

O. P. Singla and Another

Vs

Union of India and Others

Sadhu Ram and Others

Vs

Union of India and Others

Writ Petitions Nos. 5669 of 1980 and 1345 of 1981

(CJI Y. V. Chandrachud, Sabyasachi Mukharji, R. S. Pathak JJ)

14.08.1984

JUDGMENT

CHANDRACHUD, C.J.

1. (for himself and Pathak, J.) - Once again, we are back to the irksome question of inter se seniority between promotees and direct recruits. The contestants, this time, are judicial officers of Delhi. Our familiarity, generally, with the difficulties in the way of judicial officers and our awareness of their just aspirations make our task difficult and sensitive.
2. The conclusion to which we have come in this judgment is not different from the one reached by our learned Brother Sabyasachi Mukharji. In this judgment, Brother Mukharji has discussed, more fully, the various aspects of this matter as also the decisions which were cited before us. Our reasons for writing this separate opinion are, the general importance of this case, the fact that it concerns the higher judiciary and our respectful disagreement with Brother Mukharji on the interpretation of some of the provisions with which we are concerned in these writ petitions.
3. There are many decisions bearing upon the familiar controversy between promotees and direct recruits and this will be one more. Perhaps, just another. Since those various decisions have not succeeded in finding a satisfactory solution to the controversy, we would do well by confining our attention to the language and scheme of the rules which are under scrutiny herein, instead of seeking to derive a principle of universal application to the cases like those before us. Previous Judgments of this Court are, of course, binding to the extent that they are relevant and they cannot be ignored. But, if they turn upon their own facts, the general set-up of the particular service, its historical development and the words of the impugned provisions, no useful purpose will be served by discussing those cases at length, merely to justify an observation at the end that they have no application and are distinguishable.
4. We have two writ petitions before us which are filed under Article 32 of the Constitution by promotee Additional District and Sessions Judges of Delhi. We will not describe them as "Members of the Delhi Higher Judicial Service" because, that precisely is the question to be decided. If they are members of that Service, they shall have won their point. They were working at the relevant

time in temporary posts which were created by the Delhi Administration in the cadre of Additional District and Sessions Judges. In that capacity, some of them are working on deputation as members of one or the other of the Tribunals in Delhi, like the Industrial Tribunals or the Sales Tax Tribunals. The Union of India, the Delhi Administration, the High Court of Delhi and direct recruits to the Delhi Higher Judicial Service are impleaded as respondents to the petitions.

5. The Delhi Higher Judicial Service was constituted on May 15, 1971 with a complement of 12 posts. The Delhi Higher Judicial Service Rules, 1970, which were framed by the Lieutenant-Governor of Delhi in consultation with the Delhi High Court, were published in the Delhi Gazette on August 27, 1970. Those Rules were framed under Article 309 of the Constitution.

6. Rule 2(b) provides that 'Cadre Post' means any post specified in the Schedule and includes a temporary post carrying the same designation as that of any of the posts specified in the Schedule and any other temporary post declared as cadre post by the Administrator. Rule 2(d) provides that a 'Member of the Service' means a person appointed in substantive capacity to the Service under the provisions of the Rules. 'Service' is defined by Rule 2(e) to mean the Delhi Higher Judicial Service. A person who is appointed to the Delhi Higher Judicial Service by promotion from the Delhi Judicial Service is called the 'Promoted Officer', while a person who is appointed to that Service from the Bar is called the 'Direct Recruit'. By Rule 4, the authorised permanent strength of the Service and the posts included therein shall be as specified in the Schedule.

7. Part III of the aforesaid Rules deals with the method of recruitment to the Service. Recruitment of promotees is dealt with by Rule 5(1), according to which, recruitment of persons to the Service from the Delhi Judicial Service shall be made by the Administrator in consultation with the High Court. 'Administrator' means the administrator appointed under Article 239 of the Constitution for the Union Territory of Delhi. Appointment of direct recruits is dealt with by Rule 5(2), according to which, in regard to the persons not already in the Delhi Judicial Service, appointment to Service shall be made by the Administrator on the recommendation of the High Court. In other words, promotees are appointed to the Service in consultation with the High Court while direct recruits are appointed to the service on the recommendation of the High Court.

8. Rules 7 and 8 which are crucial to the controversy between the promotees and direct recruits read thus :

Rule 7. Regular Recruitment. - Recruitment after the initial recruitment shall be made :

(a) by promotion on the basis of selection from members of the Delhi Judicial Service, who have completed not less than 10 years of service in the Delhi Judicial Service;

(b) by direct recruitment from the Bar :

Provided that not more than one-third of the substantive posts in the Service shall be held by direct recruits.

Rule 8. - (1) The inter se seniority of members of the Delhi Judicial Service promoted to the Service shall be the same as in the Delhi Judicial Service.

(2) The seniority of direct recruits vis-a-vis promotees shall be determined in the

order of rotation of vacancies between the direct recruits and promotees based on the quotas of vacancies reserved for both categories by Rule 7 provided that the first available vacancy will be filled by a direct recruit and the next two vacancies by promotees and so on.

9. Rule 9 lays down the qualifications for direct recruits by providing that they should be citizens of India, that they must have practised as advocates for not less than 7 years and that they must have attained the age of 35 years but not attained the age of 45 years on January 1 of the year in which they are appointed.

10. The initial recruitment to the Service was made by the Administrator in consultation with the High Court in accordance with Rule 6, from amongst the District Judges and Additional District Judges who were functioning in the Union Territory of Delhi on deputation from other States and those whose names were recommended by the respective States for such appointment. Those persons who were appointed to the Service as part of the initial recruitment stood confirmed with effect from the very date of their appointment. That is provided by Rule 12(1). Sub-rule (2) of Rule 12 provides that all other candidates who are appointed to the Service shall be on probation for a period of two years. Rule 13 requires that all persons appointed to the Service on probation shall be confirmed at the end of the said period of two years, provided that the Administrator may, on the recommendation of the High Court, extend the period of probation but not so as to exceed three years on the whole. After the successful completion of probation, the officer is confirmed in the Service by the Administrator in consultation with the High Court as provided in Rule 15.

11. Rule 16 and 17, which occur in Part V of the Rules called 'Temporary Appointments', are also important for our purpose though they fall in category distinct and separate from the one in which Rules 7 and 8 fall. They read thus :

Rule 16. - (1) The Administrator may create temporary posts in the Service.

(2) Such posts shall be filled, in consultation with the High Court, from amongst the members of the Delhi Judicial Service.

Rule 17. - Notwithstanding anything contained in these Rules, the Administrator may, in consultation with the High Court, fill substantive vacancies in the Service by making temporary appointments thereto from amongst members of the Delhi Judicial Service.

12. The Schedule to the Rule shows that the initial authorised permanent strength of the Delhi Higher Judicial Service was 16, out of which one was to be a District and Sessions Judge and 12 were to be Additional District and Sessions Judges. The remaining 3 were appointed in Leave-Deputation reserve vacancies. Out of these 16 posts, one was a super time-scale post, three were selection grade posts and twelve were time-scale posts.

13. The contention of the petitioners is that seniority between promotees and direct recruits must be determined in accordance with the respective dates of their continuous officiation as Additional District and Sessions Judges and that, direct recruits who are appointed as Additional District and Sessions Judges after the promotees are so appointed, cannot rank higher in seniority over the promotees. It is urged that promotees discharge identical functions and bear the same responsibilities as direct recruits and upon their appointments, they constitute one common class.

Therefore, to give seniority to the direct recruits who are appointed later in point of time is violative of Articles 14 and 16 of the Constitution.

14. In support of these contentions, the promotees have filed charts showing what, according to them, is a grave and glaring act of injustice done to them in the matter of seniority. These charts show, indisputably, that promotees who have been functioning as temporary Additional District and Sessions Judges for an unbroken period of anything between 8 to 12 years are regarded as juniors to the direct recruits who have been appointed as Additional District and Sessions Judges much later. A few illustrations will help appreciate the grievance of the promotees. Shri G. S. Dakha, who is one of the respondents to these writ petitions, was appointed directly to the Service on September 27, 1978. However, he ranks higher in seniority over Shri C. D. Vasishta and Shri O. P. Singla who were appointed as temporary Additional District and Sessions Judges on June 7, 1977 and April 1, 1978 respectively. Miss Usha Mehra, who was appointed directly as an Additional District and Session Judge on April 22, 1980, is regarded as senior to several promotees who were appointed as temporary Additional District and Sessions Judges long before her. Shri D. C. Aggarwal, Shri B. K. Agnihotri, Shri Mahesh Chandra, Shri S. R. Goel and Shri P. L. Singla were all appointed as temporary Additional District and Sessions Judges on March, 24, 1972, which was 8 years before Miss Usha Mehra was appointed as a direct recruit from the Bar. Twenty-five other members of the Delhi Judicial Service were appointed as temporary Additional District and Sessions Judges on various dates between August 31, 1973 and December 11, 1979. All these have been shown as junior to Miss Usha Mehra.

15. The answer to the question as regards the infringement of the constitutional protection of quality and equal opportunity will depend upon the meaning which can reasonably be given to the Rules which we have cited above. Therefore, in the first place, we shall have to decide whether the Rules justify the rankings in the seniority list. It is only if the language of the Rules justifies those rankings that the question will arise whether the Rules violate the provisions of Articles 14 and 16.

16. Logically, we must begin this inquiry with the question as to the interpretation of the proviso to Rule 7. Does that proviso prescribe a quota or does it merely provide for a ceiling? In other words, does the proviso require that, at any given point of time, one-third of the substantive posts in the Service shall be reserved for direct recruits or does it only stipulate that the posts held by direct recruits shall not be more than one-third of the total number of substantive posts in the Service? The proviso reads thus :

Provided that not more than one-third of the substantive posts in the Service shall be held by direct recruits.

This language is more consistent with the contention of the promotees that the proviso merely prescribes, by way of imposing a ceiling, that the direct recruits shall not hold more than one-third of the substantive posts. Experience shows that any provision which is intended to prescribe a quota, generally provides that, for example, "one-third of the substantive posts shall be filled in by direct recruitment". A quota provision does not use the negative language, as the proviso in the instant case does, that "not more than" one-third of the substantive posts in the Service shall be held by direct recruits.

17. If the matter were to rest with the proviso, its interpretation would have to be that it does not prescribe a quota for direct recruits : it only enables the appointment of direct recruits to substantive posts so that, they shall not hold more than one-third of the total number of substantive posts in the

Service. However, it is well recognised that, when a rule or a section is a part of an integral scheme, it should not be considered or construed in isolation. One must have regard to the scheme of the fasciculus of the relevant rules or sections in order to determine the true meaning of any one or more of them. An isolated consideration of a provision leads to the risk of some other inter-related provision becoming otiose or devoid of meaning. That makes it necessary to call attention to the very next rule, namely, Rule 8. It provides by Clause 2 that :

The seniority of direct recruits vis-a-vis promotees shall be determined in the order of rotation of vacancies between the direct recruits and promotees based on the quotas of vacancies reserved for both categories by Rule 7 provided that the first available vacancy will be filled by a direct recruit and the next two vacancies by promotees and so on.

This provision leaves no doubt that the overall scheme of the rules and the true intendment of the proviso to Rule 7 is that one-third of the substantive posts in the Service must be reserved for direct recruits. Otherwise, there would neither be any occasion nor any justification for rotating vacancies between direct recruits and promotees. Rule 8(2), which deals with fixation of seniority amongst the members of the Service, provides, as it were, a key to the interpretation of the proviso to Rule 7 by saying that the proviso prescribes 'quotas' and reserves vacancies for both categories. The language of the proviso to Rule 7 is certainly not felicitous and is unconventional if its intention was to prescribe a quota for direct recruits. But the proviso, as I have stated earlier, must be read along with Rule 8(2) since the two provisions are interrelated. Their combined reading yields but one result, that the proviso prescribes a quota of one-third for direct recruits.

18. The process of reading the Rules as parts of a connected whole does not end with Rules 7 and 8. Rules 16 and 17 are also relevant for the present purpose and have, indeed, an important bearing on the question of reservation of vacancies for direct recruits to the extent of one-third of the substantive posts in the Service. Clause (1) of Rule 16 confers power upon the Administrator to create temporary posts in the Service. By clause (2) of Rule 16, such posts are required to be filled, in consultation with the High Court, from amongst the members of the Delhi Judicial Service, that is to say, the promotees. Rule 17, which is in the nature of a non obstante provision, provides, that notwithstanding anything contained in the Rules, the Administrator may, in consultation with the High Court, fill substantive vacancies in the Service by making temporary appointments thereto from amongst the members of the Delhi Judicial Service. The position which emerges from the provisions contained in Rules 16 and 17 is that it is permissible to create temporary posts in the Service and, even substantive vacancies in the Service can be filled by making temporary appointments. The two fold restriction on this dual power is that the High Court must be consulted and such appointments must be made from amongst the promotees only. If temporary appointments to the Service, either in temporary posts or in substantive vacancies, can be made within the framework of the Rules and have to be made, if at all, from amongst the promotees and promotees only, the quota rule contained in the proviso to Rule 7 must inevitably break down when such appointments are made. The simple reason leading to that consequence is that direct recruits cannot be appointed either to temporary posts in the Service or to substantive vacancies in the Service which are filled in by making temporary appointments. Thus, even though the proviso to Rule 7 prescribes a quota of one-third for direct recruits, Rules 16 and 17 permit the non-observance of the quota rule in the circumstances stated in these Rules.

19. At this stage, it is necessary to call attention to the definition of 'Cadre Post' in Rule 2(b) and to clear the misunderstanding which is likely to arise on account of that definition. Rule 2(b) provides

that 'Cadre Post' means any post specified in the Schedule and includes a temporary post carrying the same designation as that of any of the posts specified in the Schedule. This definition may, at first sight, create an impression that every temporary post of an Additional District and Sessions Judge is a Cadre Post, whether or not that post is included in the Service. That is not so. The first part of the definition says that 'Cadre Post' means a post specified in the Schedule. Posts which are specified in the Schedule are posts in the Service. Therefore, by reason of the first part of the definition, posts in the Service are Cadre Posts. It is the second part of the definition which is likely to create a misunderstanding of the true position. That part of the definition says that Cadre Post includes a temporary post carrying the same designation as that of any of the posts specified in the Schedule. This provision is consequential to and in consonance with Rule 16. Since it is permissible under that Rule to create temporary posts in the Service, such posts are also regarded as Cadre Posts. It would have been anomalous to treat a post in the Service as an ex-cadre post merely for the reason that the post is temporary. Normally, an ex-cadre post means a post outside the cadre of posts comprised in a Service. Therefore, all posts in the Service, whether permanent or temporary, are generally regarded as Cadre Posts. But, regardless of the normal pattern of service rules, what is necessary to appreciate is that Rule 2(b) has the limited effect of making every post in the Service a Cadre Post, whether the post is permanent or temporary. The inclusive clause contained in the second part of Rule 2(b) has to be read in the context of the first part of that Rule and must take its meaning from what precedes it. Therefore, every promotee who holds the post of an Additional District and Sessions Judge in the Service is the holder of a Cadre Post, whether the post is permanent or temporary. Direct recruits hold Cadre Posts in all events because, they can only be appointed to substantive posts in the Service on a permanent basis. Rules 16 and 17 forbid their appointments to temporary posts in the Service or to substantive vacancies in the Service on a temporary basis.

20. Though this is the true scope and meaning of Rule 2(b), it is unnecessary to be dogmatic about it. As will appear presently, even if it is assumed for the purposes of argument that temporary posts not included in the Service are also Cadre Posts, that will not make any difference to the principle on the basis of which the seniority list of the Service will have to be drawn.

21. But, before advertng to that principle, it would be useful to draw attention to Rule 2(d) which provides that 'a Member of the Service' means a person appointed in substantive capacity to the Service under the provisions of the Rules. This Rule shows that two conditions must co-exist in order that a person can become a 'Member of the Service'. Firstly, his appointments has to be in a substantive capacity and secondly, the appointments has to be to the Service, that is, to a post in the Service. Persons who hold posts bearing designations similar to the designations of posts comprised in the Service cannot, for that reason alone, become members of the Service. It is only when they are appointed in a substantive capacity to a post in the Service, that they become members of the Service.

22. The acceptance of the alternative hypothesis, that temporary posts bearing the same designation as that of the posts specified in the Schedule are Cadre Posts whether such posts are comprised in the Service or not, will, at any rate, justify the proposition that, according to the scheme of the Rules in this case, 'Service' is a narrower body than the 'Cadre'. By the definition contained in Rule 2(d), membership of the Service is limited to persons who are appointed in a substantive capacity to the Service. By the second part of Rule 2(b), if read in an extended sense, which is what the alternative hypothesis requires, every temporary post which carries the same designation as that of any of the posts specified in the Schedule is a Cadre post, whether such post is comprised in the Service or not. Such posts and the posts specified in the Schedule will together constitute the Cadre under Rule

2(b), if an extended meaning is given to the second part of that Rule.

23. In this background and with this understanding of the interpretation and effect of Rules 2(b), 2(d), 7, 8, 16 and 17, it will be easier to deal with the question of seniority between direct recruits and promotees. The contention of the petitioners which we have to examine is that the rule of seniority provided in Rule 8 is constitutionally invalid. We are not concerned in this case with the provision contained in Rule 8(1) which governs the inter se seniority of members of the Delhi Judicial Service who are promoted to the Delhi Higher Judicial Service. Members of the subordinate judicial service promoted to the Delhi Higher Judicial Service retain their former seniority. We are concerned with clause (2) of Rule 8, which provides insofar as relevant, that the seniority of direct recruits vis-a vis the promotees shall be determined in the order of rotation of vacancies between the direct recruits and promotees based on the quota of vacancies reserved for both the categories by Rule 7, provided that the first available vacancy will be filled by a direct recruit, the next two vacancies by promotees and so on.

24. This Court has taken the view in many cases that whenever the rules provide for recruitment to a Service from different sources, there is no inherent infirmity in prescribing a quota for appointments of persons drawn from those sources and in working out the rule of quota by rotating the vacancies as between them in a stated proportion. (See, for example, *Mervyn Coutindo v. Collector of Customs, Bombay* ((1966) 3 SCR 600 : AIR 1967 SC 52 : (1967) 1 LLJ 749), *S. G. Jaisinghani v. Union of India* ((1967) 2 SCR 703 : AIR 1967 SC 1427), *Bishan Sarup Gupta v. Union of India* ((1975) 1 SCR 104 : (1975) 3 SCC 116 : 1974 SCC (L&S) 506 : (1974) 2 SLR 136), *A. K. Subraman v. Union of India* ((1975) 2 SCR 979 : (1975) 1 SCC 319 : 1975 SCC (L&S) 36 : (1975) 1 LLJ 338), *V. B. Badami v. State of Mysore* ((1976) 2 SCC 901 : 1976 SCC (L&S) 353) and *Paramjit Singh Sandhu v. Ram Rakha* ((1979) 3 SCR 584 : (1979) 3 SCC 478 : 1979 SCC (L&S) 309 : 1979 Lab IC 811).) Therefore, Rule 8(2) cannot be held to be unconstitutional merely because, it reserves one-third of the vacancies in the service for direct recruits and provides that the first available vacancy in the Service will be filled in by a direct recruit, the next two by promotees and so on.

25. However, instances are not unknown wherein, though the provision of a rule or a section is not invalid, the manner in which that provision is implemented in practice leads to the creation of disparities between persons who, being similarly circumstanced, are entitled to equal treatment. Care has therefore to be taken to apply the provisions of Rule 8(2) in such a manner as not to lead to the violation of the guarantee of equality and equal opportunity contained in Articles 14 and 16 of the Constitution. For that purpose, it is necessary to ascertain as to which of the promotees can be regarded as belonging to the same class as the direct recruits.

26. The prerequisite of the right to inclusion in a common list of seniority is that all those who claim that right must, broadly, bear the same characteristics. The mere circumstance that they hold posts which carry the same designation will not justify the conclusion that they belong to the same class. Persons who are appointed or promoted on an ad hoc basis or for fortuitous reasons or by way of a stopgap arrangement cannot rank for purposes of seniority with those who are appointed to their posts in strict conformity with the rules of recruitment, whether such latter class of posts are permanent or temporary. The rules in the instant case do not require that person belonging to the former category have to satisfy any particular prescription like consultation with the High Court. We are informed that in practice, persons who are promoted to the Delhi Higher Judicial Service on an ad hoc basis or for fortuitous reasons or by way of a stopgap arrangement are appointed only after their names are cleared or approved by the High Court. That may or may not be so. The point of the

matter is that there is no provision in the Rules which requires that such appointments must also be made in accordance with any set formula. The courtesy shown by the authorities to the High Court when certain appointments are made, is one thing : The obligation imposed by the Rules on the authorities that the High Court shall be consulted when certain other appointments are made, is quite another. Indeed, there is a distinction between the process of consultation with the High Court and the screening of the promotees done by the High court, may be at the instance of the authorities, when their names are considered for appointments as Additional District and Sessions Judges on an ad hoc, fortuitous or stopgap basis.

27. Thus, persons belonging to the Delhi Judicial Service who are appointed to temporary posts of Additional District and Sessions Judges on an ad hoc basis or for fortuitous reasons or by way of a stopgap arrangement, constitute a class which is separate and distinct from those who are appointed to posts in the Service in strict conformity with the rules of recruitment. In view of this, the former class of promotees cannot be included in the list of seniority of officers belonging to the Service.

28. It is however difficult to appreciate how, in the matter of seniority, any distinction can be made between direct recruits who are appointed to substantive vacancies in the Service on the recommendation of the High Court under Rule 5(2) and the promotees who are appointed in consultation with High Court to posts in the Service under Rules 16 and 17. Rule 16 provides for the appointment of promotees to temporary posts in the Service, while Rule 17 provides for appointment of promotees to substantive vacancies in the Service on a temporary basis. Promotees who are appointed to the Service under either of these two Rules must be considered as belonging to the same class as direct recruits appointed under rule 5(2). They perform similar functions, discharge identical duties and bear the same responsibilities as direct recruits. They are appointed on a regular basis to posts in the Service in the same manner as direct recruits are appointed, the only distinction being the whereas the latter are appointed on the recommendation of the High Court, promotees are appointed in consultation with the High Court. Therefore, no distinction can be made between direct recruits on one hand and promotees appointed to the Service on the other, in the matter of their placement in the seniority list. Exclusion from the seniority list of those promotees who are appointed to posts in the Service, whether such appointment is to temporary posts or to substantive vacancies in a temporary capacity, will amount to a violation of the equality rule since, thereby, persons who are situated similarly shall have been treated dissimilarly in a matter which constitutes an important facet of their career.

29. A representative order of appointment under Rule 16, which is annexed to one of the writ petitions, shows why promotees appointed under that Rule (and for similar reasons, those appointed under Rule 17) cannot be discriminated against in the matter of seniority in comparison with direct recruits. That order reads thus :

DELHI ADMINISTRATION, DELHI

Notification

Dated March 22, 1972 No. F 1(76)/70-Judl. (i) - In pursuance to the provisions of sub-rule (2) of Rule 16 of the Delhi Higher Judicial Service Rules, the Administrator of Delhi is pleased to appoint in consultation with the High Court, the following members of the Delhi Judicial Services, temporarily to the Delhi Higher Judicial Service, till further orders, with effect from the date they take over charge of their office, against the four posts of Additional District and Sessions Judges, created vide

his notification No. F 1(13)/72-Judl. dated March, 13, 1972 :

1. Shri Dalip Chand Aggarwal,
2. Shri Bishma Kumar Agnihotri,
3. Shri Sadhu Ram Goel,
4. Shri Pyare Lal Singla

By Order, (DESH DEEPAK) Secretary (Law & Judicial) Delhi Administration,
Delhi.##

30. This order shows that, firstly, by a notification dated March 13, 1972, the Administrator created temporary posts in the Service under Rule 16(1); secondly, four promotees were appointed to those posts in the Delhi Higher Judicial Service; and thirdly, that they were appointed 'till further orders'. The appointments were neither ad hoc, nor fortuitous, nor in the nature of a stopgap arrangement. Indeed, no further orders have ever been passed recalling the four promotees and, others similarly situated, to their original posts in the subordinate Delhi Judicial Service. Promotees who were appointed under Rule 16 have been officiating continuously, without a break, as Additional District and Sessions Judges for a long number of years. It is both unrealistic and unjust to treat them as aliens to the Service merely because the authorities did not wake up to the necessity of converting the temporary posts into permanent ones, even after some of the promotees had worked in those posts from five to twelve years. Considering the history of the Delhi Higher Judicial Service, it is clear that the phrase 'till further orders' is only a familiar official device to create and perpetuate temporary posts in the Service when the creation of permanent posts is a crying necessity. The fact that temporary posts created in the Service under Rule 16(1) had to be continued for years on end shows that the work assigned to the holders of those posts was, at least at some later stage, no longer of a temporary nature. And yet, instead of converting the temporary posts into permanent ones, the authorities slurred over the matter and imperiled, though unwittingly, the reasonable expectations of the promotees. 'Unwittingly' because, no one appears to have been interested in belittling the contribution of the promotees who held temporary posts in the Service or in consciously jeopardising their prospects. The tragedy is that no one was interested in anything at all. Or else, why was direct recruitment not made from time to time, at regular intervals ? If that were done, the undesirable situation which confronts us today could have been easily avoided. The proviso to Rule 7 prescribes a system of quota and rota. Why was that Rule put in cold storage by creating temporary posts in the Service when permanent posts were clearly called for ? Permanent posts could have been allocated to direct recruits and promotees in the ratio of one to two. In these circumstances, it will be wholly unjust to penalise the promotees for the dilatory and unmindful attitude of the authorities. It is not fair to tell the promotees that they will rank as juniors to direct recruits who were appointed five to ten years after they have officiated continuously in the posts created in the Service and held by them, though such posts may be temporary. This Court, at least, must fail them not.

31. From an earlier part of this Judgment it would appear how, though the proviso to Rule 7 prescribes a quota of one-third for direct recruits and provides for rotation of vacancies between them and the promotees who are appointed to the Service, that Rule must inevitably break down when appointments of promotees are made to the Service under Rules 16 and 17. Appointments under these two Rules have to be made from amongst the promotees only. Whenever appointments

are made to the Service under either of these Rules, neither the quota reserved for direct recruits nor the rule of rotation of vacancies between them and the promotees can have any application. The question then is, in situations resulting in the suspension of the rule of 'quota and rota', which is the equitable rule for determining seniority between direct recruits on the one hand and promotees who are appointed under Rules 16 and 17 on the other ? It is difficult to evolve a rule which will cause no hardship of any kind to any member of the Service. Therefore, the attempt has to be to minimise, as far as possible, the inequities and disparities which are inherent in a system which provides for recruitment to the Service from more than one source. While doing this, the one guiding principle which must be kept in mind is that classification is a gloss on the right to equality. It is but a step in the process of working out the equities between persons who are entitled to equal treatment. It is therefore necessary to ensure that classification is made on a broad, though rational, basis so as not to produce the self-defeating result of denying equality to those, who in substance, are situated similarly.

32. That is why, it would be hyper-technical to make a sub-classification between promotees appointed under Rule 16 and those appointed under Rule 17, with the object of denying to the latter the equality of status and opportunity with the former and with direct recruits. It is true that under Rule 16, promotees are appointed to temporary posts in the Service while, under Rule 17 they are appointed in a temporary capacity to substantive vacancies in the Service. But this kind of service jargon clouds the real issue as to whether persons appointed under different rules necessarily belong to different classes and tends to produce inequalities by an artful resort, dictated by budgetary expediency, to the familiar device of fixing dissimilar labels on posts which carry the same duties and responsibilities and are subject to similar preappointment tests. It may even be that in the process of consultation, the High Court exercises greater vigilance in regard to appointments proposed under Rule 16 than in regard to appointments which are proposed under Rule 17. But, the fact that the High Court chooses to adopt, of its own volition, any particular approach in the matter of appointments made under different rules, cannot justify the proposition that persons appointed under different rules necessarily belong to different classes. The requirement for appointments under both the rules is, equally, that they must be made in consultation with the High Court. The High Court is, therefore, expected to apply the same standard and adopt the same approach whether appointments are proposed to be made under rule 16 or Rule 17. Any attempt to sub-divide the promotees according as to whether they are appointed under Rule 16 or Rule 17 will result in the creation of a distinction where no difference exists. The object of classification is to find a remedy to such situations, not to create or perpetuate them.

33. It may bear emphasis that promotees appointed under Rules 16 and 17 to the Higher Judicial Service can rank for seniority along with direct recruits only if they are appointed in consultation with the High Court as required by those Rules and if they satisfy the requirement laid down in Rule 7(a) that they must have completed not less than ten years of service in the Delhi Judicial Service.

34. The best solution to the situation which confronts us is to apply the rule which was adopted in *S. B. Patwardhan v. State of Maharashtra* ((1977) 3 SCR 775 : (1977) 3 SCC 399 : 1977 SCC (L&S) 391 : (1977) 2 SLR 215). It was held by this Court in that case that all other factors being equal, continuous officiation in a non-fortuitous vacancy ought to receive due recognition in fixing seniority between person who are recruited from different sources, so long as they belong to the same cadre, discharge similar functions and bear the same responsibilities. Since the rule of 'quota and rota' ceases to apply when appointments are made under Rules 16 and 17, the seniority of direct recruits and promotees appointed under those Rules must be determined according to the dates on which direct recruits were appointed to their respective posts and the dates from which the

promotees have been officiating continuously either in temporary posts created in the Service or in substantive vacancies to which they were appointed in a temporary capacity.

35. Our attention was drawn to several decisions but most of them turn of their own facts. For example, the promotees placed great reliance on the decision in *Baleshwar Dass v. State of U.P.* ((1981) 1 SCR 449 : (1980) 4 SCC 226 : 1980 SCC (L&S) 531 : 1981 UPSC 15 : (1981) 1 LLJ 140) In that case, there was only one rule of recruitment to both the permanent and temporary posts in the cadre. Besides, no rotation of vacancies was prescribed for the purpose of fixing seniority. The position which arises in the case before us did not therefore arise in that case. However, the observations made by Krishna Iyer, J. in that case are not without relevance for the present purpose. The learned Judge observed : [SCC para 20, pp. 237-38 : SCC (L&S) p. 543.]

We must emphasise that while temporary and permanent posts have great relevancy in regard to the career of Government servants, keeping posts temporary for long, sometimes by annual renewals for several years, and denying the claims of the incumbents on the score that their posts are temporary makes no sense and strikes us as arbitrary, especially when both temporary and permanent appointees are functionally identified. If, in the normal course, a post is temporary in the real sense and the appointee knows that his tenure cannot exceed the post in longevity, there cannot be anything unfair or capricious in clothing him with no rights. Not so, if the post is, for certain departmental or like purposes, declared temporary, but it is within the ken of both the Government and the appointee that the temporary posts are virtually long-lived. It is irrational to reject the claim of the 'temporary' appointee on the nominal score of the terminology of the post. We must also express emphatically that the principle which has received the sanction of this Court's pronouncements is that officiating service in a post is for all practical purposes of seniority as good as service on a regular basis. It may be permissible, within limits, for Government to ignore officiating service and count only regular service when claims of seniority come before it, provided the rules in that regard are clear and categorical and do not admit of any ambiguity and cruelly arbitrary cut off of long years of service does not take place or there is functionally and qualitatively, substantial difference in the service rendered in the two types of posts. While rules regulating conditions of service are within the executive power of the State or its legislative power under proviso to Article 309, even so, such rules have to be reasonable, fair and not grossly unjust if they are to survive the test of Articles 14 and 16.

36. In *A. Janardhana v. Union of India* ((1983) 3 SCC 601 : 1983 SCC (L&S) 467), the Court had to consider the validity of rules of seniority which were applicable to the military Engineering Service. The recruitment to the Service was made from two sources, directly and by promotion. The appellant was a promotee of 1962 who, it was argued in that case, could find a place in the seniority list in 1989, when it would be time for him to retire. D. A. Desai, J. observed in that case : [SCC para 15, pp. 610-11 : SCC (L&S) pp. 476-77.]

In other words after having rendered service in a post included in the service, he is hanging outside the service, without finding a berth in service, whereas direct recruits of 1976 have found their place and berth in the service. This is the situation that stares into one's face while interpreting the quota-rotta rule and its impact on the service of an individual. But avoiding any humanitarian approach to the problem, we shall strictly go by the relevant Rules and precedents and the impact of the Rules on the members of the service and determine whether the impugned seniority list is valid or not. But, having done that we do propose to examine and expose an extremely undesirable, unjust and inequitable situation emerging in service jurisprudence from the precedents namely, that a person already rendering service as a promotee has to go down below a person who comes into service

decades after the promotee enters the service and who may be a schoolian, if not in embryo, when the promotee on being promoted on account of the exigencies of service as required by the Government stated rendering service. A time has come to recast service jurisprudence on more just and equitable foundation by examining all precedents on the subject to retrieve this situation.

37. No two cases are alike and, therefore, an attempt has been made in this judgment to consider the language and implications of the Rules which govern appointments to the Delhi Higher Judicial Service. But, the observations which we have extracted above are not without relevance to the decision of the case before us. They lend considerable support to the conclusion which has been recorded in this judgment.

38. The decision of this Court in *Joginder Nath v. Union of India* ((1975) 2 SCR 553 : (1975) 3 SCC 459 : 1975 SCC (L&S) 2 : (1975) 1 SLR 33), does not afford any assistance on the question which is in issue before us. That case arose out of a controversy between the promotees inter se and not between promotees and direct recruits.

39. The seniority list which is impugned in this case has been prepared on the basis that the rule of 'quota and rata' will continue to apply notwithstanding the fact that appointments are made to the Service under Rules 16 and 17. As pointed out earlier, the rule of 'quota and rota' which is prescribed by the proviso to Rule 7 would cease to apply when appointments are made to the Service under Rules 16 and 17. The seniority list has therefore to be quashed. 40. A new seniority list shall have to be prepared by the authorities on the basis of the view taken in this judgment. The new seniority list will include (i) direct recruits and (ii) promotees appointed under Rules 16 and 17. They will rank for seniority as explained above. 41. The question of the seniority of respondent 4, Shri G. S. Dakha has to be dealt with on a different basis. He was appointed as an Additional District and Sessions judge in a vacancy reserved for members of the Scheduled Castes. He will retain his position in the seniority list since that position is due to him as a member of a Scheduled Caste. 42. The case of Miss Usha Mehra has caused us some anguish. She was appointed as a direct recruit on April 22, 1980. The rule of 'quota and rota' was in operation since the inception of the Delhi High Judicial Service and she must have joined the Service on the basis of certain reasonable expectations flowing out of a senior position. Though comparatively young, she had a fairly large practice at the Bar when she was appointed as an Additional District and Sessions Judge. A strong plea has been made on her behalf that her place in the seniority list should not be disturbed. We wish that were possible. It would be incongruous to do so because, if the rule of 'quota and rota' ceased to apply when appointments were made to the Service under Rules 16 and 17, her present position in the seniority list which has been accorded to her on the basis of that rule cannot be maintained. For this consequence the promotees are not to blame, and certainly, not any of the direct recruits. The promotees had made a representation to the High Court as long back as in the year 1977 but, for a reason not easy to understand, the High Court did not dispose of the representation for over three years. Indeed, one of the contentions of the High Court before us is that these writ petitions are premature because the representation of the promotees is still pending before it. Miss Mehra was appointed three years after the promotees had made their representation to the High Court, which was the most appropriate authority for them to approach. A timely disposal of the representation by the High Court would have saved the predicament in which some of the direct recruits like Miss Mehra will now find themselves. It was urged that the promotees ought not to grudge one little exception in favour of Miss Mehra since they have derived quite some benefits from the operation of Rules 16 and 17. It is true that the promotees have derived a substantial benefit by the operation of Rules 16 and 17. They monopolised all the appointments to temporary posts as also temporary appointments to substantive vacancies in the Service. Simultaneously, they also derived benefit from

the rule of 'quota and rota.' For example, though Shri N. L. Kakkar and Shri R. K. Sinha were promoted to the Service in 1972, they were placed in the seniority list above Shri N. G. Kochar who was recruited directly in 1971. That was done in conformity with the quota and rota rule of 1 : 2. If, at least some of the temporary posts had been converted into permanent ones as they ought to have been one out of every three posts would have gone to a direct recruit. But as pointed out by us, difficulty in the way of maintaining Miss Mehra's present position in the seniority list is that doing so would be inconsistent with the view which we have taken in this judgment. We cannot, therefore, make an exception in the case of any particular direct recruit.

43. It is patent that this judgment will upset the balance between direct recruits and promotees in the Delhi Higher Judicial Service. If the authorities desire to restore that balance, appropriate rules shall have to be framed for future application. But, more than merely framing the rules, care shall have to be taken to implement the rules both in letter and in spirit. That will call for greater concern and understanding on the part of the authorities for the future of a system, which one believes, has stood the people well.

44. In the result, the proviso to Rule 7 and Rule 8(2) bear the meaning and interpretation which is given to them in this judgment. Those provisions do not by themselves suffer from any constitutional infirmity. But, the seniority list which is challenged by the promotees in these writ petitions is violative of the provisions of Articles 14 and 16 of the Constitution. That list is quashed and the writ petitions are allowed to the extent indicated above. There will be no order as to costs.

SABYASACHI MUKHARJI, J. (partly dissenting). ♦

With great respect I find myself unable to agree with the learned Chief Justice on certain aspects of the relevant rules in this case. I would, therefore, like to state my reasons with such relevant rules as are necessary.

46. These two writ petitions under Article 32 of the Constitution question the validity of Rule 8(2) of Delhi Higher Judicial Service Rules, 1970 hereinafter referred to as the said Rules and the fixation of inter se seniority of the promotees and direct recruits of Delhi Higher Judicial Service.

47. In the first one, namely Writ Petition No. 5669 of 1980, the petitioners are, one Shri O. P. Singla, who was at the relevant time working as an Additional District and Sessions Judge and at the time of the institution of the petition working as the Presiding Officer, Industrial Tribunal in Tis Hazari Court, Delhi along with Shri. D. G. Aggarwal, Additional District and Sessions Judge, Delhi. The respondents to this application are the Union of India, Delhi Administration, Delhi High Court, respondent 4, Shri G. C. Dakha, Additional District and Sessions Judge, Tis Hazari, Delhi and respondent 5, Miss Usha Mehra, Additional District and Sessions Judge, Tis Hazari, Delhi.

48. In the second petition there are 32 petitioners who are Additional District and Sessions Judges in the Delhi Higher Judicial Service along with Delhi Judicial Service Association. The respondents to the said petition are apart from the Union of India, Delhi Administration, Delhi High court, Shri G. S. Dakha, who is a respondent to the other petition also, Miss Usha Mehra (who is also a respondent in the other petition) and two other respondents, namely, Shri C. D. Vashist, Additional District and Sessions Judge, Tis Hazari, Delhi and one Shri S. P. Singh Chowdhary, Additional District and Sessions Judge, Tis Hazari, Delhi.

49. The immediate cause which prompted the filing of the second petition, according to the

petitioners, was the advertisement published in the 'Indian Express' dated January 30, 1981 which invited applications for filling three permanent posts in the cadre of Delhi Higher Judicial Service. The case of the petitioners is that petitioners in both these petitions are promotee Additional District and Sessions Judges in the Delhi Higher Judicial Service and they had joined the service long time back. The petitioners in the first petition namely, Writ Petition No. 5669 of 1980 had joined the Delhi Higher Judicial Service in the beginning of 1972 and have been serving since then with ability.

50. The other relevant facts have been stated in the judgment of my brother, the learned Chief Justice. It is, therefore, not necessary for me to state these again.

51. The controversy in these two writ petitions in inter se seniority between the promotees and the direct recruits and for this, one must refer to some other relevant provisions of the said Rules and mainly to Rules 7 and 8 along with Rules 16 and 17 of the said Rules. The rules are as follows :

Rule 7. Regular Recruitment. - Recruitment after the initial recruitment shall be made :

(a) by promotion on the basis of selection from members of Delhi Judicial Service, who have completed not less than 10 years of service in the Delhi Judicial Service;

(b) by direct recruitment from the Bar :

Provided that not more than one-third of the substantive posts in the Service shall be held by direct recruits.

52. There is a further proviso which is not really relevant for the present controversy and which provides that where a member of the Delhi Judicial Service is considered for such appointment under clause (a), all persons senior to him in the Service shall also be considered, irrespective of the fact whether or not they fulfil the requirements as to the minimum of 10 years service. There is an Explanation for calculation of period of 10 years which again is not relevant for the present purpose.

53. Rule 8 is as follows :

8. (1) The inter se seniority of members of the Delhi Judicial Service promoted to the Service shall be the same as in the Delhi Judicial Service.

(2) The seniority of direct recruits vis-a-vis promotees shall be determined in the order of rotation of vacancies between the direct recruits and promotees based on the quotas of vacancies reserved for both categories by Rule 7 provided that the first available vacancy will be filled by a direct recruit and the next two vacancies by promotees and so on.

54. Rule 9 deals with the qualification for direct recruits and provides that they (1) should be citizens of India, (2) must have practiced as advocates for not less than seven years, (3) must have attained the age of 35 years and not attained the age of 45 years on first January of the year in which their appointment is made.

55. The submission of the petitioners is that the officers intended to hold the posts of District Judges cannot artificially be prevented from holding such posts substantively, either because of delay in

making posts permanent or by being discriminated against in the fixation of seniority in the cadre vis-a-vis direct recruits to the Service, who have lesser years of practice at the Bar as compared to the period of promotee-officers' judicial service period and period of practice at the Bar, if any, put together. The petitioners have given instance of the incongruities, according to them, that will result if the present system is allowed to continue. The petitioners themselves and through their association had made several representation in January 1978, July 1978 and December 1978 and also sought remedy against what they call injustice and they also submitted that direct recruitment from the Bar might not be made by the High Court to the Delhi Higher Judicial Service until the question was resolved. The petitioners contend that the present interpretation and the present seniority list create anomalous positions.

56. After the petitions were filed, rules nisi were issued and certain interim orders were passed. It is not necessary to set out the details of the said orders made by this Court from time to time.

57. It may be mentioned, however, that on September 29, 1981 this Court issued rules nisi in both these matters and further ordered that there would be no reversion either from the category of promotees who were working as District and Session Judges or from the category of direct recruits who were also working in the same capacity. Several intervention application were allowed. On April 27, 1982 this Court further directed that if any officer who was then working on deputation returns to the parent cadre, it might become necessary to revert the juniormost officer who is at present holding the post of Additional District and Sessions Judge, but this Court noted that even then such reversion should, as far as possible, be avoided.

58. In these petitions, charts of the gradation list have been annexed. According to the list, Shri Dakha, respondent 4 has been shown as number 6 and Miss Usha Mehra, respondent 5 as number 9. This is so because of artificial reading of Rule 7 and Rule 8 of the said Rules, according to the petitioners. By the same process, it is indicated that Miss Usha Mehra who had joined as Additional District and Sessions Judge on probation on April 24, 1980 supersedes by the working of Rule 7 and Rule 8 in improper and illegal way, 22 officers, including Shri Mahesh Chandra, whose date of birth was October 12, 1928 and whose date of appointment as Additional District and Session Judge was 8 years before Miss Mehra. She also supersedes Shri S. R. Goel who was born on October 12, 1929 and who had joined the Service on March 24, 1972-8 years before Miss Mehra had joined as Additional District and Sessions Judge; more or less similar is the position in case of Shri Y. B. Gupta, Shri P. K. Bahri, Shri H. P. Bagchi and Mrs. Santosh Duggal who was born on March 21, 1931 and had joined the Service as Additional District and Sessions Judge on September 29, 1975 and numerous other officers last of whom had joined on August 23, 1979 and most of whom were at least 10 years older than respondent 5, Miss Mehra. Similarly Shri Dakha supersedes 16 officers by joining as Additional District and Sessions Judge in 1978 and is superseding officers who had joined in 1972, 1973, 1974, 1975 and some of whom were much older than him in age. Shri J. B. Goel will also be superseding some of the officers who have been indicated in the chart.

59. This anomaly has been caused by the operation of Rule 7(b) of the said Rule read with sub-rule (2) of Rule 8. Rule 7 which deals with regular recruitment provides two modes of recruitment, namely (1) by promotion on the basis of selection and (2) by direct recruitment from the Bar. So far as direct recruitment from the Bar is concerned, it clearly states that "not more than one-third of the substantive posts in the Service shall be held by direct recruits". Reading it simply without anything else and unaided or uninfluenced by service parlance and without being inhibited by any interpretation of other statutes in the context of some other rules, it appears that it merely provides that in case in a year there is vacancy for recruitment from the Bar as well as by promotion, more

than one-third of substantive posts should not be filled in by direct recruitment. It says this and no more. It is difficult to contend that there is any quota of Bar recruits of one-third. The Rule does not say that one-third of direct recruits must for each year be one-third of the recruitment made. It puts a ceiling on number of Bar recruits in a year where Bar recruits are available and willing to be appointed. It does not fix any quota for them. As the working of the Rule would indicate, it was for unnecessary and hypothetical situation which never arose in years subsequent to the framing of the Rules. The framers of the Rules perhaps thought and assumed that many Bar recruits would be willing to join the Service and selections would be made from Bar regularly and timely eliminating thereby the chances of the promotees whose knowledge and experience were also necessary to be retained for the better administration of the judicial service. Many factors have worked otherwise and the assumption upon which this Rule had been framed has not proved to be correct.

60. If Rule 7 was standing by itself simpliciter, no problem would have arisen. The problem, however, arises by virtue of sub-rule (2) of Rule 8. Sub-rule (1) of Rule 8 stipulates that inter se seniority of the members of Delhi Judicial Service promoted to the Service shall be the same as in the Delhi Judicial Service. This creates no problem for the present controversy. Sub-rule (2) of Rule 8, however stipulates that seniority of direct recruits vis-a-vis promotees shall be determined in the order of rotation of vacancies between direct recruits and promotees based on quotas of vacancies reserved for both categories by Rule 7 provided that first available vacancy shall be by direct recruitment and next two vacancies by promotees and so on, Sub-rule (2) or the makers of sub-rule (2) of Rule 8 presumed and assumed a factual position that quotas of vacancies have been reserved for both categories by Rule 7 which is really not a fact. Rule 7 does not reserve any quota for either of the categories. Rule 7 only provides for ceiling of direct recruits by providing that in case there were recruitments from Bar as well as by promotions, in such a case Bar recruits would not be more than one-third of the substantive posts in the Service. This brings the problem of so interpreting the Rules as to avoid any possible injustice to any section, if possible.

61. In this task in the instant case there is one advantage that though there are numerous decisions, dealing with rights and privileges of promotees vis-a-vis direct recruits, there is no case, at least none to which attention was drawn in this case, where the Rule dealing with position between district recruits and promotees in a service composed of two different types of recruits, is worded in the manner as provided in the Rules in the instant case. It is well settled that bereft of anything where a service consists of recruitments made from two different sources and the rules and regulations provide for their recruitment and their rights inter se, primarily and essentially those rights have to be adjusted within the scheme of the rules though it might in some cases lead to certain amount of imbalances or injustice because a service is built on various considerations and various factors induce the legislature or the rule-making authority to induce different and diverse knowledge, diverse aptitudes and requirements needed for running of the service. The legislature or the rule-making authorities have better knowledge and better capacities to adjust those factors. It is common knowledge that administration of justice in this vast land of ours, where there are growing expectations with the explosion of ideas with new problems, call for fusion of different calibers, talents and aptitudes. Administration of justice calls for independence of mind, freshness of outlook, uninhibited by normal service life and routine. It also calls for experience in writing judgments and knowledge gathered in conducting cases from lower rank and gaining experience thereby and any ideal system would be where there is complete fusion between these two sources and streams of knowledge to enrich the machinery of the administration of justice. But the machinery of the administration of justice fused in that manner must work with a sense of justice within itself but if, as very often is the case in this country, where there are recruitments from different sources instead of creating harmony and that harmony utilised with dedication for the purpose of the institution,

creates disharmony and discontent amongst the various segments of that institution generating amongst money a brooding sense of injustice, real or imaginary. Justice should be the end of all law. But then what is justice ? It is merely creating situations for the realisation of one's just expectations or is it adjustment of the rights and expectations of many in the administration with sense of justice within the machinery administering justice in accordance with the rules designed to attract talents ? Independence, experience and knowledge must be the aim and purpose of these Rules intended to regulate their conditions and if these Rules are not clear, these should be so interpreted, where the courts are not fettered or bound by precedents, to ensure that justice flows, such justice is essential for society to survive. It is important because it enables the individuals in the administration of justice to serve justice and to identify themselves with the process. But by rules, we cannot make justice creating in this uncertain age but all we can ensure is, attempt to prevent injustice. Most of the problems as are apparent in working out these types of schemes and rules have been due to the failure to see the reality and the desire to proceed on ad hocism.

62. The Rules in question have been noted in the instant case in detail. There is no quota as such. Rule 8(2) proceeds on the misconception that there is quota fixed for direct recruits, which Rule 7 does not. Rule 8(2) cannot on plain literal meaning also be construed or interpreted to mean that it was deemed by the Legislature and the rule-making body to engraft any quota. There is no deemed quota, if that was the intention then the Rule would have said so. It has not. Rule 8(2) proceeds on wrong assumption. Therefore, it should be given effect to insofar as it can be without reading any quota for the subsequent years. How it should be so read would be presently indicated. There is another aspect of the matter. Rule 16 permits making additional appointments. Before the actual situation, where Rule 7 and Rule 8(2) can be adjusted it deal with, it would be relevant to note some of the decisions cited at the Bar though, most of these are not relevant. On the wording of Rule 7 read in conjunction with Rule 8(2) one is on virgin ground.

63. In the case of *Mervyn Coutindo v. Collector of Customs, Bombay* ((1966) 3 SCR 600 : AIR 1967 SC 52 : (1967) 1 LLJ 749), this Court noted that there was no inherent vice in the principle of fixing seniority by rotation in a case where a service is composed of fixed proportion of direct recruits and promotions. There as indicated by the emphasis supplied that the rule proceeded on different basis than the present one. In the instant case in view of the specific and clear language of proviso to Rule 7 read with Rule 8 it cannot be said that recruitment to the Service was "in fixed proportion". In that view of the matter, the observations of this Court in the said decision would not throw much light in resolving the present controversy.

64. In the case of *S. G. Jaisinghani v. Union of India* ((1967) 2 SCR 703 : AIR 1967 SC 1427), this Court was concerned with the Seniority Rules of the Income-tax Service. There the context in which controversy arose must be considered in the context of the rules. This Court noted that in order to improve the Income-tax administration, the Government of India on September 29, 1944 reconstituted and classified the prevailing Income-tax Service as Class I and Class II. The reorganisational system provided for recruitment of Income-tax Officer Class I, Grade II service partly by promotion and partly by direct recruitment. The reorganisational system was set out in certain Government communication. Reading of the rules would indicate that there was a fixed proportion, in the instant case there is none. In the light of this, it is to necessary to deal with the observations made by this Court in the context of the said rules.

65. In the case of *Chandramouleshwar Prasad v. Patna High Court* ((1970) 2 SCR 666 : (1969) 3 SCC 56 : AIR 1970 SC 370), this Court was concerned with a situation and rules entirely different from the terminology of proviso to Rule 7 of the present Rules. It is, therefore, also not necessary to

pursue the said decision any further.

66. Some reliance was placed on the decision of this Court in the case of *V. B. Badami v. State of Mysore* ((1976) 2 SCC 901 : 1976 SCC (L&S) 353). The Court observed in the context of the rules before this Court in that case that as long as the quota rule remained neither promotees could be allotted any of the substantive vacancies of the quota of direct recruits nor could direct recruits be allotted promotional vacancies. Two more principles were settled; one was that quotas which were fixed were unalterable. Quotas which were fixed could only be altered by fresh determination of quotas under the relevant rule. The other was that one group could not claim the quota fixed for the other group either on the ground that the quotas were not filled up or on the ground that because there had been a number in excess of quota the same should be absorbed depriving the other group of quota.

67. The observations made in that decision would have been very apposite and might have helped the present respondents if it was possible to find that there was any fixed or unalterable quota so far as direct recruits are concerned in this case as in that case and further that ad hoc arrangements or promotions meeting the exigencies of the Service had not been made in accordance with the procedure envisaged by the Rules itself, namely Rule 16 in the instant case.

68. The case of *Bishan Sarup Gupta v. Union of India* (1975 Supp SCR 491 : (1973) 3 SCC 1 : 1973 SCC (L&S) 1 : (1973) 1 SLR 115) also deals with quota rule in connection with Income-tax Officers. In view of the present Rules in the instant case, it is also not necessary to deal with the said decision.

69. The facts of this case and the Rule under which the problem has to be adjusted have been set out hereinbefore. Some of the general principles enunciated in some decisions this Court might be noted in resolving the unfortunate controversy that has arisen in this case.

70. In the case of *Joginder Nath. v. Union of India* ((1975) 2 SCR 553 : (1975) 3 SCC 459 : 1975 SCC (L&S) 2 : (1975) 1 SLR 33), this Court had to construe the Delhi Judicial Service Rules, 1970 in the context of seniority and confirmation. But this was not in the context of inter se seniority between promotees and direct recruits. The question was the seniority amongst the members of the promotees who were members of the Delhi Judicial Service Rules who became absorbed in Delhi Higher Judicial Service. In view of the main controversy in this case that is only an incidental point but so far as that controversy i.e. the question of seniority amongst the promotee officers of the Delhi Higher Judicial Service, it would suffice to say that insofar as that controversy affects any position in the instant case, the same will be guided by the ratio of the decision in *Joginder Nath* case ((1975) 2 SCR 553 : (1975) 3 SCC 459 : 1975 SCC (L&S) 2 : (1975) 1 SLR 33). But so far as the controversy regarding the fixation of the seniority list between promotees and direct recruits which is the main point here, the same will be dealt with separately.

71. In approaching the present controversy, it is necessary to keep certain basic fundamental principles in mind which are of importance in service jurisprudence. Service Jurisprudence in this country has developed in a peculiar way. It has sought to infuse both fresh blood and old experience but somehow our administrators did not foresee the need for expanding administration and the personnel necessary for this expansion, as a result in making appointments and even in granting promotions, there has been a good deal of ad hoc arrangements with the result that it has created in practically every branch of our administration feeling of discontent and misunderstanding between promotees and direct recruits. This has, to a very large extent, damaged the friendly atmosphere

which should prevail among the member of the administration, if the administration has to remain a vehicle of social progress and transformation which the Indian administration must, in view of the very great possibility and the transitory nature through which it is passing in spite of the severe personal and economic hardships that the members of the administration go through.

72. The decision in the case of S. B. Patwardhan v. State of Maharashtra ((1977) 3 SCR 775 : (1977) 3 SCC 399 : 1977 SCC (L&S) 391 : (1977) 2 SLR 215) may be noted, in resolving the present controversy though the decision in that case was rendered in the context of the controversy of the Engineering Service. Rule 8(1) of the relevant rules in that case before this Court dealt with the various categories which manned the Class II sub-divisional posts which were complied in two lists, one list of Bombay Service of Engineers, Class II cadre of Permanent Deputy Engineers and the other list of officiating Deputy Engineers. It is not necessary for the present controversy to set out the details of the same. The controversial provision was Rule 8 (iii) which was as follows :

The probationers recruited directly to the Bombay Service of Engineers, Class II cadre in any year shall, in a bunch, be placed senior to promotees confirmed during that year.

73. Learned Chief Justice observed that this Rule was highly discriminatory against the promotees and gave preferential treatment to direct recruits. Its main justification was said to be that persons who were promoted as officiating Deputy Engineers did not belong to cadre so long as they were not confirmed as Deputy Engineers whereas direct recruits appointed on probation as Deputy Engineers either from that class or cadre on the very date of their appointment since after a satisfactory completion of probation, confirmation was guaranteed to them. Learned Chief Justice felt that this needed careful examination. More or less similar submissions were made in the present writ petitions. This Court further noted that there was no universal rule, either that a cadre consisted of both permanent or temporary employees or that it must consist of both. That is primarily a matter of rules and regulations governing the particular service in relation to which the question regarding the composition of the cadre arises. The Court noted several decisions on this point. At page 800 of the Report, learned Chief Justice observed as follows : [SCC para 51, p. 424 : SCC (L&S) p. 416]

We are not unmindful of the administrative difficulties in evolving a code of seniority which will satisfy all conflicting claims. But care ought to be taken to avoid a clear transgression of the equality clause of the Constitution. The rules framed by the state Governments were constitutionally so vulnerable that the administration was compelled to adopt inconsistent postures from time to time leaving the employees no option save to resort to courts for vindication of their rights. In this process, courts, high and low, had to discharge functions which are best left to the expertise of the appropriate departments of the Government. Having struck down certain rules, we do not want to take upon ourselves the task of framing rules of seniority. This is not the function of this Court and frankly it lacks the expertise and the data to do so. We however hope that the Government will bear in mind the basic principle that if a cadre consists of 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 factors 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.

74. The aforesaid observations have to be borne in mind in deciding the present controversy.

75. In the case of *Rajendra Narain Singh v. State of Bihar* ((1980) 3 SCR 450 : (1980) 3 SCC 217 : 1980 SCC (L&S) 363 : 1980 Lab IC 703), the question was about the interpretation of the Bihar Police Service (Recruitment) Rules, 1953. In that case Rule 3 of the relevant rules was thus :

The Governor shall decide in each year the number of vacancies to be filled in that year :

Provided that the number of vacancies to be filled by promotion in the service in any one year shall not, unless the Governor is satisfied that there is not a sufficient number of officers fit for promotion, be less than half the total number of vacancies to be filled in any such year.

The Court further observed that Rule 3 of Bihar Police Service (Recruitment) Rules was not really a quota rule and it did not lay down any proportion; all it did was to insist that the number of vacancies to be filled in by promotion should not be less than half of the total number of vacancies to be filled in any year. Adding to the number of vacancies and filling them by promotion did not certainly violate the rule requiring, that not less than half of the vacancies must be filled by promotees.

76. The observations of this Court in the Case of *A. Janardhana v. Union of India* ((1983) 3 SCC 601 : 1983 SCC (L&S) 467) may be referred to. This Court said thus after pointing out anomalies similar to the facts of the instant case : [SCC para 38, p. 628 : SCC (L&S) p. 494]

It is therefore, time to clearly, initiate a proposition that a direct recruit who comes into service after the promotee was already unconditionally and without reservation promoted and whose promotion is not shown to be invalid or illegal according to relevant statutory or non-statutory rules should not be permitted by any principle of seniority to score a march over a promotee because that itself being arbitrary would be violative of Articles 14 and 16. Mr. Ramamurthi, learned counsel for some of the direct recruits, in this connection urged that if at the time when the promotee was recruited by promotion, his appointment/promotion was irregular or illegal and which is required to be regularised, any subsequent direct recruit coming in at a later date can seek relief and score a march over such irregular or illegal entrant. We find it difficult to subscribed to this view. Though we have dwelt at some length on this aspect any enunciation of general principle on the lines indicated by us would require a reconsideration of some of the decisions of this court. We say no more save that we have solved the riddle in this case in accordance with the decisions of this court and interpretation of relevant rules.

77. The decision in the case of *Baleshwar Dass v. State of U.P.* ((1981) 1 SCR 449 : (1980) 4 SCC 226 : 1980 SCC (L&S) 531 : 1981 UPSC 15 : (1981) 1 LLJ 140) was also referred to. There in the context of different rules namely U.P. Service of Engineers (Junior and Senior Scales) Irrigation Branch Rules, this Court observed that officiating service in a post is for all practical purposes of seniority as good as service on a regular basis. It may be permissible within limits, for government to ignore officiating service and count only regular service when claims of seniority arise before it, provided the rules in that regard are clear and categorical and do not admit of any ambiguity and an arbitrary out of long years a of service does not take place. While rules regulating conditions of service are within the executive power of the State or its legislative power under proviso to Article 309, such rules have to be reasonable, fair and not grossly unjust if they are to survive the test of Articles 14 and 16 of the Constitution. This Court further noted that for purposes of seniority, one has to go normally by the order of appointment to the Service in a substantive capacity. But no fixed

connotations can be attributed to expressions like 'substantive capacity', 'Service', 'cadre' and the like because probation even for temporary appointments is provided for in the rules may mean that even temporary appointments can be substantive. For there cannot be probation for a Government servant who is not to be absorbed substantively in the service on completion thereof. Permanency carries with it other rights than mere seniority and promotion. Permanent posts and temporary posts are in official terminology sharply different, but in that case the Court further noted that from this alone, there was no difference, in the historical context of U.P. Service of Engineers. The Court noted in that even the case of temporary engineers required consultation with the Public Service Commission. In the context Rule 16 of the Rules in the instant case requiring consultation with the High Court may be noted.

78. In the aforesaid decision this Court noted that a person is said to hold a post in a substantive capacity when he holds it for an indefinite period, especially of long duration in contradistinction to a person who holds it for a definite or a temporary period of holds it on probation subject to confirmation. If the appointment was to a post and the capacity in which the appointment was to be made was of indefinite duration, if the proper authority had been consulted and had approved, if the tests prescribed have been taken and passed, if probation has been prescribed and has been approved, one may well say that the post was held by the incumbent in a substantive capacity. Applying these tests to the facts and circumstances of this case dealing with the officers holding the post for a long time, there is no doubt that the petitioners officers have held the position in substantive capacities.

79. This can be looked at from another point of view. Most of the petitioners are holders of temporary posts in substantive capacities. These posts have been created by the Administrator under Rule 16. See also Rule 17 which begins with the non obstante clause. By reason of Rule 2(b) and Rule 2(d), the petitioners being holders of temporary posts in substantive capacities are holding 'cadre posts' and are also members of the Service. Appointment in a substantive capacity is different from appointment to a substantive post. This has been held in the case of Baleshwar Dass ((1981) 1 SCR 449 : (1980) 4 SCC 226 : 1980 SCC (L&S) 531 : 1981 UPSC 15 : (1981) 1 LLJ 140) [SCR pp. 467-469 : SCC pp. 240-243] and A. Janardhana ((1983) 3 SCC 601 : 1983 SCC (L&S) 467) [SCC para 23, pp. 617, 618] though, as was contended on behalf of the High Court the context of the relevant rule was somewhat different from the present one but that difference is not of much significant distinction in principle. It is, therefore, erroneous to contend that the holders of substantive posts, i.e. the 12 posts originally at the inception of the Service and 22 posts now, alone are members of the Service. All incumbents holding either substantive posts or temporary posts in substantive capacities are members of the Service, in the context of the present Rule.

80. The actual terms of Rule 7 have been noted but it is manifest that in the context of the present circumstances, Rule 7 can have only application to recruitments to the substantive posts in the Service. It provides two different sources of recruitment, and without fixing any actual quota, but a ceiling of not more than 1/3 of the substantive posts to be held by direct recruitments. Rules 7 and 8 do not exist in isolation. These have to be read with the other rules, particularly Rule 16. The principles of harmonious construction must be accepted so that all the rules are rendered operative and one does not make the other nugatory. Rule 16 is a rule of relaxation or an additional rule of recruitment providing for temporary posts being filled up in addition to the substantive posts. The effect of the creation of temporary posts is to expand the area of membership of 'the Service'. As the filling up of the temporary posts under Rule 16 is confined to recruitment from the members of Delhi Judicial Service, Rule 7 cannot be made applicable for the recruitment to temporary posts. Therefore, there is no quota rule applicable with regard to temporary posts.

81. In the aforesaid view of the matter, it appears that by definition, temporary posts of District and Sessions Judges are 'cadre posts'. See in this connection Rule 2(b) of the said Rules. Holders of such temporary posts become members of the Delhi Higher Judicial Service if they are appointed to such posts in a substantive capacity under rule 2(d) and Rule 2(e) of the said Rules. A person can be said to hold a post, permanent or temporary, in a substantive capacity only if his appointment to that post is not fortuitous or ad hoc. A person appointed to a post as a stopgap arrangement cannot be said to hold that post in substantive capacity. In addition to the requirement that the appointment should not be of a fortuitous stopgap or ad hoc nature, no appointment to a temporary post can be regarded as substantive unless it is made in compliance with the rules and regulations which have to be complied with while making appointments to permanent post. In the instant case, for example, an appointee to a temporary post of Additional District and Sessions Judge can only hold that post in a substantive capacity if he has completed not less than ten years of service in the Delhi Judicial Service as required by Rule 7(a) and if, he was appointed on the basis of selection from amongst the members of the Delhi Judicial Service in consultation with the High Court as enjoined by Rule 5(i) of the said Rules.

82. The proviso to Rule 7(b) does not prescribe any quota of one-third for direct recruits. As has been noted, it merely indicates a ceiling i.e. that not more than one-third of the substantive posts of Service shall be held by direct recruits.

83. Even if one assumes that proviso to Rule 7(b) provides for a quota of one-third for direct recruits, Rule 16(1) which empowers the Administrator to create temporary posts in the service, read with Rule 16(2) which provides that temporary posts shall be filled in, in consultation with the High Court, from amongst the members of the Delhi Judicial Service either constitute an exception to the quota rule or in the alternative proceeds on the basis of relaxation or abrogation of quota rule. By Rule 16(2) a direct recruit cannot be appointed to a temporary post. In other words, only promotees can be appointed to temporary posts. If the source of recruitment to temporary posts is one and one only namely, the members of the Delhi Judicial Service, no question of applying the quota rule can possibly arise. The quota rule can have application only if there is more than one source of recruitment. If temporary posts in the Service are created as has been done in this case by the Administrator as envisaged by Rule 16(1) and if such posts have been filled in as it appears to have been done here in consultation with the High Court from amongst members of Delhi Judicial Service as required under Rule 16(2) of the Rules, quota rule assuming that there is any, cannot apply to such appointment. The validity of such appointment is not open to the exception that these violate the quota rule, if any. As has been mentioned hereinbefore it is impossible to find in Rule 7 any quota Rule simply because Rule 8 assumes that quota rule is there is Rule 7, and then proceeds to make a rotational system. It would not be proper to accept the position that there is any quota rule specially in view of the fact that working of the said Rules over all these years indicates that the Rule was not adhered to and the fulfilment of the Rule cannot be adhered to if the appointment under Rule 16 is given effect to and also in view of the fact that if the quota rule is adhered to in conjunction with Rule 8(2), it will result in manifest injustice. As between direct recruits, on the one hand, and the members of the Delhi Judicial Service who were appointed in substantive capacity to temporary posts of Additional District & Sessions Judges on the other hand, the seniority must be governed by the rules of continuous officiation in the cadre post i.e. a direct recruit who is appointed after a member of the Delhi Judicial Service is appointed in a substantive capacity to a temporary post of Additional District & Sessions Judge, cannot and should not rank higher than the latter in the list of seniority; if a direct recruit is appointed after a member of the Delhi Judicial Service thus promoted, he would rank lower in seniority than the latter. The following conclusions follows :

- (1) Rule 7(b) is not in the nature of a quota rule;
- (2) The temporary posts can be held in substantive capacity;
- (3) The holders of such temporary post are members of the Delhi Higher judicial Service.
- (4) Rule 8(2) which provides for a rotation of vacancies between direct recruits and promotees "based on the quota of vacancies reserved for both categories by Rule 7", must be read so as to restrict its application to simultaneous appointments of direct recruits and promotees or in the case of first and initial appointment. Any other construction will make the Rule incongruous as well as invalid offending Articles 14 and 16 of the Constitution.

84. The history of Delhi Judicial Service shows that placement of the promotees on probation is a matter of idle curiosity (sic). Promotees were placed on probation retrospectively as is shown by the recent instance which occurred during the pendency of these writ petitions. By an order dated September 6, 1993, the Secretary (Law and Judicial), Delhi Administration, notified that five promotees were placed on probation with effect from various dates ranging from October 1, 1981 to May 10, 1983. The promotee at Serial No. 1, Smt. Santosh Duggal was placed on probation retrospectively from October 1, 1981, that means her probationary period of 2 years would be over within three weeks of the letter dated September 6, 1983, it is also interesting to note that Shrimati Duggal had been working as a judicial member of the Customs and Excise Gold Control Appellate Board since October 1982. Such probations are meaningless formalities. Therefore, promotees who were appointed in substantive capacities in the sense indicated above can be placed on probation now if that has not been done so far.

85. As has been noted in the decision of *A. Janardhana v. Union of India* ((1983) 3 SCC 601 : 1983 SCC (L&S) 467) at 608 of the Report (SCC), if proviso to Rule 7(b) is read with Rule 8(2) and in the manner contended by the respondents, it might so happen that a candidate's position may be placed in such a way that by legal fiction, he will be placed as senior to a person as a District and Session Judge by notional placement at a time when he did not even reach the age at which he or she would have become eligible for appointment. That would be unfortunate and would produce incongruous result. Indeed such a result had happened in *A. Janardhana case* ((1983) 3 SCC 601 : 1983 SCC (L&S) 467)

86. An argument was advanced on behalf of the respondents that there is no provision of probation for the appointments under Rules 16 and 17 of the said Rules, but sub-rule (2) of Rule 12 required that all candidate shall be on probation for a period of two years. An appointment on probation is not a jurisprudential sine qua non for absorption into the services, though normally and generally various rules of different services make such provisions as Rule 12(2) here. But as has been noted in the working out the practice of Delhi Judicial Service Placement of promotees on probation has not been very strictly followed. The promotees cannot suffer for this. It was, then, urged that there was no process of selection. It may be mentioned that Rule 7(a) provides for recruitment to the Delhi Higher Judicial Service inter alia by promotion on the basis of selection from the members of Delhi Judicial service, who have completed not less than ten years of service in the Delhi Judicial Service. It may be mentioned that in actual practice all appointments have been made by selecting people from Delhi Judicial Service and sometimes officers have been passed over on the basis of assessment of comparative merits.

87. It may be appropriate here to note on the question whether the petitioners were appointed regularly that all the promotees were appointed to temporary posts in accordance with the qualifications laid down under Rule 7(a), namely, by selection and after completion of a minimum of ten years judicial service. The selections were made by the Full Court of the High Court and appointments were made on merit-cum-seniority basis so much so that persons found not fit for promotions were ignored as in the case of Shri C. D. Vashist and Shri S. P. Singh Chowdhary.

88. On behalf of the respondents attention was drawn to the decision of this Court in the case of M. Veeraiyan Chowdhary v. Government of A.P. (Civil Appeal No. 2030 of 1981) as well as the decision of this Court in the case of S. P. Gupta v. Union of India (1981 Supp SCC 87 : (1982) 2 SCR 365 : AIR 1982 SC 149). Inasmuch as the context of the provisions involved in those two decisions are entirely different from the context of the Rules in the instant case, the respondents cannot have any support from the aforesaid two decisions.

89. Another argument canvassed was that Bar recruits had joined the Services and some of them with a very good practice about which we have no doubt that they had and they had joined the Service at great sacrifice, would suffer if any alternation of the gradation list was now made. It was submitted that if necessary at all the same should be done prospectively, if the seniority list is revised, it should be done prospectively without affecting the positions of those Bar recruits where seniority on the old basis in the light of the High Court's understanding before these petitions were filed had been existing.

90. One should give anxious considerations to this aspect of the matter. One should be hesitant and loath to upset the just expectations of the members of the legal profession who have joined the Service and one would be very sorry to do that. Judicial appointments are no longer attractive for any lawyer of any kind of success. One would be hesitant to put further disincentives for those with professional experience to join judicial service, and therefore be reluctant to interfere with the just expectations of professional entrants who had entered judicial service at sacrifice of considerable money and position. But the provisions of the Rule as well as of the Constitution must be given effect to. In the instant case members of the judicial service, the petitioners had made representations to the High Court in 1977. The two entrants who would be vitally affected by the readjustment of the list would be Shri G. S. Dakha who joined the service on September 27, 1978 and Miss Usha Mehra who joined the service on probation on April 24, 1980. At that time challenge in the form of representation to existing seniority before the High Court was there. Shri J. B. Goel had joined the Service on November 10, 1980 and Shri B. S. Chaudhary had joined the Service on November 10, 1982. So far as Shri Dakha is a member of Scheduled Castes and Tribes, his position may not be affected on other grounds. We say no more on this aspect. So far as Miss Mehra is concerned, she was appointed on probation in April 1980 and got her confirmation during the pendency of the present petitions. Miss Mehra is still young and has a long tenure. It is hoped that she will overcome any temporary or momentary loss of seniority and would continue to render her valuable service to the administration of justice. In judicial careers many just expectations get upset as experiences of recent times would indicate.

91. The interpretation indicated above and the principles mentioned hereinbefore in adjusting the rights between the promotees and direct recruits in the background of the Rules prevailing in the instant case are appropriate and rational. One should insist that Government must abolish this system of making appointments from two different sources in ad hoc manner. If appointments have to be made from two different sources, then the authorities should so plan that the recruits come from two different sources in time and officers from one source are not required to function

substantively and effectively in the jobs which are intended to be performed by recruits of other source and fact the prospect of being either pushed back or thrown out. Nothing more need to be said.

92. The rules nisi are made absolute. Current gradation list of the Judicial Department of the Delhi Administration specially with reference to respondents 4 and 5 is quashed with a direction to the respondents 1 to 3 to prepare the gradation list of the Delhi Higher Judicial Service on the basis of the principles indicated in this Judgment. This, however, will not in any way prejudice the claim of seniority of respondent 4, Shri G. S. Dakha on the ground of his being member of Scheduled Caste or Scheduled Tribe. This direction will also not in any way affect the seniority of the promotee officers of the Delhi Higher Judicial Service amongst themselves. That position would be guided by the principles laid down by this Court in Joginder Nath case ((1975) 2 SCR 553 : (1975) 3 SCC 459 : 1975 SCC (L&S) 2 : (1975) 1 SLR 33) (indicated hereinbefore).

93. In the facts and circumstances of the case, parties will bear their own costs.

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