IN THE HIGH COURT OF HIMACHAL PRADESH SHIMLA

C.W.P. No.488 of 2001.

Judgment reserved on: 15.10.2008.

Date of decision: 29.12.2008.

Shri V.K. Behal and others ...Petitioners

-Versus-

State of H.P. and others ….Respondents

Coram:

The Hon'ble Mr.Justice Deepak Gupta, Judge.

The Hon'ble Mr.Justice V.K.Ahuja, Judge.

Whether approved for reporting? Yes

For the Petitioners: Mr.Dalip Sharma, Advocate.

For Respondents: Mr.R.M.Bisht, Dy.A.G. for respondents No.1 & 2.
Mr.Surinder Sharma, counsel for R-3.
Mr.Bhuvnesh Sharma, counsel for R-4.
Mr.Ajay Chandel, counsel for interveners.

Deepak Gupta, J.

This Writ Petition is directed against the order of the learned H.P. State Administrative Tribunal dated January 12, 2001 passed in O.A. No.191 of 1999 whereby the Original Application filed by the petitioners and respondents No.6&7 herein was rejected.

Briefly stated, the facts are that the petitioners and the private respondents are all working in the Prosecution Department of the State of Himachal Pradesh. They were selected as Assistant District Attorneys on different dates. The petitioners, by means of the O.A. and by means of the present petition have challenged the

constitutional validity of the Demobilized Armed Forces Personnel (Reservation of vacancies in the Himachal Pradesh State Non-Technical Services) Rules, 1972 (hereinafter referred to as the Rules). Rule 5(i) of the aforesaid Rules as originally notified on 28.3.1972 read as follows:

> "Service rendered in the armed forces including the period spent on training prior to Commission in the case of Commissioned Officers, shall count, in full, towards seniority and fixation of pay under the State Government in the post to which he is first appointed against the vacancy reserved under Rule 3."

This rule was amended vide notification dated 6.12.1980 to read as follows:

> "Seniority and pay of the candidates who are appointed against the vacancies reserved under Rule 3 shall be determined on the assumption that they joined the service or the post, as the case may be, under the State Govt. at the first opportunity they had after they joined the military service or training prior to the Commission."

The aforesaid provision was against amended and now the provision reads as follows:

> "(1)Only the period of approved military service rendered after attaining the minimum age prescribed for appointment to the service concerned by the candidates appointed against reserved vacancies under the relevant rules, shall count towards fixation of pay and seniority in that service. This benefit shall however be allowed at the time of first civil employment only and it shall not be admissible in subsequent appointments of ex-servicemen who are already employed under the State/Central Govt. against reserved posts."

The petitioners challenge the validity of this Rule on various counts.

We have heard Shri Dalip Sharma, learned counsel for the petitioners, Sh.R.M. Bisht, learned Deputy Advocate General for respondents 1&2 and S/Sh.Bhuvnesh Sharma, Ajay Chandel and

Surinder Sharma, counsel for private respondents and the interveners.

The main contention raised on behalf of the petitioners by Sh.Dalip Sharma is that the Rules are unconstitutional because they give benefit to even those ex-servicemen who had not joined service in the armed forces during the period of emergency. According to the petitioners, the persons who join the armed forces when the situation in the Country is normal do not do anything extra-ordinary and they join the armed forces like any other career and therefore there is no rationale for giving them benefit of the service rendered by them in the armed forces for the purposes of pay and seniority. Sh.Dalip Sharma, learned counsel for the petitioners has urged that he is not in any manner arguing that the ex-servicemen do not form a separate class. He submits that to satisfy the tests of Article 14 not only should the classification be justified but there should be a reasonable nexus with the object sought to be achieved. It is his submission that if the object is to rehabilitate the ex-serviceman this object is served by providing reservations to them. However, according to him, there is no justification in granting them the benefit of seniority by adding the period of service rendered by them in the Army. He submits that once the persons are recruited from various sources and become members of one service no further distinction can be made between them on the ground of the past service rendered in a totally unrelated employment. In the alternative he submits that the benefit, if any, should be restricted to

grant of financial benefits like fixation of pay only and the rights of other individuals who joined service much before the ex-servicemen cannot be jeopardized by giving the ex-servicemen benefit of adding the service rendered by them in the armed forces for reckoning their seniority. According to him, the case of ex-servicemen who joined armed forces during the period of emergency when the Nation was facing foreign aggression or when the sovereignty and integrity of the Country was at stake, stands on a completely different footing and the ex-servicemen who joined during emergency have to be treated as a different class. The benefit given to such ex-servicemen who joined during emergency cannot be extended to the person who joined service during normalcy. In the alternative it is urged that even if the Rule is held to be valid the deemed date of appointment cannot be from a date prior to such persons acquiring the minimum educational eligibility criteria prescribed in the Rules.

On the other hand, counsel for the respondents and interveners have supported the validity of the Rules and have contended that not only is there an intelligible criteria but the classification also has a reasonable nexus with the object sought to be achieved. The respondents have also argued that the Apex Court has virtually upheld the validity of the H.P. Rules though in the context of H.P. Police Service in **S.B. Dogra vs. State of H.P., (1992) 4 SCC 455.**

The main plank of argument of the petitioners is that the Apex Court in **Ram Janam Singh vs. State of Uttar Pradesh and another, AIR 1994 SC 1722** clearly held that the ex-servicemen

who joined service in the armed forces during the period of emergency have to be treated at a higher pedestal than those who joined service during normalcy. The two categories are unequal and cannot be equated. It would be pertinent to mention that under the U.P. Non Technical (Class-II) Services (Reservation of Vacancies for Demobilized Officers) Rules, 1973 the benefit of the Rules was confined to those ex-servicemen who had joined service in the armed forces during the period when the Country was under a state of emergency. One person who had joined service in the armed forces during the period when the emergency was not in operation challenged the non-grant of the benefit of Rules to him on the ground that there was no reasonable rational basis for excluding the period from January 10, 1969 when the emergency was lifted till December 3, 1971 when the same was re-imposed. This writ petition was allowed by the Allahabad High Court. Thereafter, Ram Janam Singh filed an appeal before the Apex Court which was allowed. The Apex Court held as follows:

> "10. From time to time controversy regarding inter se seniority is raised between persons recruited from different sources to the same service. In past, notional seniority used to be given to one group of officers, purporting to mitigate their hardship or to rectify any alleged wrong done to them in the process of recruitment or promotion. Ultimately, it was realised that if liberty is given to fix seniority of an officer or group of officers belonging to a particular category with reference to a notional date, that will lead to great uncertainty in public service. The date of entry into a particular service was considered to be the most safe rule to follow while determining the inter se (sic) one officer or the other or between one group of officers and the other recruited from the different sources. After referring to different judgments of this Court, a Constitution Bench in the case of Direct Recruit Class II Engineering Officers' Association v. State of Maharashtra, (1980) 2 SCC 715 : (AIR 1990 SC 1607), came to the same conclusion. The same has been reiterated in the case of State

of West Bengal v. Aghore Nath Dev,(1993) 3 SCC 371. It is now almost settled that seniority of an officer in service is determined with reference to the date of his entry in the service, which will be consistent with the recruitment of Articles 14 and 16 of the Constitution. Of course, if the circumstances so require a group of persons can be treated a class separate from the rest, for any preferential or beneficial treatment while fixing their seniority. But, whether such, group of persons belong to a special class for any special treatment, in matters of seniority has to be decided on objective consideration and on taking into account relevant factors which can stand the test of Articles 14 and 16 of the Constitution. Normally, such classification should be by statutory rule or rules framed under Article 309 of the Constitution. The far-reaching implication of such rules need not be impressed, because they purport to affect the seniority of persons, who are already in service. For promotional posts, generally the rule regarding merit and ability or seniority-cum- merit is followed in most of the services. As such the seniority of an employee in the later case is material and relevant to further his career, which can be affected by factors, which can be held to be reasonable and rational.

11. It appears that the framers of the Rules 1973 and 1980, while treating the persons, who had been commissioned on or after November 1, 1962 but before January 10, 1968 and again on or after December 3, 1971, took into account the circumstances and the background in which such persons were commissioned in Armed Forces i.e. when the nation was faced with foreign aggressions and the cry of the time was that persons should join the Armed Forces to defend the integrity and sovereignty of the nation. It is well known that many persons in such situation are not inclined to join Armed Forces and only those with feeling for the honour of the nation rise to such occasions. In this background, if such persons have been treated as a separate class for extending any benefit in the matter of seniority, none can make any grievance and their classification can be upheld even in the light of Articles 14 and 16 of the Constitution.

12. But, we fail to understand as to how persons, who joined after the emergency was over i.e. after January 10, 1968 and before December 3, 1971, when another emergency was imposed in view of the foreign aggression can be treated at par or on the same level. It need not be pointed out that such persons were in look out of a career and joined the Armed Forces of their own volition. It can be presumed that they were prepared for the normal risk in the service of the Armed Forces. Those who joined Armed Forces after November 1, 1962 or December 3, 1971, not only joined Armed Forces but joined a war which was being fought by the nation. If the benefits extended to such persons, who were commissioned during national emergencies are extended even to the members of the Armed Forces who joined during normal times, members of the Civil Services can make legitimate grievance that their seniority is being affected by

persons recruited to the service after they had entered in the said service without there being any rational basis for the same.

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14. Can it be said that the persons who had joined army after the declaration of emergency due to foreign aggression and those who joined after the war came to an end stand on the same footing? Those who joined Army after revocation of emergency joined army as a career. It is well known that many persons, who joined army service during the foreign aggression could have opted for other career or service. But the nation itself being under peril, impelled by the spirit to serve the nation, they opted for joining Army where then risk was writ large. No one can dispute that such persons formed a class by themselves and by Rules aforesaid an attempt has been made to compensate those who returned from war if they compete in different service. According to us, the plea that even persons, who joined army service after cessation of foreign aggression and revocation of emergency have to be treated like persons, who have joined army service during emergency, due to foreign aggression is a futile plea and should not have been accepted by the High Court. It need not be impressed that whenever any particular period spent in any other service by a person is added to the service to which such person joins later, it is bound to affect the seniority of persons who have already entered in the service. As such any period of earlier service should be taken into account for determination of seniority in the later service only for some very compelling reasons, which stand the test of reasonableness and on examination can be held to be free from arbitrariness."

(emphasis supplied)

In **Narendra Nath Pandey and others vs. State of U.P. and others, AIR 1988 SC 1648** the Apex Court was dealing with the provisions of Rule 6 of the U.P. Rules, the relevant portion of which reads as follows:

"R.6 Seniority and pay-

(1)Seniority and pay of candidates appointed against the vacancies reserved under sub-rule (1) of Rule 3, shall be determined on the assumption that they entered the service concerned at their second opportunity, of competing for recruitment, and they shall be assigned the same year of allotment as successful candidates of the relevant competitive examination."

Interpreting this Rule, the Apex Court held as follows:

"13. It is true that Rule 6 does not provide for the period between demobilisation and recruitment of a war service candidate in the civil service.

Nor does it forbid consideration of such period. It cannot, however, be denied that after the discharge from war service, there will be some lapse of time for the recruitment of a candidate in the Provincial Civil Service. Immediately after discharge, one cannot get himself recruited in the Provincial Civil Service. There is a question of competing in the examination. Rule 6 does not provide for any gap to be taken into consideration, yet it is apparent that some reasonable period has to be allowed to a candidate so as to enable him to avail himself of the opportunity of appearing at the competitive examination for his recruitment in the Provincial Civil Service. It cannot be gainsaid that to compete in the examination, a candidate has to make preparation for that. Competitive examinations are generally difficult and, in our opinion, at least two years' time should be allowed to a candidate, after his discharge, for his preparation for the competitive examination and that will be his first opportunity. The second opportunity will arise in the next year, that is, in the third year of his discharge from the armed forces. In other words, he should be allowed three years for competing in the relevant examination for recruitment in the civil service.

14. Even after he becomes successful, he is not recruited immediately. There is the question of availability of vacancies and posting. It is common knowledge that some time is taken for posting. On a proper construction of Rule 6, the period spent by a candidate for competing in the examination which, in our opinion, will not be more than three years, and the period of time taken for his recruitment or posting will also be taken into consideration for the purpose of computing the seniority of a war service candidate. Thus, if a candidate is discharged in the year 1968, he should be given three years' time to avail himself of the opportunity of competing in the examination. Suppose, he is successful in the examination held in 1971 and posted in 1973. In view of Rule 6, he would be deemed to have entered service at the second opportunity of competing for recruitment and the entire period from the date of assumed entry in the service up to his recruitment in 1973 shall betaken into account for the purpose of computing seniority and pay. If, however, a candidate does not avail himself of the opportunity within three years of his discharge from war service or takes the examination but becomes unsuccessful, the period between his discharge and subsequent recruitment will not be taken into account for the purpose of computing the seniority. Rule 6 should be given a reasonable interpretation. We do not find any reason to interpret Rule 6 in a way which will be doing injustice to the appellants who have been recruited under the Service Rules after competing successfully in the examination.

15. We agree with the High Court that the 1973 Rules as also the 1980 Rules are quite legal and valid. We are, however, of the view that under Rule 6 of the 1973 Rules or Rule 5 of the 1980 Rules only a reasonable period, namely, the

> period of three years, required for taking the examination and the time taken for recruitment or posting, as discussed above, along with the period of war service, but no other period, will be taken into consideration for the purpose of computing the seniority and pay. The impugned seniority list prepared in 1976 and also that prepared subsequently in the year 1980 cannot be sustained, as they have been prepared by taking into consideration the entire period between the discharge and the recruitment without any reservation for computing the seniority."

A Division Bench of this Court of which one of us (V.K.Ahuja, J) was a Member, considered in detail the provisions of reservation for ex-servicemen in so far as they were applicable to the H.P. Administrative Service in **CWP No.1352 of 2006 titled Rajinder Singh and others vs. State of H.P. and others** & other connected matters. In that case also Rule 4(i) of the Rules was challenged on the ground that though there may be reservation for those persons who joined armed forces during emergency when the Nation faced aggression by treating them as special class but the said reservation should not be extended by giving benefit to all those persons who had joined the armed forces in normal period. The Division Bench while dealing with this contention discussed the issue in the following terms:

> "A perusal of these Rules shows that the term 'demobilized' has not been defined in any of the rules and it is clear that taking the definition from the dictionary, it can be interpreted that these Rules are meant for providing reservation to those armed forces personnel who had been demobilized from these forces. Nowhere the word ex serviceman has been used in the preamble or title of these Rules. The intention of the State Government was to give benefit to those persons who had been demolished (sic) after the emergency and not to all ex servicemen. This demobilization may

be due to the cessation of external aggression and reduction of strength of armed forces which are raised to meet the challenge posed by the Indo China war of 1962 and Indo Pak war of 1965.

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These Rules were exclusively framed for the benefit of those Indian Armed Forces Personnel who had served in these forces during the national emergency and not for all ex servicemen though they were entitled to be selected against the quota reserved for ex servicemen which was already availed for 1984-85 batch by Shri B.R. Verma and there could not be reservation for two posts in that year and, therefore, respondent No.4 was not entitled to be adjusted for the purpose of seniority or reservation as an ex serviceman or demobilized person which are two distinct terms and has to be construed distinctively at different places.

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The next limb of the argument of the learned counsel for the petitioners was that respondent No. 4 had not joined during emergency and the benefit of service rendered as ex-serviceman were given to a person who did not join in emergency but joined in normal time and, therefore, the Rules providing for reservation or giving of benefit of past military can be said to be ultra vires provisions of the Constitution and further that the amendment in rules cannot take the benefits accrued to a person retrospectively and the seniority cannot be changed after a lapse of considerable time. Learned counsel for the petitioners had placed reliance on the following decisions.

In the decision in **S.B. Dogra** Vs. **State of H.P. and others**, **(1992) 4 Supreme Court Cases 455**, shows that an Appellant Emergency Commissioned Officer, joined Delhi, H.P. Anandaman and Nicobar Island Police Service and after formation of State of Himachal Pradesh was allocated to State Police Service and appointed against the vacancy reserved for Demobilized Armed Forces Personnel. It was held that the Tribunal ought not to have disturbed the seniority after such a long lapse of time when respondent had not challenged it before the same was finalized in 1979.

In **Chittranjan Singh Chima & another** Vs. **State of Punjab & others**, **(1997) 11 Supreme Court Cases 447**, the apex Court has held that the persons appointed to defence services under the normal recruitment, before proclamation of (External) Emergency on 26.10.1962, were not covered under the expression "military service" as defined in the Punjab Government National Emergency (Concession) Rules, 1965. Hence, the appellants who were enrolled in Indian Air Force on 7.12.1957 and 3.9.1959 respectively and were released in 1974 on completion of 15 years of service, held, not entitled to benefit of this service for seniority and other consequential benefits because they were not appointed during emergency but in the regular process.

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The decision in **Ram Janam Singh** Vs. **State of Utter Pradesh & others**, **AIR 1994 S.C. 1722**, deals with the question about which concessions were given to those officers joining armed forces during emergency and thereafter. However, denial to those joining after revocation of emergency is not discriminatory. Separate rules were framed conferring benefit in the matter of seniority only on those officers joining armed forces after November 1, 1962 but before January 10, 1968 and those joining after 3rd December, 1971 were held to be not discriminatory. Such officers benefited under the Rules constitute a separate class. It is apparent from Ram Janam's case supra that the Supreme Court has clearly held that denial of the concession to persons who joined armed forces after revocation of emergency is not discriminatory and the officers benefited under the Rules framed by the State Government to give benefit to those who joined during emergency constitute a separate class and, therefore, as a class they are entitled to the benefit of the previous services."

After discussing the matter in great detail, as above, the Division Bench concluded as follows:

"Rule 4(1) of DIAFP Rules which gives benefit of military service with retrospective effect are quashed for the reasons given

above. However, the Government shall be at liberty to frame fresh rules for making reasonable classification in regard to the persons appointed during emergency and in normal time. These shall be applicable for future only."

It is clear that the Division Bench in relation to the Demobilized Indian Armed Forces Personnel Rules relating to the H.A.S. has held that the Rules in so far as they give benefit of military service with retrospective effect are illegal and that the Government should frame Rules for making reasonable classification in respect of the persons appointed during emergency at normal times in view of the judgments

The Apex Court in a number of cases has upheld the validity of the Rules whereby benefit of counting the service rendered in the armed forces for the purposes of calculating seniority in the civil post is granted. However, the Apex Court in **Ram Janam Singh's case and Chittranjan Singh Chima's case** has clearly held that ex-servicemen who joined the armed forces during the period of emergency form an entirely different class as distinguished from the ex-servicemen who joined the armed forces when there is no state of emergency in operation and normalcy is prevailing. The Apex Court has clearly held that these two categories of ex-servicemen form two separate classes and are not equal to each other.

When a state of emergency is declared and the Nation is at war or facing the threat of aggression some young persons out of a feeling of patriotism join the armed forces knowing fully well that they are putting their lives at stake. They give up their chance to join civil service and live a comfortable life in the main cities of the

country. These persons stand on a totally different footing from those who join service during normal period. These persons weigh all the pros and cons and after taking into consideration all factors come to the conclusion that they have a good future in the armed forces. They join the armed forces as a profession like any other. This is not to demean or in any manner diminish the value of their service to their country. The sacrifice of the armed forces personnel can never be forgotten. They serve society in times of turmoil. They live separately from their families. They serve at the borders in hostile climes and when they leave the army it is the Nation's duty to ensure that they are rehabilitated in a proper manner.

However, as held by the Apex Court and already indicated by us above there can be no manner of dispute that ex-servicemen who joined the armed forces during emergency have to be placed on a much higher pedestal. Their sacrifice is much more than that of those persons who have joined the armed forces during normal service. Therefore, though the grant of benefit of service rendered in the armed forces to ex-servicemen who join during emergency may be justified, such benefit may not be totally justified in the case of those ex-servicemen who joined during normal times.

There may exist an intelligible criteria for providing reservation to ex-servicemen. The object is also reasonable i.e. to rehabilitate the ex-servicemen but this object can be achieved by providing reservations to them. Nobody is against such reservation. Their pay can also be protected. The problem arises when there is a

conflict between persons from the civil society who have joined service much earlier than the ex-servicemen but then they are placed lower when the ex-servicemen who are given benefit of their past service regardless of the fact whether they have joined during emergency or not.

It would also be pertinent to point out that as per the information available with us in all other States in the Country the benefit of Demobilized Armed Forces Personnel Rules or similarly worded Rules is confined to those persons who joined the armed forces during the period of emergency. In fact as per the information supplied at the Bar, in the other States even the benefit of reservation is only available to those persons who joined the armed forces during the period of emergency. It is only in the State of Himachal Pradesh that this benefit has been extended to all ex-servicemen. This Court can take judicial notice of the fact that a large proportion of the population of the State of H.P. joins the armed forces. In this State there is a culture of serving the armed forces. It is probably in this context that the benefit of reservation was extended to all ex-servicemen. However, this appears to have been done in a mechanical manner. The benefit of counting the period of service rendered in the armed forces for the purposes of seniority in civil service has been made available to all ex-servicemen without looking into all aspects of the matter.

We are of the view that such benefit should have been limited to those persons who joined during the period of emergency

only. Otherwise the Rules would become unconstitutional. The Apex Court in a number of cases including those quoted above has clearly held that efficiency should not suffer on account of reservation. Reservation can be held to be reasonable as long as efficiency does not suffer. It is also well settled that the seniority of an officer in service is determined with reference to the date of entry in the service. This is consistent with Articles 14 & 16 of the Constitution. Exceptions can be made only in special circumstances. However, what are the special circumstances and who are the persons who are entitled to such benefits has to be decided objectively. Therefore, the rules in this behalf must be framed by taking into consideration the effect which such reservation will have on efficiency of the service and the manner in which it will affect the seniority of persons who are already in service.

We may approach this issue from another angle. The Apex Court both in **Ram Janam Singh's case** as well as in **Chittranjan Singh Chima's case** clearly held that the ex-serviceman who joined the armed forces during normalcy could not be equated with ex-serviceman who joined the armed forces during emergency. The Rule under challenge in fact equates these two. Therefore, two unequals have been treated as equals. What may be valid or reasonable for the ex-servicemen who stand on higher pedestal i.e. ex-servicemen who joined during emergency may not necessarily be valid or legal for those who stand on a lower footing. The civil servants who are placed lower to such ex-servicemen can genuinely

complaint that they are the victims of arbitrary discrimination as clearly pointed out in **Ram Janam Singh's case**. Efficiency of the service is also bound to suffer if all ex-servicemen are given this benefit.

In our considered opinion the State Government did not at all take into consideration these aspects of the matter. No material has been placed on record to show whether such objective criteria were followed while framing the Rules. We also find that in the State of Himachal Pradesh benefit of past service rendered in the armed forces is even being given to those persons who did not even fulfil the minimum educational criteria for the service which is otherwise mandatory. Take for example the present case. According to the R&P Rules relating to District Attorneys, the minimum eligibility criteria is a degree in law with three years experience as a lawyer. Ex-servicemen who were not even possessing a degree in law nor having any experience of practice are being given the benefit of the past service rendered in the Army. Immediately on joining the service they become senior to persons who have come from the general category and joined service much earlier to them. This is bound to affect the efficiency in the service. This will also cause heart burning. Competent persons who joined from the general category are placed lower in seniority to those who may have become eligible to even join service much after they joined.

On behalf of the respondents reliance is placed on two judgments of the Apex Court in **Charan Singh and another vs.**

State of Punjab and others,(1998)9 SCC 283 & Amarjit Singh vs. State of Punjab and others, (1998)9 SCC 284. It would be pertinent to mention that in those cases nobody had challenged the validity of the Rules and only the interpretation of the Rules was in question. In the present case it is the validity of the Rules which has been challenged. It would be pertinent to mention that in **Janeshwar Goyal and others vs. Hon'ble High Court of H.P. ad others, 1995(2) Sim.L.C. 205,** a Division Bench of this Court dealt with a similar situation. No-doubt the Division Bench decided the case mainly on the ground that the Rules were invalid since the High Court had not been consulted before making the reservations applicable to the judicial service. However, certain observations of the Court are relevant in this regard, which are quoted below:

> "16……The petitioners also submit that even otherwise the impugned orders are arbitrary and violative of Articles 14&16 of the Constitution of India. It is particularly submitted that the impugned orders have the effect of making respondent No.3 a Judicial Officer from 1974 when he was not even qualified to hold the said post. As has been noticed earlier, the respondent No.3 was only a matriculate when he joined the Indian Air Force in November, 1965. He passed his B.A. in 1971 and LL B., in 1976. Rule 4 of 1973 Rules provide that no person shall be appointed to be a subordinate judge who is not a Law Graduate or has not possessed of an equivalent examination. Clearly, therefore, respondent No.3 was not eligible to be appointed as a Subordinate Judge before 1976. It is, therefore, a case where he has been treated as having been appointed before he was eligible to be so appointed. The rule, if any, made in this behalf and having the aforesaid effect would require consideration in the

> context of Articles 14 & 16 of the Constitution. It has, however, been held that there has been no such Rule in existence and hence the consideration of said question would not arise. Since the impugned orders are supported de hors the rules, it is necessary to consider whether they are arbitrary as alleged. Assuming that respondent No.3 being the Ex Armed Personnel would fall in a distinct and separate category at the time of his entering the service and hence reservation of post will be constitutionally valid, the same distinction would disappear after his induction into the service. Thereafter it will not be possible to grant the said respondent any such benefit and the said grant would be prima facie arbitrary. It is well settled that persons though recruited from various source as members of the service, are treated as having become part of the said service after their appointment and thereafter no distinction between them can be made. In this view of the matter, respondent No.3 could not be given the said benefit. The said benefit would be violating Rule 4 of 1973 Rules and cannot be justified in any manner. 1973 Rules have statutory force and cannot be permitted to be violated. Then conferring benefits on the respondent No.3 from a date when he was not even eligible for appointment would, in our opinion, be wholly arbitrary and unjustified."

In **Pritam Chand vs. State of H.P. and others, CWP No.177 of 2000 decided on 22.7.2008,** a Division Bench of this Court following the aforesaid decision held as follows:

> "In the present case also since respondent No.1 had acquired the minimum qualification of graduation required for filling up the post of Statistical Assistant in April, 1983, he could not be granted the benefit of entire approved military service before April, 1983."

A person who does not have the minimum educational qualification would not be even eligible to apply for the post. When the person is not even eligible to apply for the post it does not stand

to reason that he can be given benefit of service rendered in the Army in such a post. The purpose of the Rules is to rehabilitate the army man. The rehabilitation is done by providing them reservation but when it comes to giving them the benefit of seniority the Rule becomes unconstitutional if the candidate being given the benefit is ineligible to hold the post. Even the State is not clear as to from which date this benefit is to be given. In some cases like in the case of respondent No.4 and Sh.G.C. Rana the benefit of past service has been given only from the date these persons acquired the minimum educational qualifications but in the cases of some other persons this benefit has been given regardless of this date. This practice is also discriminatory and violative of Article 14 of the Constitution of India.

In view of the above discussion we are clearly of the view that in case Rule 5(i) of the Rules has to be upheld, the entire benefit of the same should be made available only to those ex-servicemen who joined the armed forces during the period of emergency. As far as other ex-servicemen are concerned they may avail the benefit of reservation and fixation of pay but cannot count the past service rendered in the armed forces for the purposes of counting their seniority in the civil service which they have joined under the reserved category of ex-servicemen. It is also made clear that in all cases the benefit of past service can only be available from the date when the ex-servicemen acquired the minimum educational

qualification. No benefit can be given for the army service rendered prior to the date of attaining such education qualification.

In view of the above discussion, the writ petition is allowed. The Provision of Rule 5(1) of the Rules are read down and they are held to be unconstitutional in so far as they give benefit of counting the past army service towards seniority in civil employment in case of ex-servicemen who have not joined the Armed forces during the period of emergency. It is also held that the benefit of such service can not be given from a date prior to the date when the ex-serviceman attains the minimum educational eligibility criteria prescribed in the rules. Consequently, the seniority list Annexure P-3 is held to be illegal and is accordingly quashed and the respondents are directed to re-frame the same in accordance with the directions issued hereinabove. There shall be no order as to costs.

(Deepak Gupta),
Judge

December 29, 2008.
PV

(V.K. Ahuja),
Judge