

SUPREME COURT OF INDIA

D. K. Mitra

Vs.

Union of India

W.P.No.8353 of 1981

(Y. V. Chandrachud, C.J.I., R. S. Pathak and Sabyasachi Mukharji, JJ.)

01.07.1985

JUDGEMENT

R. PATHAK, J.:-

1. By this petition under Article 32 of the Constitution the petitioners challenge the validity of a combined seniority list dated October 30, 1979 of Divisional Medical Officers and of promotions and officiating appointments made on the basis of that seniority list to posts of Medical Superintendents in the Indian Railway Medical. Service.

2. Medical Service in the Indian Railways is structured in ascending levels. At the base, for the purpose of this case, is the cadre of Assistant Divisional Medical Officers Class I (who before January 1, 1973 were described as Assistant Medical Officers Class II). Above them is the cadre of Divisional Medical Officers. The next above is. the cadre of Medical Superintendents. Still higher rank Chief Medical Officers, and the apex of the hierarchy is held by the Director General of Medical Services.

3. There are eight petitioners. They were Assistant Medical Officers Class 11 and had been confirmed in that grade, one petitioner in 1962 and the others in 1963.

4. During the years 1970 to 1972, the petitioners were selected by Departmental Promotion Committees for officiating appointments to the Class I Posts of Divisional Medical Officers, when the Indian Railway Medical Service (District Medical Officers) Recruitment Rules, 1965 were in force. Those rules were repealed and replaced by the Indian Railway Medical Service (District Medical Officers) Recruitment Rules, 1973. Under the Rules of 1965 and the Rules of 1973, the posts of District Medical Officers were treated as selection posts.

5. To give effect to the recommendations of the Third Pay Commission, the scales of pay of existing categories of officers were revised. The existing pay scale of Rs. 350-900 attached to the posts of Assistant Medical Officer was revised and split into two pay scales, a higher Class I scale of Rs. 700-1600 and a lower Class II scale of Rs. 650-1200. The post of Assistant Medical Officers were divided into those carrying the higher pay scale and those carrying the, lower pay scale. A very large number of posts of Assistant Medical Officers were upgraded to the higher pay scale of Rs. 700-1600, and were designated as "Assistant Divisional Medical Officer". The petitioners were placed in the higher pay scale of Rs. 700-1600 and were designated as Assistant Divisional Medical Officers with effect from January 1, 1973. The screening of over 2000 Assistant Medical Officers for the purpose of upgrading them to the higher scale kept the Screening Committee busy from 1974 to 1976 or so, and practically no recruitment was made during those years either by permanent promotion or direct recruitment to the posts of Divisional Medical Officer.

6. The Rules of 1973 were replaced by the Indian Railway Medical Service (Divisional Medical Officers/Senior Medical Officers) Recruitment Rules, 1975. These, in their turn yielded place to the Indian Railway Medical Service (Chief Medical Officers, Additional Chief Medical Officers, Medical Superintendents and Divisional/Senior Medical Officers) Recruitment Rules, 1978. Under the Rules of 1978, promotion is effected on the principle of "non-selection", an expression in the Rules which is construed by the Railway Administration as "seniority-cum-suitability".

7. By a letter No. E(0)I-78/SR-6/14 dated October 10, 1979 the Railway Board published a combined seniority list of Divisional Medical Officers recruited directly or by promotion. The respondents Nos. 4 to 64 were shown in that list. They include promotees as well as direct recruits. The petitioners did not find place in the seniority list. Subsequently, on the basis of their position in that seniority list, some of the respondents Divisional Medical Officers were appointed to officiate as Medical Superintendents by a Railway Board letter No. E(0)III-81 PN/6/199 dated, August 31, 1981.

8. The petitioners challenge the combined seniority list of Divisional Medical Officers and the officiating promotions to the posts of Medical Superintendents. The petitioners contend that the seniority assigned to the respondents Nos. 4 to 64 and the consequent promotions made thereafter violate Articles 14 and 16(1) of the Constitution. The grievance operates in two dimensions, against the promotee respondents and against the direct recruit respondents.

9. We propose to consider first the grievance of the petitioners in respect of the seniority accorded to the promotee respondents as Divisional Medical Officers and their promotion to officiate as Medical Superintendents. The case of the petitioners is that the petitioners were promoted as Divisional Medical Officers much before, the promotee respondents, that their promotion was made by selection on the basis of merit adjudged by Departmental Promotion Committees under the Rules of 1965, that they had continued in service as Divisional Medical Officers against vacancies in permanent posts without interruption for periods ranging respectively between 8 years to 12 years, and yet the promotee respondents who had held such posts for shorter periods had been confirmed before the petitioners and shown senior in the seniority list and preferred for promotion as Medical Superintendents. It is contended that the petitioners should have been confirmed in the normal course in the order of their promotion against permanent vacancies. The petitioners submit that the promotee respondents have been confirmed zonewise and such confirmation cannot serve as a proper reference for determining seniority because when confirmation is granted zonewise, it depends on the fortuitous accrual of vacancies arising arbitrarily at different times and in different numbers in different individual zones. The petitioners contend that if the date of confirmation is adopted as the criterion, confirmation should not be reckoned on a zonal basis, but as if the vacancies arose in a single all India structure for, the petitioners say, a seniority list prepared for the purpose of promotion to the posts of Medical Superintendents which is an all India cadre, should properly be drawn on an all India basis. The petitioners urge that if confirmation has to be considered zone-wise, then for the purpose of promotion to the all India cadre of Medical Superintendents the only logical and uniform criterion should be the total length of continuous service as Divisional Medical Officers reckoned from the date of promotion. It is a criterion which makes the arbitrary chance of confirmation against fortuitous vacancies in individual zones irrelevant. Finally, the petitioners urge that for the purpose of fixing seniority in the grade of Divisional Medical Officers the seniority ruling in the grade of Assistant Medical Officers or Assistant Divisional Medical Officers is of no material significance because under the Rules in force when the promotions in the instant case were made, promotions were governed by the principle of selection on the basis of merit.

10. The respondents, on the other hand, maintain that the seniority list has been correctly prepared, that it contains the names of only those officers who were either directly recruited as Divisional Medical Officers or had been approved for permanent promotion against the quota of posts reserved for them in vacancies allotted among the individual Railways on the basis of the cadre position of each Railway, and that none of the petitioners qualified for inclusion in the seniority list as they had been promoted in an officiating capacity to temporary vacancies in the posts of Divisional Medical Officers. The respondents contend that the petitioners have no right to be treated at par with those officers who were holding permanent posts on a confirmed basis, as confirmation was made on the basis of their selection for permanent promotion as Divisional Medical Officers. It is stated that seniority was also fixed on that basis. The respondents rely on a practice, followed by the Railway

Administration for several years, under which three Select Lists were prepared. List A set out the names of officers selected for substantive promotion against permanent vacancies. List B included the names of officers selected for officiating promotion against temporary vacancies. These officers were also considered subsequently by Departmental Promotion Committees for permanent promotion along with other eligible officers in the field. The petitioners were placed in List B. The third list, List C, bore the names of officers included in List B by earlier Departmental Promotion Committees but not considered as "suitable yet" for substantive promotion by subsequent Departmental Promotion Committees. It is stated that in the Railway Administration Class II officers were considered for substantive appointment to permanent vacancies in Class I posts, and also for officiating appointment against temporary vacancies in Class I posts. In each case, there was a separate selection by a Departmental Promotion Committee, and the selection was made zonewise. The Departmental Promotion Committee, after considering the officers at five to six times the number of vacancies, made a selection on an assessment of their Confidential Records. It is stated that officers selected for officiating appointment, and subsequently coming within the field of consideration for permanent appointment against permanent vacancies, were also considered for selection by subsequent Departmental Promotion Committees. In this manner, it is said, all eligible Class II officers were considered for permanent appointment against permanent vacancies, and the most meritorious were selected. It is pointed out that this practice was terminated in the Medical Department of the Railways after 1972, because with effect from January 1, 1973, the Class II posts of Assistant Medical Officer were upgraded as Class I posts of Assistant Divisional Medical Officer.

11. According to the respondents, at no time during the period ending with the year 1972, whenever Departmental Promotion Committees met for selecting officers against permanent vacancies, did any of the petitioners fall within the field of consideration for permanent appointment in view of their place of seniority in the Class II posts. It is also submitted that the promotion of the petitioners, then Assistant Medical Officers, to the post of Divisional Medical Officers in an officiating capacity against temporary vacancies cannot be traced to the Rules of 1965 or the Rules of 1973 because those rules dealt with promotion to permanent vacancies only. Nor could the petitioners, when they became Assistant Divisional Medical Officers with effect from January 1, 1973, claim the benefit of the said Rules because those rules provided for selection of Class II Officers to Class I posts. The respondents urge that the principle which truly governs the petitioners in the matter of promotion from the posts of Assistant Divisional Medical Officers to the posts of Divisional Medical Officers is the principle of seniority-cum-suitability in the former grade embodied in the Rules of 1978. It is denied that this construction would amount to giving retrospective operation to the Rules of 1978. It is explained that when the question of preparing the seniority list arose, the Rules of 1978 were in operation, and they provided for permanent promotion on the basis of seniority-cum-suitability and the rule of selection on merit operating under the earlier Rules no longer prevailed, and, in any event, could not apply when an Assistant Divisional Medical Officer, which was a Class I post, was considered for promotion to the Class I post of Divisional Medical Officer. Apparently, the promotee respondents were senior to the petitioners as Assistant Medical Officers or Assistant Divisional Medical Officers, and that seniority was made the basis of permanent promotion to the grade of Divisional Medical Officers. The respondents dispute the proposition that promotion to the grade of Divisional Medical Officers must be made on the basis of the total length of service rendered as Assistant Medical Officers and Assistant Divisional Medical Officers considered on an all India basis as, they assert, promotion to vacancies has to be considered zonewise.

12. A perusal of the Rules of 1965 shows that there were 101 posts in the grade of Divisional Medical Officers. The Rules of 1973 mention 109 posts. The posts are not divided between permanent posts and temporary posts, and we must assume that the Rules refer to permanent posts only. It appears that proceedings were taken by the Railway Administration from time to time for the promotion of Assistant Medical Officers, to the Class I posts of Divisional Medical Officers. The Railway Ministry indicated the number of existing vacancies for the purpose of permanent promotion and the number of anticipated vacancies for the purpose of officiating appointment, the number under each category being specified zonewise. The selection for both categories was made on the basis of merit. It may be noted that both under the Rules of 1965 and the Rules of 1973, the posts of Divisional Medical Officers were regarded as selection posts. A Class I Departmental Promotion Committee met on February 20, 1970 and considered the cases of candidates who had completed five years and above of service as Assistant Medical Officers for such recruitment. Both for substantive promotion and for officiating promotion the field of choice was extended to six times the number of vacancies. Another Class I Department Promotion Committee met on October 22, 1971 and January 3, 1972. A third Class I Departmental Promotion Committee held its meetings on September 29 and 30, 1972 and October 3, 1972. The minutes of the several meetings indicate that the petitioners Nos. 1. to 8 were selected for officiating appointments, some of them being classified as "very good" and others as "good". They were accordingly appointed to officiate as Divisional Medical Officers on different dates in 1971 and 1972 and the petitioner No. 7, the last to be promoted, was appointed in 1974. The record shows that these were all regarded as officiating appointments to vacancies in the Class 1 post of Divisional Medical Officers. There is nothing before us to indicate why the Railway Ministry sought to fill some of the vacancies in the permanent posts on a substantive basis and the 'others on an officiating basis. The respondents say that substantive appointments were made to permanent vacancies and officiating appointments were made to temporary vacancies. We have carefully perused the copies of the official documents placed on the record before us. They do not speak of temporary vacancies at all. Nor is there any material suggesting the need for treating some of the vacancies as temporary, There is nothing to show that the vacancies would have ceased to exist within the foreseeable future or upon the happening of some anticipated contingency. On the contrary, the petitioners have continued to fill the vacancies for several years. In the circumstances, we are of opinion that the vacancies to which the petitioners were appointed should be regarded as permanent vacancies.

13. As regards the need for making officiating appointments, it was explained during oral argument that officiating appointments were made when some of the candidates considered for substantive appointment were found to be of inferior calibre for such appointment, and, therefore, some of the vacancies were left to be filled on an officiating basis. We are not impressed by the submission. The communication of the Railway Ministry to the Departmental Promotion Committee specifying the number and nature of the appointments to be made was issued long before the cases of individual officers were examined for promotion. It was only after the Departmental Promotion Committee had been informed of the Railway Ministry's requirement that it commenced its task of selecting candidates for substantive appointment and for officiating appointment. The field of choice for each category, substantive appointment or officiating appointment, was demarcated by the rule that the officers to be considered would be six times the number of vacancies. According to the material placed before us by the respondents, the petitioners did not at any time fall within the field of choice for making substantive appointments, That was because their seniority in the grade of Assistant Medical Officers did not at the relevant time bring them within the field of choice for substantive appointment. They were considered for officiating appointment only, and not for substantive

appointment. It was the mere statistical fact of their seniority as Assistant Medical Officers and not their merit, that precluded their consideration for substantive appointment as Divisional Medical Officers at the relevant time.

14. Now the petitioners had been selected for promotion by the same or similar Class I Departmental Promotion Committees as those selecting the substantively appointed Divisional Medical Officers, and in no sense were their functions and responsibilities any different from those of the substantively appointed Divisional Medical Officers. It seems to us that if from the outset the temporary vacancies had been regarded as permanent vacancies, and substantive appointments had been made instead of officiating appointments, the petitioners would have been appointed substantively to those permanent vacancies. In the entire field of choice in which they fall, they were found to be the most meritorious. Ever since their respective appointments in 1971, 1972 and 1974 the petitioners have continued to serve without interruption as Divisional Medical Officers and were doing so when this writ petition was filed in 1981. They have continued to serve in the posts for a significant number of years, and there is no indication that their appointments will come to an end merely because the vacancies have been described as temporary. There is no material to show that their confidential records contained any adverse entries or that otherwise they were not fit on their merit for substantive appointment to permanent vacancies. Indeed, we are told that the petitioners have now been appointed Divisional Medical Officers on a substantive basis. It appears that the only reason why they were not originally appointed substantively to permanent vacancies as Divisional Medical Officers is that only a limited number of substantive appointments was desired by the Railway Ministry and the petitioners were not considered for those substantive appointments because they did not fall within the field of choice, having regard to their place of seniority in the lower grade of Assistant Medical Officers. While there is no doubt that technically, according to the terms of appointment, the petitioners were appointed on an officiating basis, we are reminded of the observations of this Court in *Baleshwar Prasad (Dass?) v. State of U. P.* (1981) 1 SCR 449, 462 (AIR 1981 SC 41 at p. 48) :

"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 government, and the appointee that the temporary posts are virtually longlived. 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."

These are apposite observations bearing directly on the point before us. We may point out that they

were found relevant by this Court in deciding *G. P. Singla v. Union of India* (1984) 4 SCC 450 : (AIR 1984 SC 1595). To our mind the petitioners are entitled to say that they should *be considered at par, for the purpose of fixing seniority, with those appointed to permanent posts in a substantive capacity. Nothing has been placed before us to indicate why they should not be entitled to the benefits which the substantive holders of permanent posts enjoy. It seems to us that for the purpose of determining seniority among promotees the petitioners should be treated as having- been appointed to permanent vacancies from the respective dates of their original appointment and the entire period of officiating service performed by them should be taken into account as if that service was of the same character as that performed by the substantive holders of permanent posts.

15. As regards the practice on which the respondents have relied, of maintaining the three Lists A, B and C and that the petitioners were shown in List B as being fit only for officiating promotion against a temporary vacancy, it seems to us that the circumstance makes no difference to the view taken by us. We are of opinion that on the facts of this case, when the petitioners are continuing to hold the posts of Divisional Medical Officers for several years, the continued inclusion of their names in List B is wholly meaningless.

16. If it is true that the length of continuous service reckoned from the date of promotion furnishes the criterion for determining seniority between the petitioners and the substantively appointed Divisional Medical Officers, that principle should apply with equal vigour as between the petitioners and those promotee respondents who also began to serve, like the petitioners, in officiating appointments as Divisional Medical Officers. There is no reason why such promotee respondents, although appointed subsequently to the petitioners, should be treated as senior to them.

17. But, it is said, the date of confirmation is the material date for determining relative seniority, and the promotee respondents were confirmed before the petitioners. It appears that the Railway administration in according confirmation has been influenced by two principal factors. One is that confirmation has been considered zonewise. Confirmation has been made as vacancies have arisen within a particular zone. The vacancies differ from zone to zone. They do not arise equally in different zones, but turn on factors peculiar to each zone, such as the strength of the cadre within the zone, and the differing number of vacancies arising in different zones at different times. In other words, confirmation based on the placement of an officer within a particular zone must necessarily be determined by factors confined to that zone and unrelated to an all India standard. It is apparent that confirmations limited by such a local perspective cannot serve as a legitimate base for drawing up a seniority list intended for effecting promotions to the all India cadre of Medical Superintendents. To adopt the date of confirmation as the governing point in such circumstances is to inject an element of inequality into the very foundation of the promotion process. It is conceivable that the Railway Administration has adopted the rule of according confirmations zonewise for certain practical considerations and, therefore, we do not propose to adjudicate on the validity of that practice. But we do lay down that such confirmations cannot legitimately constitute the basic norm for drawing up a seniority list of Divisional Medical Officers for the purpose of promotion to the grade of Medical Superintendents. In the circumstances, the true principle, in our opinion, must be that seniority should be related to the length of continuous service as Divisional

Medical Officers reckoned from the date of promotion to the post. This is subject of course to the exception that such service should not include any period served in a fortuitous, stopgap or ad hoc appointment.

18. Having said this, we may advert now to the -other factor which appears to have influenced the Railway administration in assigning seniority. The impugned seniority list was prepared in 1979. It was drawn up when the Rules of 1979 had come into force. It was drawn up at a time when the new rule of "non-selection" embodied in the Rules of 1978, or "seniority-cum-suitability" as the respondents understand it, had begun to govern promotion to the grade of Divisional Medical Officers. The Railway administration, following those rules, ignored the fact that the petitioners had been selected on their merit to those posts long before, and had occupied them all the years since. The consequence of applying, the rule of seniority-cum-suitability in the lower grade was to wipe out all the advantage claimed by the petitioners by virtue of the several years of continuous service, and to give an ascendancy to those Assistant Medical Officers who although promoted subsequently were confirmed earlier only by reason of their seniority in the lower grade. The question is whether the rule of seniority-cum-suitability can prevail. The point would have been capable of easy resolution but for the complexity introduced in implementing the recommendations of the Third Pay Commission. The Third Pay Commission, recommended an upward revision of the scale of pay attached to different grades of posts in the Railways. In the course of implementing the recommendation in relation to the Medical Department of the Railways, the Railway Ministry issued a letter No. PC III/74/PS-1/2 dated December 31, 1974 publishing a schedule showing therevised scales of pay. The Schedule contained a special provision in regard to the posts of Assistant Medical Officer. The entry read:

| Designation of post allowance (Rs.) (Rs.) | Authorised Scale of Pay (Rs.) Revised Scale of Pay (Rs.) | Existing rates of non-practising allowance (Rs.) Revised rates of non-practising allowance |
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| Assistant Medical Officer of pay subject to a minimum of Rs. 150/- per month. 1600 (Class I) | 350-25-500-30-590-EB-30-800-EB-830-35-900 (Class II) 1-5 stages : Rs. 150/- p.m. | 33-1/3% 700-40-900-EB-40-1100-50-1250-EB-50- |
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6-10 stages : Rs. 200/- p.m

11-15 stages : Rs. 250/- p.m.

16th stage onwards : Rs. 300/- p.m.

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| 150/- p.m. | 650-30-740-35-810-EB-35-880-40-1000-EB-40-1200 | 1-8 stages : Rs. |
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9-13 stages : Rs. 200/- p.m.

14-16 stages : Rs. 250/- p.m.

Remarks : AMOs in the existing Class II scale of Rs. 350-900. will be screened to determine their fitness for the revised Class I scale of Rs. 700-1600 and only those found fit will be entitled to this revised Class I scale. Those not found fit will be entitled only to the revised standard Class II scale of Rs. 650-1200 until they are found fit for Class I by the Screening committee. Posts operated in the revised Class I scale will be designated as "Assistant Div. Medical Officer". Separate orders will be issued regarding the number of posts to be placed in each of the two scales from time to time.

19. It is apparent that the post of Assistant Medical, Officer originally carried the Class II scale of Rs. 350-900. That scale of pay was now substituted by two distinct scales of pay, a higher scale of Rs. 700-1600 (Class I) and a revised lower scale of Rs. 650-1200 (Class II). Both scales of pay were shown against the posts of Assistant Medical Officer. The class I scale Rs. 700-1600 was intended for Assistant Medical Officers who were found fit by a Screening Committee for that scale, and posts operating in -that scale were, designated as Assistant Divisional Medical Officer The Assistant Medical Officers not found fit by the Screening Committee were entitled only to the lower Class II scale of Rs. 650-1200 until they were subsequently found fit for the Class I scale by the Screening Committee. It is clear from the entry in the schedule that both groups of officers, those drawing the Class I higher scale as well as those drawing the Class II lower scale were included under the single category "Assistant Medical Officer". All Assistant Medical Officers were screened in order to determine who among them were superior to the others for the purpose of meriting the higher of the two revised scales of pay. It was merely as a matter of convenience that Assistant Medical Officers who were allotted that higher revised scale were said to hold, the posts designated as "Assistant Divisional Medical Officer", while the others continued to be described as Assistant Medical Officers. In short, all the officers. comprising the two groups were Assistant Medical Officers, and an Assistant Divisional Medical Officer was nothing but an Assistant Medical Officer who drew the higher revised scale of pay. That being so the conclusion is inescapable that Assistant Divisional Medical Officers were, for the purpose of promotion as Divisional Medical Officers, governed by the Rules of 1965 and the Rules of 19 /3. Those Rules mention Assistant Medical Officers, as a source of recruitment, without referring to any limiting qualification that they should be officers drawing a Class II scale of pay. The expression "Assistant Medical Officer" in those Rules is comprehensive enough to include all Assistant Medical Officers, whether drawing the Clas II revised scale of pay or entitled to the Class I revised scale of pay. And all such officers were, under those Rules, governed by the principle of selection on merit for promotion as Divisional Medical Officers. It must be remembered that Assistant Medical Officers were designated as Assistant Divisional Medical Officers with effect from January 1, 1973, when the Rules of 1965 were still in force. The Rules of 1973 came into force in August, 1973. It is true that when Assistant Medical Officers were designated as Assistant Divisional Medical Officers in the revised Class I scale of Rs. 700-1600 by 4 notification such as Notification No. E(GP)74/1/153 dated July 24, 1976, the notification spoke of the "appointment" of Class III Assistant Medical Officers as Assistant Divisional Medical Officers, but having regard to the terms of the schedule to the Railway Ministry's letter dated December 31, 1974 referred to earlier, such notifications must be understood to mean that the Assistant Medical Officers had been assigned the Class I scale of Rs. 700-1600 and merely described as Assistant Divisional Medical Officers. As explained earlier, they continued to belong to the broad category "Assistant Medical Officers". In this connection, it is significant that

upon Assistant Medical Officers being designated as Assistant Divisional Medical Officers under the new scheme, there was no corresponding amendment in the Rules of 1965 or the Rules of 1973. It is for the first time, under the Rules of 1978, that we find that the post of Divisional Medical Officer is described as a "non-selection" post to be filled by promotion from the ranks of Assistant Divisional Medical Officers and by direct recruitment. In other words, the only Assistant Medical Officers now entitled to promotion as Divisional Medical Officers were those drawing the Class I scale of Rs. 700-1600 and designated as "Assistant Divisional Medical Officers". What is important to remember is that the new sub-division of Assistant Medical Officers described as Assistant Divisional Medical Officers was deemed to have taken birth on January 1, 1973, five and a half years before the Rules of 1978 were brought into force. It could never have been intended that this class of officers should exist in a vacuum where no rules operated. There was no vacuum because they were comprehended within the expression "Assistant Medical Officer" in the Rules of 1965 and the Rules of 1973, and therefore no amendment was considered necessary in those Rules to take cognizance of this class or sub-division.

20. We hold that the principle of selection by merit, enunciated in the Rules of 1965 and Rules of 1973 governed the promotion of Assistant Medical Officers (including Assistant Divisional Medical Officers) to the posts of Divisional Medical Officer before the Rules of 1978 came into force. Both before and after January 1, 1973, during the period before the Rules of 1978 came into force, the principle of "non-selection", that is seniority-cum-suitability in the lower grade, which was provided in the Rules of 1978 did not apply to the promotion of Assistant Medical Officers (including Assistant Divisional Medical Officers) to the posts of Divisional Medical Officers.

It is also beyond dispute that having regard to the provisions of the Rules of 1978, those Rules can apply only to promotions and appointments to the posts of Divisional Medical Officers made under them, that is from and after August. 12, 1978. They cannot affect promotions and appointments already made before that date. And as the act of confirmation does not amount to a fresh appointment but merely to setting the seal of approval on an appointment already made, it must follow that the Rules of 1978 cannot be applied for the purpose of confirming promotions and appointments made under the earlier Rules.

21. Consequently, upon all the considerations set forth earlier, the confirmation of the petitioners and all other officers appointed to the posts of Divisional Medical Officer before the Rules of 1978 came into force must be governed by the Rules of 1965 and the Rules of 1973. It may be noted that promotions and appointments made under the Rules of 1965 and on the repeal of those rules by the Rules of 1973, fall to be governed by the Rules of 1973, for while repealing the Rules of 1965. Rule 9 of the Rules of 1973 provides :

"Provided that anything done or any action taken under the rules so repealed shall be deemed to have been done or taken under the corresponding provisions of these rules".

Significantly, such a saving provision is absent in the Rules of 1978. This is as clear an indication as any that the scheme under the Rules of 1978 marked a complete departure from that embodied in the earlier Rules. We hold that the confirmation of the petitioners and other officers appointed as Divisional Medical Officers fall to be considered under the Rules of 1965 or the Rules of 1973 and not under the Rules of 1978. Accordingly, the rule of seniority-cum-suitability cannot be applied to the petitioners and the promotee respondents, and all promotee respondents who were promoted to the posts of Divisional Medical Officer subsequent to the petitioners must be regarded as junior to them, notwithstanding that they may have ranked senior to the petitioners in the grade of Assistant Medical Officers (including Assistant Divisional Medical Officers). This principle will rule even where confirmation is made zonewise, for in the absence of anything adverse in the officer's conduct, quality of work or other relevant factor confirmation should follow the order in which the original appointments have been made.

22. The respondents point out that the impugned Seniority List was prepared in 1979 when the Rules of 1978 were in force. and therefore the principle of seniority-cum-merit, was made the basis of the Seniority List. It is immaterial, in our opinion, that the Seniority List was prepared in 1979. The inter se seniority between the members of a service will ordinarily depend on the date of entry into the grade. That is an event governed by the rules of recruitment, whether it be direct recruitment or promotion on the basis of selection on merit or on the basis of seniority in the lower grade or some other factor. Where seniority is fixed in a grade according to the length of service in that grade, that implies a reference back to the date of entry. It is wholly immaterial when the Seniority List is prepared.

23. We approach the second part of this case now. The petitioners challenge the seniority assigned to the direct recruit respondents in the impugned Seniority List. They contend that the quota prescribed for direct recruitment and for promotion under Rules has been wrongly applied at the stage of confirmation when it should have been applied at the stage of appointment. They also contend that there is no provision for applying the principle of rotation of vacancies between direct recruits and promotees for the purpose of determining relative seniority between them. And even if it can be said that the directive issued in 1976 constitutes a valid rule of rotation, it is open to prospective operation only and cannot be applied retrospectively. Finally, the petitioners urge that the promotees should be held entitled to a weightage of five years on the basis of their service in the Class II posts of Assistant Medical Officers when considering their seniority in relation to direct recruits.

24. The case of the respondents that the inter se seniority between the direct recruits and the promotee Divisional Medical Officers has been carefully fixed with reference to the direct recruitment and promotional quotas in force from time to time, without affecting the date of confirmation of the Divisional Medical Officers. It is explained that where the promotees have been promoted in excess of their quota in a particular year they have had to be pushed down to a later year for absorption when due within their quota, and seniority has been fixed accordingly. It is pointed out that for some years direct recruitment could not be resorted to on the required scale as the restructuring of the Medical Department was under consideration with a view to improving the avenues of promotion. In consequence direct recruits appointed in later years were brought up

higher in the Seniority List in order to provide them their due position according to the quota of vacancies laid down for direct recruitment. The respondents also point out that Divisional Medical Officers were allowed to count seniority only from the date of permanent absorption if such absorption was within their quota. It is stated that from 1973 onwards representations were made by and on behalf of promotees Divisional Medical Officers to give them weightage in respect of their officiating service for the purpose of seniority in the cadre of Divisional Medical Officers vis-a-vis the direct recruits, and after giving due consideration to those representations and taking into regard judgment of this Court in *A. K. Subraman v. Union of India* (1975) 2 SCR 979: (AIR 1975 SC 483) it was decided that inter se seniority between direct recruit Divisional Medical Officers and promotee Divisional Medical Officers promoted permanently should be fixed on a rotational basis with reference to the direct recruitment and promotional quotas in force from time to time. It is maintained that the impugned Seniority List was prepared on the basis of those principles. The petitioners, it is urged, cannot claim inclusion in that list as none of them had been promoted as Divisional Medical Officers on a permanent basis against the quota of seats reserved for such promotions under the relevant Rules. The claim of the petitioners to a weightage of five years of substantive service rendered in the lower grade is disputed by the respondents on the ground that the principle providing such weightage for seniority has not been applied to the Medical Department of the Railways in view of the structural pattern of the Department.

25. The objection of the Respondents that the petitioners were not appointed to the posts of Divisional Medical Officers on a permanent basis and therefore they were not entitled to inclusion in the Seniority List can be disposed of shortly. We have already held while examining the case of the petitioners vis-a-vis the promotee respondents that the petitioners were entitled to be treated at par with substantively appointed Divisional Medical Officers for the purpose of fixing seniority, and the circumstance that they were appointed in an officiating capacity was of no significance in this regard. We have pointed out that for determining seniority among promotees the petitioners should be treated as having been appointed to permanent vacancies from the respective dates of their original appointments and the entire period of their officiating service should be taken into account as if that service was of the same character as that performed by the substantive holders of permanent posts. We have held further that the promotee respondents appointed subsequently to the petitioners must be regarded as junior to them even though senior in the lower grade. We have detailed the reasons for taking this view. Applying the same criteria for determining the seniority between the petitioners and the direct recruits, we are of opinion that the petitioners must be held senior to the direct recruits appointed subsequently to them. In this connection, it would be permissible to quote from the judgment of this Court in *O. P. Singla* (AIR 1984 SC 1595) (supra), where the question was of fixing seniority between temporary promotes and direct recruits (at P. 1605) :

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 have worked in those posts from five to twelve years

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 imperilled, though unwittingly, the reasonable expectations of the promotees 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."

And further (at Pp. 1606-07 of AIR) :

"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: (AIR 1977 SC 2051). 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 persons 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."

26. Considerable emphasis has been laid by the respondents on the fact that in the present case the pertinent Rules laid down the respective direct recruitment and promotional quotas from time to time and it was necessary to adjust the seniority between the direct recruit Divisional Medical Officers and the promotee Divisional Medical Officers in such a way that the quotas were maintained from year to year. This implied, it is urged, the rotation of vacancies between the two classes, reserving them for one or the other in an order which would ensure compliance with the quotas. The Rules themselves do not lay down any principle of rotation. They specify the quotas only. It was for the first time on May 26/27, 1976 that the Railway Ministry by its letter No. E(0)I-74/SR-6/10 directed that "the seniority of Class II officers of the Medical Department promoted to Class I Senior Scale against the quota earmarked for a particular year vis-a-vis the officers recruited against the direct recruitment quota for that year will be fixed on a rotational basis with reference to the direct recruitment and promotional quotas in force from time to time." This directive however can be of no assistance to the respondents. It may be open to an administration to work the quota rule through a principle of rotation but that implies that a quota rule is being actively operated and effect is being given to it. In the present case, it must be borne in mind that the quotas laid down by the Rules were not observed at all by the Railway Administration, and no direct recruitment was made during the years 1973 to 1976. Indeed the process of direct recruitment was employed on a substantial basis only from 1978 onwards. Only one officer appears to have been inducted by direct recruitment into the grade in 1977 and apparently none before. The grade of Divisional Medical Officers was manned by promotees selected on their merit under the Rules of 1965 and the Rules of

1973. There was power under Rule 7 of the Rules of 1973 to relax the provisions of those Rules which would include the provision requiring the observance of specified quotas for recruitment from promotional and from direct recruitment sources. It seems to us that the present case falls within the dicta of this Court in *A. Janardhana. v. Union of India* (1983) 3 SCC 601 : (AIR 1983 SC 769 at P. 775) where the Court said:

"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 started rendering service." and concluded with the observations (at Pp. 785-86 of AIR) :

"Even where the recruitment to a service is from more than one source and a quota is fixed for each service, yet more often the appointing authority to meet its exigencies of service exceeds the quota from the easily available source of promotees because the procedure for making recruitment from the market by direct recruitment is long prolix and time consuming. The Government for exigencies of service, for needs of public services and for efficient administration promotes persons easily available because in a hierarchical service one hopes to move upward. After the promotee is promoted, continuously renders service and is neither found wanting nor inefficient and is discharging his duty to the satisfaction of all, afresh recruit from the market years after promotee was inducted in the service comes and challenges all the past recruitments made before he was borne in service and some decisions especially the ratio in *Jaisinghani case* (AIR 1967 SC 1427) as interpreted in two *B. S. Gupta cases* (AIR 1972 SC 2627 and AIR 1974 SC 1618) gives him an advantage to the extent of the promotee being preceded in seniority by direct recruit who enters service long after the promotee was promoted. When the promotee was promoted and was rendering service the direct recruit may be a schoolian or college- going boy. He emerges from the educational institution, appears at a competitive examination and starts challenging everything that had happened during the period when he has had nothing to do with service If this has not a demoralising effect on service we fail to see what other inequitable approach would be more damaging. 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".

27. In the present case, there was no direct recruitment up to 1977 for certain administrative reasons, and no observance of the quota system embodied in the prevailing Rules. The Assistant Medical Officers were pressed into service, promoted as Divisional Medical Officers and were alone responsible for assuming the burden and discharging the functions and duties of those posts during all the years until direct recruitment was made. It would be grossly unjust and discriminatory in the circumstances to require them to be junior to direct recruits brought in some years later.

28. The respondents rely on A. K. Subraman (AIR 1975 SC 483) (supra). In that case, however, the facts which the Court took into consideration and upon which it proceeded to render judgment were different. The point raised in the present case falls more appropriately within the scope of the observations in A. Janardhana (AIR 1983 SC 769) (supra) to which elaborate reference has been made earlier. Indeed, when A. K. Subraman (supra) was considered subsequently by this Court in P. S. Mahal v. Union of India (1984) 4 SCC 545 : (AIR 1984 SC 1291) the Court expressly referred to the exception implied in Bishan Sarup Gupta v. Union of India 1975 Supp SCR 491 : (AIR 1972 SC 2627) as the effect of a serious deviation from the quota rule, and it recorded its agreement with A. Janardhan a (supra). It said (at P. 1321 of AIR):

"But this rotational rule of seniority can work only if the quota rule is strictly implemented from year to year. Some slight deviations from the quota rule may not be material but as pointed out by Palekar, J. in the Bishan Sarup Gupta case, "if there is enormous deviation, other considerations may arise". If the rotational rule of seniority is to be applied for determining seniority amongst officers promoted from different sources, the quota rule must be observed. The application of the rotational rule of seniority when there is large deviation from the quota rule in making promotions is bound to create hardship and injustice and result in impermissible discrimination .That is why this Court pointed out in A. K. Subraman case that :

'..... When recruitment is from two or several sources it should be observed that there is no inherent invalidity in introduction of quota system and to work it but by a rule of rotation. The existence of a quota and rotational rule, by itself, will not violate Article 14 or Article 16 of the Constitution..... It is the unreasonable implementation of the same which may, in a given case attract the frown of the equality clause. (SCC para 28, P. 333 SCC (L and S) P. 50)

The rotational rule of seniority is inextricably linked up with the quota rule and if the quota rule is not strictly implemented and there is large deviation from it regularly from year to year, it would be grossly discriminatory and unjust to give effect to the rotational rule of seniority. We agree wholly with the observation of D. A. Desai, J. in A. Janardhana v. Union of India that

'..... Where the quota rule is linked with the seniority rule if the first breaks down or is illegally not adhered to giving effect to the second would be unjust, inequitable and improper.' (SCC para 29, P. 621 : SCC (L and S) P. 487)

This was precisely the reason why the Court in the first Bishan Sarup Gupta case held that with the collapse of the quota rule, the rule of seniority set out in Rule 1(f)(iii) also went."

29. In our opinion, the directly recruited Divisional Medical- Officers are entitled to seniority only from the date of their entry into service and not from any anterior date, and therefore cannot enjoy a seniority above the petitioners. The date of appointment to a permanent vacancy, whether of a promotee or a direct recruit, will be the date for determining the seniority of the officer. We may also observe that there is no ground for detaining the confirmation of the petitioners merely because the quota reserved for direct recruitment has not been filled.

30. As regards the claim to weightage made by the petitioners on the basis of their service in the lower grade of Assistant Medical Officers, we find no substance in the claim because the administrative instructions issued under the Railway Board's letter No. E.54/SR-6/1/2 dated March 10, 1955, on which the petitioners rely, did not apply to the Medical Department of the Railways.

31. In the result, the writ petition is allowed, the Seniority List published by the Railway Ministry's letter No. 752-E/530 (E1A) dated November 22, 1979 as well as the appointments made to the posts of Medical Superintendents by the Railway Ministry's letter No. E(0)III-81 PM6/199 dated August 31, 1981 are quashed. The Railway Administration is directed to draw up a fresh Seniority List of Divisional Medical Officers in accordance with the principles laid down in this judgment and to make fresh appointments from among the Divisional Medical Officers to the posts of Medical Superintendents. The petitioners are entitled to their costs against respondents Nos. 1, 2 and 3.

Petition allowed.