rule 2(i)

"fortuitous service" means that service which is rendered by a person during the period commencing on the date of his actual continuous officiation in a cadre and ending on the deemed date of continuous officiation in that cadre (such deemed date being later than the date of the actual continuous officiation of such person in the said cadre).

Thus, in fortuitous appointment there is no issue of two dates, but it is a temporary appointment pending made regular. Rule 13(5) of the Rules of 1977 states the basis of seniority should be continuous service in the cadre of Deputy Collectors except service on fortuitous appointment. Much is argued by the learned Senior Counsel Mr. Rajadhyaksha on understanding of the term 'cadre'. This Rule cannot be read in isolation ignoring the provisions in Rule 4 which specifically states of maintaining quota of the direct recruits. Thus, admittedly the quota as stated above is related to only permanent posts and not temporary posts and

cadre includes permanent as well as temporary posts. There should not be disagreement that unit of permanent posts stands on a higher footing than temporary posts or even additional posts. The promotees occupying 65 to 50% of the quota which is variable year to year, are standing in the rank on the basis of their continuous officiation on that post. Therefore while considering the seniority the State has placed permanent posts (higher) of all the Deputy Collectors by maintaining quota on the basis of continuous officiation and the officers who hold temporary posts in the cadre will be placed thereafter by applying the principle of continuous officiation. We are of the view that there is no deviation in following Rule 13(5).

36. The learned Senior Counsel Mr. Rajadhyaksha has submitted that where the Quota / Rota system is broken then it is not to be followed. However it is not the case in the present matter. The Quota of direct recruits is maintained in 541 permanent posts every year. The Applicants were not in the final select list so it cannot be provisional appointment. We make it clear the Government may promote Tahsildar as stop-gap Deputy Collectors, the number may exceed to permanent posts, but they are on temporary posts, unless they are made regular in the cadre. By this seniority list on 30.12.2020 the Respondents have regularized their appointment from 1999 to 2003.

37. Maintenance of Quota in the cadre as laid down under Rule 4 is required in view of the rationale of getting benefit of experienced hand and as well as a fresh blood and fresh attitude. We accept the submissions of learned Senior Counsel Mr. Rajadhyaksha and learned Counsel Mr. Dubey that the quota is available only to the direct recruits for appointment and it is not applicable to promotees in giving promotions. However, the promotees exceeding permanent posts will be on temporary posts and permanent posts are on the higher pedestal than the temporary posts or even additional posts, hence, first all permanent posts will come and then temporary posts on the basis of continuous officiation. The aggressively expanding administration of the State has to meet challenges with novel and growing needs from time to time. Every year some posts from the quota fall vacant due to superannuation, retirement or administrative actions. Promoting and transferring more and more number of Tahsildars to various ex-cadre posts on deputation to the posts of Deputy Collectors, led creation of excess stop-gap / temporary appointments. Those posts were also filled-up by the Government without following the proper procedure. As on today against the 514 permanent posts, 749 officers are admittedly working in the said cadre. Thus, the Respondent-State after crossing the total number of substantive posts of 514 further in its

authority created temporary posts time and again by giving appointment to the Tahsildars to the post of Deputy Collectors.

38. In the case of **S.B Patwardhan (supra)** the Hon'ble Supreme Court on giving retrospective effect to the executive instructions has held that the executive instructions like notifications, G.Rs and Circulars, unlike Rules regulating recruitment and conditions of service, these instructions do not carry the same force equal to the service rules framed for the recruitment and the service conditions under proviso to Article 309 of the Constitution, therefore, these executive instructions cannot have any retrospective effect. This is not applicable to the G.R. of 30.12.2021 which is under challenge in the present case, because by G.R. the service in the past is made regular after three years. Only date is notified and it cannot be said that this G.R. is violative of ratio laid down in **S.B Patwardhan (supra)**.

39. Mr. Apte, learned Senior Counsel has relied on the affidavit-in-reply of one Mr. Madhav V. Veer, Deputy Secretary, Revenue and Forest Department and on instructions submitted that not only the applicants but the other Tahsildars who are promoted, irrespective of observing procedure to the post of Deputy Collectors working long period and whose appointments are beyond the permanent post of 514, none of them will be reverted to the post of Tahsildars and not only that both the applicants are given further

promotions. The seniority list is from 1999 to 2003. The applicants at present holding permanent posts in fact are senior to get promoted further in view of the seniority in the year 2021. 83 posts of Additional Collectors are vacant and are to be filled-up immediately.

40. Thus the Government wants to adjust the time clock by applying certain reasonable and possible mode by relaxing the conditions of final list and review but adhering otherwise to the Rules of 1977. The arguments of Mr. Rajadhyaksha that as we were not reverted, means having continuous officiation necessarily from the date of joining is correct but that continuation is on temporary post. We rely on **G.S. Lamba (supra)** the judgment of Privy Council in **Montreal Street Railway Company Vs. Normandin, AIR 1917 PC 142**, is referred to :-

“When the provisions of a statute relate to the performance of a public duty and the case is such that to hold null and void acts done in neglect of this duty would work general inconvenience or injustice to persons who have not control over those entrusted with the duty and that at the same time would not promote the main object of the Legislature, it has been the practice to hold such provisions to be directory only, the neglect of them, though punishable, not affecting the validity of the acts done.”]

41. The ratio laid down in the case of **Wander Ltd. (supra)** regarding granting of status quo cannot be applied blindly if the applicants fail to prove prima facie their legal right. Moreover, all other Deputy Collectors either promotees or recruits who are

enlisted are not before us. The order may have adverse impact on those.

42. We are of the view that the Applicants have failed to establish prima facie case to grant interim relief. Hence, interim relief is rejected. The matter is adjourned by six weeks for affidavit-in-reply of the Respondents. Adjourned to 7th September, 2021.

Sd/-

(P.N Dixit)
Vice-Chairman (A)

Sd/-

(Mridula Bhatkar, J.)
Chairperson

LATER ON

Date : 27.07.2021.

O.A.No.236 of 2021 with O.A.No.237 of 2021

1. After the pronouncement of the order rejecting the interim relief the learned Counsel Mr. Dubey for the Applicant prays for stay of the order.

2. The learned Senior Counsel Mr. Apte and other Counsel appearing for the Respondents and private Respondents opposed the same.

3. In view of the detailed reasons mentioned in the order we do not find any reason and good ground to stay our order of rejecting interim relief. Hence, the prayer to stay the order is rejected.

Sd/-

(P.N. Dixit)
Vice-Chairman

Sd/-

(Mridula Bhatkar, J.)
Chairperson