

Ashok Gulati and Others

Vs

B. S. Jain and Others

Civil Appeal No. 149 of 1981

(A. P. Sen, S. Natarajan JJ)

17.12.1986

JUDGMENT

A. P. SEN, J. :-

1. In this appeal by special leave, the short question involved is whether respondents 1 and 2 were entitled to the benefit of the period of service rendered by them as Temporary Engineers on an ad hoc basis in the Irrigation Branch of the Public Works Department, State of Haryana i. e. prior to their appointment as Assistant Engineers on regular basis on April 21, 1975 along with the six appellants and respondents 5-24 for purposes of reckoning their eligibility for promotion to the post of Executive Engineer under Rule 6 (b) read with the Explanation thereto of the Haryana Service of Engineers, Class I, Public Works Department (Irrigation Branch) Rules, 1964, as amended in 1975, ("Class I Rules" for short) as also for purposes of their seniority in the cadre of Assistant engineers.

2. Facts bearing on the question are as follows. In response to an advertisement published in the Daily Tribune of February 6, 1970 inviting applications for appointment as Temporary Engineers on an ad hoc basis, respondent 1 B. S. Jain was appointed as a Temporary Engineer (ad hoc) w. e. f. January 2, 1971 for a period of six months i. e. after the coming into force of the Haryana Service of Engineers, Class II, Public Works Department (Irrigation Branch) Rules, 1970 ("Class II Rules" for short). Prior to this, respondent 2 S. L. Gupta was also appointed as a Temporary Engineer on an ad hoc basis w. e. f. May 19, 1969 by calling his name through the Employment Exchange i. e. subsequent to the coming into force of the Class II Rules. Their appointments were de hors the rules to meet the exigencies of service. In the letters of appointment issued to them, it was specified that their appointment was purely on an ad hoc basis for a period of six months from the date of their joining the post on a fixed salary of Rs. 400 plus allowance and their services were terminable without notice. They were specifically informed that the appointment would not entitle them to any seniority or other benefit under the service rules of the time being in force and would also not count towards increment in their salary. They were also intimated that the posts of Temporary Engineers in Class II service would be advertised in due course by the Haryana Public Service Commission and they should apply for such posts through the Commission, and that if they were not selected by the Commission, their services would be liable to be terminated without notice. Also that their inter se seniority among the Temporary Engineers would be in the order of merit in the list of candidates as settled by the Commission. The services of respondents 1 and 2 were however continued by the State Government from time to time, six months at a time, till the Secretary, Haryana Public Services Commission by his letter dated July 8, 1973 addressed to the Commissioner and Secretary to the State Government of Haryana, Public works Department (Irrigation Branch) conveyed the approval of the Commission to the ad hoc appointment of 251 Temporary Engineers beyond the period of six months till regular appointments were made to the posts through the Commission.

Accordingly, both these respondents continued to hold the posts of Temporary Engineers on ad hoc basis till the end of the year 1974 i. e. till they were recruited as Assistant Engineers through the Public Service Commission on April 21, 1975 on regular basis.

3. It appears that in response to an advertisement issued by the Public Service Commission in October 1973, respondents 1 and 2 appeared at a competitive examination along with the appellants and respondents 5-24 and were selected by the Public Service Commission for appointment as Assistant Engineers under the Haryana Service of Engineers, Class II, Public Works Department (Irrigation Branch) Rules, 1970. In the letter of appointment issued by the Commissioner and Secretary to Government of Haryana (Irrigation and Power Department) dated January 13, 1975 it was specified that inter se seniority of Assistant Engineers would be determined on the basis of the combined merit list prepared by the Public Service Commission. In the combined merit list prepared by the Commission, respondents 1 and 2 were placed very much below the appellants and respondents 5-24 being at serial Nos. 148 and 150 respectively. It may be stated that the merit list prepared by the Commission has never been questioned before us.

4. A few more facts. The State Government of Haryana by order dated December 20, 1978 promoted 62 Assistant Engineers including the appellants and respondents 5-24 as Executive Engineers on a purely ad hoc basis for a period of six months subject to certain terms and conditions, namely : (i) The promotions were subject to the approval of the Public Service Commission as also to the claims of other officers (ii) Such promotions were not to give any right to the officers for being appointed on a substantive basis as Executive Engineers and (iii) Such of the officers as had not passed the departmental professional and revenue examinations were required to pass such examinations within a period of one year or otherwise they were liable to be reverted to their original post. These ad hoc promotions of the appellants and respondents 5-24 were made in relaxation of the provisions contained in Rules 6 (b) and 15 of the Haryana Service of Engineers, Class I, Public works Department (Irrigation Branch) Rules, 1964. Presumably, the State Government excluded from consideration the case of respondents 1 and 2 promotion because in the combined seniority list they ranked below the appellants and respondents 5-24 being placed at serial Nos. 148 and 150 respectively.

5. The ad hoc promotion of appellants and respondents 5-24 was assailed by respondents 1 and 2 by a petition under Article 226 of the Constitution filed before the Punjab and Haryana High Court mainly on the ground that when qualified persons like them i. e. respondents 1 and 2 were eligible for being considered for promotion to the post of Executive Engineer under Rule 6 (b), there was no justification whatever for the State Government to grant general relaxation under the proviso thereof to make the ineligible persons eligible for promotion in denial of their claims. It was further pleaded that the State Government having relaxed the condition of eligibility under the proviso to Rule 6 (b) read with the Explanation thereof as regards eight years service in the case of promotion of the case of promotion of the appellants and respondents 5-24 as Executive Engineer on an ad hoc basis failed to appreciate that respondents 1 and 2 who were recruited along with them and has also put in more or less 3 1/2 years service as Assistant Engineers became entitled to the benefit of such relaxation and the action of the State Government in not considering their cases for such promotion was wholly arbitrary and was tantamount to denial of equal opportunity in the matter of employment in violation of Articles 14 and 16 (1) of the Constitution. It was also pleaded that the power conferred on the State Government to grant relaxation under Rule 22 was not a general power but a power to mitigate hardship in a particular case and thus the general relaxation granted by the State Government to some of the respondents who had not passed their departmental professional and revenue examinations was invalid. It was asserted that the State Government and

the Engineer-in-Chief, Irrigation Department, Haryana had wrongly treated respondents 1 and 2 as ineligible for promotion on the ground that the period from January 1971 and May 1969 up to April 21, 1975 i. e. the period during which respondents 1 and 2 remained employed as Temporary Engineers on ad hoc basis, could not be treated as period in that class of service within the meaning of Rule 6 (b) i. e. in Class II service.

6. The specific stand taken by the State Government in the return filed before the High Court was that respondents 1 and 2 were recruited to the post of Assistant Engineer on April 21, 1975 and thus had only about 3 1/2 years service on December 20, 1978 to their credit when appellants and respondents 5-24 were promoted as Executive Engineers on an ad hoc basis. Prior to their appointment as Assistant Engineers, respondents 1 and 2 had been appointed as Temporary Engineers on ad hoc basis de hors the rules and under the terms of appointment they were not entitled to any seniority or other benefit under the service rules as a result of such appointment. Further, it was pleaded that respondents 1 and 2 in the seniority list prepared by the Public Service Commission were ranked junior to the appellants and respondents 5-24 and therefore they were not entitled to be considered for promotion.

7. A learned Single Judge (R. N. Mittal, J.) by his judgment dated October 8, 1980 quashed the impugned order of the State Government making ad hoc promotions of the appellants and respondents 5-24 and directed the State Government to reach a decision afresh as regards the ad hoc promotions with advertence to the observations made by him. In his judgment the learned Single Judge repelled the contention of respondents 5-24 for being considered for promotion since none of them had completed eight years' service as Assistant Engineer on the ground that the State Government was empowered in terms of proviso to Rule 6 (b) to relax generally, in public interest, the condition regarding eight years' experience for reasons to be recorded in writing. He found on perusal of the records placed before him that reasons for the relaxation in public interest of the condition of eight years' service imposed by Rule 6 (b) had in fact been recorded for reducing the period to 3 1/2 years in consultation with the Finance Department. He accordingly held that the ad hoc promotion of the appellants and respondents 5-24 was not invalid on that account. The learned Single Judge however accepted the contention of respondents 1 and 2 that they were entitled to the benefit of the period of continuous officiation as Temporary Engineers on an ad hoc basis from January 1971 and May 1969 to April 21, 1975 in reckoning eight years' experience in that class of service within the meaning of Rule 6 (b) i. e. Class II service by reason of Explanation to Rule 6 (b) and were therefore eligible for promotion to the post of Executive Engineer under Rule 8 (2) in view of the definition of the expression "Temporary Engineer" contained in Rule 2 (5), as amended in 1975. He also upheld their contention that the power conferred on the State Government under Rule 22 was not a general power of relaxation but a power exercisable only to mitigate any undue hardship in the case of a particular individual and therefore the impugned order of the State Government permitting relaxation in the case of respondents 9, 10 and 11 Gyan Singh, P. D. Kadian and C. P. Goel as regards the passing of the departmental professional and revenue examination as required by Rules 15 was invalid. Upon that view, the learned Single Judge allowed the writ petition and quashed the impugned order of the State Government for the ad hoc promotion of the appellants and respondents 5-24 as Executive Engineers. Incidentally, the judgment of the learned Single Judge leaves untouched the impugned order insofar as it relates to the ad hoc promotion of 37 Assistant Engineers to the post of Executive Engineer.

8. Thereupon, the appellants preferred an appeal under Clause 10 of the letters patent but the appeal was dismissed in limine by a Division Bench (P. C. Jain and C. S. Tiwana, JJ.) by its order dated November 6, 1980. The learned Judges stated that they were in full agreement with the view

expressed by the learned Single Judge. The appellants apparently advanced a contention that the appointment of respondents 1 and 2 as Temporary Engineers on an ad hoc basis was contrary to para. 8.312 of the Manual of Administration and therefore the period during which they worked as Temporary Engineers (ad hoc) could not be taken into consideration. The learned Judges repelled, the contention on the ground that no such point was taken before the learned Single Judge.

9. We must at the very outset observe that the judgment of the learned Single Judge quashing the impugned order of the State Government for the promotion of the appellants and respondents 5-24 as Executive Engineers on an ad hoc basis on the ground that the State Government could not have relaxed the condition of passing the departmental professional and revenue examinations prescribed under Rule 15 of the Class I Rules by taking recourse to Rule 22 which did not confer a general power of relaxation can hardly be sustained. We are afraid, the learned Single Judge was completely misled in taking the view that he did. This was not a case of relaxation at all but a question of prescribing the period during which such examinations had to be cleared as required under Rule 15. Rule 15 in terms provides that the departmental professional and revenue examinations for purposes of promotion to the Class I service have to be passed within such period as may be prescribed. The word "prescribed" in Rule 15 clearly empowers the State Government to provide for the period during which the promoted officers had to pass the departmental test. In terms of that rule, the State Government by the impugned order directed that the officers who had not passed the departmental professional and revenue examinations were required to pass such examinations within a period of one year otherwise they were liable to be reverted to their original post. It must be said in all fairness that learned counsel for respondents 1 and 2 did not support this part of the judgment.

10. After having heard learned counsel for the parties quite at some length in a hearing lasting over several days, we feel that irrespective of the merits of the contentions advanced, no useful purpose would be served in maintaining the judgment of the High Court insofar as it quashes the impugned order of the State Government dated December 20, 1978 for the promotion of the appellants and respondents 5-24 as Executive Engineers on an ad hoc basis after a lapse of such a long time as it would create unnecessary administrative complications. During the hearing we expressed our doubts about the wisdom of the High Court in entertaining the writ petition of respondents 1 and 2 particularly when the impugned order of the State Government making promotion of the 62 Assistant Engineers including the appellants and respondents 5-24 as Executive Engineers was purely on an ad hoc basis for a period of six months and expressly made subject to the rights of other officers. Instead of interfering with the impugned order of the State Government the proper course for the High Court should have been to issue a direction to the State Government to consider the cases of the eligible officers including respondents 1 and 2 for ad hoc promotion as Executive Engineer if their turn was due for such promotion according to their placement in the seniority list and it should have in the meanwhile allowed the appellants and respondents 5-24 continue in their posts as Executive Engineers (ad hoc) subject to the condition that while considering their cases for promotion the State Government would not take that circumstance into consideration that they had continued to function as Executive Engineers on an ad hoc basis.

11. That course commends itself to us for another reason as well. Although the High Court by its judgment and order dated October 8, 1980 quashed the impugned order of the State Government dated December 20, 1978 making the ad hoc promotions and issued a direction that the government should reach a decision afresh in the matter, the fact remains that neither the judgment of the High Court nor the directions made by it have taken effect. On the contrary, this Court while granting special leave on January 14, 1981 stayed the operation of the judgment of the High Court. As a consequence, the result has been that the appellants and respondents 5-24 have continued to function

as Executive Engineers on an ad hoc basis for the last about eight years under the interim order of stay. Incidentally, the judgment of the High Court leaves untouched the promotion of 37 Assistant Engineers and Executive Engineers. The State Government will also have to give effect to the decision of this Court in *A. S. Parmar v. State of Haryana* laying down that a degree in Engineering was not an essential qualification for promotion of Assistant Engineers in the Irrigation Branch to the Cadre of Executive Engineers in Class I service under Rule 6 (b) of the Class I Rules and the therefore the Assistant Engineers who are diploma holders are equally eligible for such promotion. The State Government in the Public Works Department (Irrigation Branch) by a notification dated June 22, 1984 purported to effect an amendment to Rule 6 (b) of the Class I Rules with a view to nullify the decision of this Court in *A. S. Parmar* case. By a separate judgment in the connected Writ Petitions Nos. 630-32 of 1984 delivered today, we have struck down the impugned notification as offending against Articles 14 and 16 (1) of the Constitution and also as ultra vires the State Government by reason of the proviso to Section 82 (6) of the Punjab Reorganisation Act, 1966. It appears that the State Government has been treating a degree in Engineering referred to in clause (a) of Rule 6 as an essential qualification for promotion to the post of Executive Engineer in Class I service in the case of officers in Class II service presumably on the view expressed by the Punjab and Haryana High Court in *O. P. Bhatia v. State of Haryana*. The controversy was settled by the decision of this Court in *A. S. Parmar* case and it overruled the decision of the High Court in *O. P. Bhatia* case and held on a consideration of the relevant rules that the qualification of degree in Engineering was not necessary in the case of officers in Class II service for promotion to the post of Executive Engineer. That apart, we must deal with the appeal on merits as the judgment of the High Court leaves much to be desired.

12. Issues raised in this appeal by special leave are of far-reaching significance to the civil services. It involves a claim by persons who had been in employment in the government service on a purely ad hoc basis de hors the rules, that they were entitled upon their absorption to the post on a regular basis, to the benefit of the period of their continuous officiation as temporary employees on ad hoc basis for determining their eligibility for promotion to the higher grade or post. The questions presented are whether the principles laid down in *N. K. Chauhan v. State of Gujarat* and *S. B. Patwardhan v. State of Maharashtra*, reiterated in *Baleshwar Dass v. State of Uttar Pradesh* and subsequently followed in several decisions, that ordinarily in the absence of any specific rule of seniority governing the cadre or service, the length of continuous officiation should be counted in reckoning seniority as between direct recruits and promotees, should also be extended in determining seniority of such ad hoc employees vis-a-vis direct recruits, and whether the failure on the part of the government to count the entire period of officiation as such ad hoc employees would be per se arbitrary and irrational and thus violative of Articles 14 and 16 (1) of the Constitution inasmuch as the temporary service in the post in question was not for a short period intended to meet some emergent or unforeseen circumstances, but to meet the exigencies of the service. It is asserted that the recent pronouncement of this Court in the case of *Narender Chadha v. Union of India* supports this view. The argument at first blush appears to be plausible but on deeper consideration is not worthy of acceptance. We proceed to give reasons therefor.

13. We are not aware of any principle or rule which lays down that the length of continuous officiation/service is the only relevant criterion in determining seniority in a particular cadre or grade, irrespective of any specific rule of seniority to the contrary. It is necessary to emphasise that the principles laid down in the two leading cases of *N. K. Chauhan* and *S. B. Patwardhan*, reiterated in *Baleshwar Dass* case and subsequently followed in several decisions are not an authority for any such proposition. These decisions particularly that in *Baleshwar Dass* case clearly lay down that ordinarily and in the absence of any specific rule of seniority governing the cadre or service, the

length of continuous officiation should be counted in reckoning seniority as between direct recruits and promotees. These authorities nowhere lay down that the same principle i. e. the length of continuous officiation must be the sole guiding factor and the only criterion in determining seniority of such ad hoc employees vis-a-vis direct recruits.

14. The contention on behalf of the appellants firstly is that the High Court was clearly in error in holding that the entire period of service of respondents 1 and 2 as Temporary Engineers on ad hoc basis i. e. the period from January 1971 and May 1969 to April 21, 1975 had to be counted not only for purposes of their seniority under Rule 8 (2) of the Class I Rules but also for the purpose of their eligibility for promotion to the post of Executive Engineers under Rule 6 (b). It is said that the High Court failed to appreciate that respondents 1 and 2 were not recruited as Temporary Engineers under the instructions contained in the Manual of Administration issued under the Punjab Service of Engineers, Class II, Public Works Department (Irrigation Branch) Rules, 1941 or under the Punjab Service of Engineers, Class II, Public Works Department (Irrigation Branch) Rules, 1970, but their appointment as Temporary Engineers was purely on an ad hoc basis de hors the rules and therefore they did not fall within the ambit of the definition of the expression "Class II Service" as defined in Rule 2 (5), as amended in 1975. Secondly, the High Court failed to take into account the fact that respondents 1 and 2 became members of Class II service only on April 21, 1975 when they were recruited as Assistant Engineers on a regular basis through the Public Service Commission. Till then they did not answer the description of "Temporary Engineers" as defined in Rule 2 (5). They did not even figure in the notification dated May 18, 1982 issued by the State Government under Rule 3 constituting the service of Engineers as Class II service w. e. f. December 25, 1970. It must therefore logically follow that the service rendered by them as Temporary Engineers on ad hoc basis prior to their recruitment as Assistant Engineers in 1975 could not be treated to be service in that class within the meaning of Rule 6 (b) of the Class I Rules. Likewise, Rule 8 (2) which speaks of any service rendered as Temporary Engineer must be construed accordingly as meaning service rendered by a Temporary Engineer recruited in the manner provided by the instructions contained in Manual of Administration issued under the 1941 Rules or recruited as such under the 1970 Rules. Lastly, the decision in Baleshwar Dass case does not lay down any proposition that persons employed on a purely ad hoc or fortuitous basis like respondents 1 and 2 are entitled as a matter of law to the benefit of their period of ad hoc service and the two later decisions in G. P. Doval v. Chief Secretary, Government of U. P. and Narender Chadha are of little assistance. These submissions, in our opinion, must prevail.

15. In reply, the main contention of learned counsel for respondents 1 and 2 is that respondents 1 and 2 upon their absorption to the post of Assistant Engineer on a regular basis on April 21, 1975 were entitled to the benefit of the entire period of officiation as temporary Engineers on an ad hoc basis i. e. the period from January 1971 and May 1969 to April 21, 1975 and the failure of the government to count such period of their ad hoc service was per se arbitrary, irrational and thus violative of Articles 14 and 16 (1) of the Constitution inasmuch as the service rendered by them as Temporary Engineers (ad hoc) was not for a short period intended to meet some emergent or unforeseen circumstances, but to meet the exigencies of the service and there is no reason why the principles laid down in Baleshwar Dass case should not be extended in determining the seniority of such ad hoc employees vis-a-vis direct recruits. Secondly, he contends that exercise of the power of relaxation of the condition of eight years' service for purposes of eligibility conferred on the State Government under the proviso to Rule 6 (b) is conditioned by the obligation to record reasons in writing which requirement was mandatory. There was failure on the part of the government to record reasons therefore or to indicate any basis to show that such relaxation was in public interest or to indicate any basis to show that such relaxation was in public interest. Further, the words "Class

II service" in Rule 8 (2) must bear the same meaning as the expression "Class II service" as defined in Rule 2 (5). The artificial definition of "Class II service" introduced by amendment of Rule 2 (5) in 1975 was obviously to bring persons who were not Assistant Engineers i. e. members of Class II service within the Zone of consideration for purposes of promotion the post of Executive Engineer under Rule 6 (b) of Class I Rules. Furthermore, the State Government having relaxed the condition of 8 years' service by recourse to the proviso to Rule 6 (b), respondents 1 and 2 were similarly situate as the appellants and respondents 5-24 as they were all recruited together as Assistant Engineers in Class II service in 1975 and they had all rendered about 3 1/2 years' service in that class and therefore failure on the part of the State Government to consider the case of respondents 1 and 2 for purposes of promotion to the post of Executive Engineer was tantamount to the total exclusion of a class within a class and was thus per se discriminatory. Lastly, the action of the State Government in making as hoc promotion of the appellants and respondents 5-24 was wholly mala fide. Learned counsel wanted us to draw an inference of mala fide from the fact that the Private Secretary to Chief Minister was present at a meeting held in the room of the Irrigation Minister where the list of promotion was settled. It is suggested that initially the names of respondents 1 and 2 figured in the list but later on wholly extraneous considerations their names were deleted.

16. It would be convenient at this stage to refer to the relevant provisions of the Punjab Service of Engineers Class I, PWD (Irrigation Branch) Rules, 1964, as amended in 1975. The amendment effected in 1975 substituted a new Rule 2 (5) for the existing Rule 2 (5) and it defines the expression "Class II service" as follows :

2 (5). "Class II service" shall, for the purpose of promotion to the service, comprise of members of the Haryana Service of Engineers, Class II (Irrigation Branch); Temporary Engineers; Officiating Sub-Divisional Officers and Officiating Assistant Design Engineers; except those promoted in excess of the quota fixed under Rule 6 of the Haryana Service of Engineers, Class II, Public Works Department (Irrigation Branch) Rules, 1970.

The qualifications of persons eligible for appointment are prescribed in Rule 6 which is in these terms :

6. Qualifications. - No person shall be appointed to the service unless he -

(a) Possesses one of the University Degrees or other qualifications prescribed in Appendix B of these Rules;

Provided that government may waive this qualification in the case of a particular officer belonging to Class II service;

(b) In case of an appointment by promotion from Class II services, has completed in that class of service for a period of ten years from the commencement of these rules, six years service and after that period eight years service;

Provided that if it appears to be necessary to promote an officer in the public interest, the government may, for reasons to be recorded in writing either generally or in any individual case reduce the period of six or eight years to such extent as it may deem proper in consultation with the Finance Department.

Explanation. - For the purpose of this clause in computing of the period of six or

eight years any service rendered as a Temporary Engineer shall be taken into account.

17. We may next set out Rule 8 which deals with the method of promotion :

8. Appointment by promotion. - (1) A Committee consisting of the Chairman of the Public Service Commission and where the Chairman is unable to attend any other member of the Commission representing it, the Secretary, PWD (Irrigation Branch) and the Chief Engineer, Punjab, PWD Irrigation Branch, shall be constituted.

(2) The government shall prepare a list of eligible and suitable persons for promotions in order of their seniority in Class II service, which shall be reckoned :

(a) in the case of a member of the Haryana Service of Engineers, Class II (Irrigation Branch) from the date of his continuous officiation as Sub-Divisional Officer or Assistant Design Engineer or appointment as Temporary Engineer, as the case may be :

(b) in the case of a Temporary Engineer from the date of his appointment as such.

18. As a matter of construction, the words "Class II service" in Rule 8 (2) introduced by amendment in 1975 must be construed to have the same meaning as the expression "Class II service" as defined in Rule 2 (5). We find the language employed by the framers of the rules in the definition clause in Rule 2 (5) has been departed from in the definition of the expression "Class II service" and it is generally but not always a fair presumption that the alteration in the languages used in the new definition in Rule 2 (5) was intentional. Prior to the amendment in 1975, the expression, "Class II service" as defined in Rule 2 (5) meant the members of Class II service including Temporary Engineers. As the State stood in need of many more Executive Engineers it became essential to take steps to recruit not only persons who strictly belong to Class II service proper but also to bring within the zone of consideration others who are not members of Class II service e. g. Offg. Sub-Divisional Officers and Offg. Assistant Design Engineers who would not be so included. The key to the interpretation of the definition clause in Rule 2 (5) is the words "for the purpose of promotion". The effect of the enlarged definition of Class II service in Rule 2 (5) is that these words when found in the Act must, for the purpose of promotion, be understood in that context in a certain sense i. e. to include not only members of Class II service including Temporary Engineers but also Offg. Sub-Divisional Officers and Offg. Assistant Design Engineers who, but for the interpretation clause, would not be so included. That would be in consonance with the purpose and object of the amendment. There is reason why the words "Class II service" in Rule 8 (2) introduced in 1975 must bear the same meaning as the expression "Class II service" as defined in Rule 2 (5) as both the provisions deal with the same subject i. e. promotion of members of Class II service to the post of Executive Engineer in Class I service. The mode of promotion to the post of Executive Engineer is as laid down in Rule 8 (2). Now, Rule 8 (1) remains unaltered. Rule 8 (1) directs that a committee consisting of the Chairman of the Public Service Commission or where the chairman is unable to attend any other member of the Commission representing it, Secretary to the Government, PWD (Irrigation Branch) and the Chief Engineer, Punjab, Irrigation Branch shall be constituted. Under Rule 8 (2) introduced in 1975, the government has to prepare a list of eligible and suitable persons for promotion in order of their seniority in Class II service which shall be reckoned (a) in the case of a member of the Haryana Service of Engineers, Class II, Irrigation Branch, from the date of his continuous officiation a Sub-Divisional Officer or Assistant Design Engineer or appointment as

Temporary Engineer, as the case may be. (b) In the case of a Temporary Engineer from the date of his appointment as such. These provisions can lead to no other conclusion but that the list of eligible and suitable persons for promotion has to be drawn not only comprising of regular members of Class II service including Temporary Engineers in order of their seniority but also of Offg. Sub-Divisional Officers or Offg. Assistant Design Engineers in that class of service from the date specified therein. Apparently, the requirements of Rules 8 (1) and 8 (2) have not been complied with. All that exists is the combined seniority list of Assistant Engineers belonging to Class II service in order of their seniority prepared by the Public Service Commission which incidentally has never been challenged.

19. The meaning of the word "as" in the collection of the words "any service rendered as a Temporary Engineer" in Explanation to Rule 6 (b) of the Class I Rules must obviously mean "in the capacity of". In *Dr Asim Kumar Bose v. Union of India* the question was whether the appellant who was a Radiologist in the Maulana Azad Medical College which was a post belonging to Specialist Grade II could be appointed to the post of professor of Radio-Therapy in that College by direct recruitment under Rule 8 (2) of the Central Health Service (Amendment) Rules, 1966. In 1971 there were certain amendments in the Rules prescribing the mode in which the posts of Professor and Associate Professor could be filled in and paragraphs 2 (b) and 3 of Annexure I to the Second Schedule and sub-rule (2-A) to Rule 8 were inserted which brought about a change. These amendments brought about a change inasmuch as they provided for a vertical channel of promotion to the teaching post up to the post of Associate Professor. At p. 363 [SCC (L&S) p. 203, para. 34] of the Report this Court referred to the report of the Third Pay Commission where it was observed at p. 173 :

While the Specialists on the teaching side can hold posts of hospital specialists, the latter cannot be promoted to teaching posts because of lack of teaching experience.

Presumably, the Ministry of Health on that view held that the word "as" in paragraphs 2 (b) and 3 of Annexure I to the Second Schedule and sub-rule (2-A) of Rule 8 makes holding of a post in the cadre a condition precedent to the post of a Professor or an Associate Professor. In that context, it was observed : [SCC p. 363, SCC (L&S) p. 203, para. 34]

Normally, a Professor or an Additional Professor in a medical college or a teaching institution can be appointed by direct recruitment from amongst persons holding the post of Associate Professor or Assistant Professor in the concerned speciality in a medical college or a teaching institution having at least six years' teaching experience out of 12 years' standing in the Grade through the Union Public Service Commission. An Associate Professor in the medical college or a teaching institution can only be promoted from amongst persons holding the post of Reader or Assistant Professor having at least five years' teaching experience in the concerned speciality by the Departmental Promotion Committee. We are inclined to the view that the word "as" in the collocation of the words used "at least six years" experience as Associate Professor/Assistant Professor/Reader" in paragraph 2 (b) and of the words "at least five years" experience as Reader/Assistant Professor" in paragraph 3 and sub-rule (2-A) of Rule 8 must be interpreted in its ordinary sense as meaning teaching experience gained "in the capacity of". In *Black's Law Dictionary*, 5th edn., p. 104, the meaning of the word "as" as given is : "Used as an adverb, etc., means like, similar to, of the same kind, in the same manner, in the manner in which". In *Shorter Oxford Dictionary*, 3rd edn., p. 111, the word "as" is stated to mean : "The same as, in the character, capacity, role of".

In spite of all this, the contention of respondents 1 and 2 that they were entitled to the benefit of the

period of service rendered by them as Temporary Engineer on an ad hoc basis w. e. f. January 2, 1971 and May 19, 1969 respectively prior to their appointment as Assistant Engineers on regular basis on April 21, 1975 for purposes of reckoning their eligibility under Rule 6 (b) read with the Explanation thereto of the Class I Rules as also for purposes of their seniority in the cadre of Assistant Engineers, cannot prevail. They were not recruited under paragraphs 8.312 to 8.316 of the Manual of Administration, Public Works Department. In the erstwhile State of Punjab there was a distinct class of Engineers designated as Temporary Engineers. All persons appointed as Temporary Engineers had to face the Public Service Commission for selection to the post under Rules 4 and 5 of the Punjab Service of Engineers, Class II, PWD (Irrigation Branch) Rules, 1941. Under the Rules the term "Temporary Engineer" was defined in Rule 2 (f) to mean an engineer in the service of the Public Works Department, Punjab whose appointment was temporary within the meaning of the Fundamental Rules, was pensionable and who was not a member of any regular service. The word "service" as defined in Rule 2 (g) of the Rules meant the Punjab Service of Engineers, Class II, Irrigation Branch. Rule 5 provided that to Temporary Engineer could be taken into service or member of the Overseers Engineering Service, Punjab promoted unless he had been declared by the Commission on the report of the Chief Engineer to be fit for the service, was serving the department and held an appointment for not less than two years continuously before the date of entry into the service.

20. Next came the Punjab Service of Engineers, Class II, PWD (Irrigation Branch) Rules, 1970. The expression "member of service" was defined in Rule 2 (12) to mean an officer appointed substantively to a cadre post. The definitions of the word "service" and of the term "Temporary Engineer" in Rule 2 (15) and (16) remained the same except for the difference that the word "temporary" carried the meaning as given in the Civil Service Regulations in place of the Fundamental Rules. Rule 6 provided for the manner of recruitment of Temporary Engineers from different sources, in the proportions and the order indicated. Sub-rule (3) thereof provided that in case a candidate was not available from sources 1 and 3 i. e. by direct recruitment or by promotion, and a person had to be appointed in public interest, as a stop-gap arrangement, the period of service rendered by such person shall not be reckoned for the purpose of seniority. Sub-rule (4) provided that the government could fill a short term vacancy in the exigencies of public service, after recording specific reasons, for the period not exceeding six months from the Overseers Engineering Service, Irrigation Branch. It is quite apparent under these rules that appointment of respondents 1 and 2 as Temporary Engineers on an ad hoc basis was de hors the rules.

21. It may seem to be somewhat illogical that though respondents 1 and 2 were appointed as Temporary Engineers on an ad hoc basis, they should be deprived of the period of their officiation as such till they were absorbed to the post of Assistant Engineer on a regular basis through the Public Service Commission on April 21, 1975. That is a legal consequence which cannot be avoided on well settled principles. In their case the length of continuous officiation cannot be the basis for reckoning their seniority since they never became members of Class II service prior to their absorption. On the terms of appointment of respondents 1 and 2, it was specifically provided that their appointment was purely on an ad hoc basis for a period of six months from the date of their joining the post on a fixed salary of Rs. 400 + allowances and that their services were liable to be terminated without notice. It was also specifically mentioned that the appointment as such Temporary Engineers on ad hoc basis would not count towards seniority or increment in their salary. It was further stated that the posts of Temporary Engineers in Class II service would be advertised in due course by the Public Service Commission and that if they were not selected by the Commission, their services would be terminated without notice. They were also intimated that their inter se seniority among the Temporary Engineers so recruited would be in the order of merit in the list of

candidates as settled by the Commission. It is common ground that respondents 1 and 2 were not recruited through the Public Service Commission. It was not till July 8, 1973 that the Secretary to the Commission conveyed to the State Government the approval of the Commission to the ad hoc appointment of 251 Temporary Engineers beyond the period of six months till regular appointments were made in the posts of Assistant Engineers through the Commission. These are the facts on which there is no doubt or difficulty as to the principles applicable.

22. According to the accepted canons of service jurisprudence, seniority of a person appointed must be reckoned from the date he becomes a member of the service. The date from which seniority is to be reckoned may be laid down by rules or instructions (a) on the basis of the date of appointment (b) on the basis of confirmation (c) on the basis of regularisation of service (d) on the basis of length of service, or (e) on any other reasonable basis. It is well settled that an ad hoc or fortuitous appointment on a temporary or stop-gap basis cannot be taken into account for the purpose of seniority even if the appointee was qualified to hold the post on a regular basis; as such temporary tenure hardly counts for seniority in any system of service jurisprudence. In somewhat similar circumstances, in the case of *State of Gujarat v. C. G. Desai* the question for consideration was whether in the case of Deputy Engineers directly recruited through the Public Service Commission by competitive examination, the service, if any, rendered by them as officiating Deputy Engineers prior to their appointment to Class II service i. e. during the pre-selection period, could be taken into account for purposes of their eligibility for promotion as Executive Engineers under Rule 7 (2) of the Bombay Engineering Service Rules, 1960 which provided for a period of 7 years' experience in Class II service. The government's stand was that the service rendered by the direct recruits prior to their appointment to the Class II service could not be taken into account in computing their eligibility of 7 years' experience in that class of service and the court upheld the stand. It was contended on behalf of the promotees that if for promotion to the post of Executive Engineer in Class I service the period of eligibility of 7 years' experience in Class II service was to start from the date of absorption in that class of service, then, for most of them there would be rare chance of ever getting promotion as officiating Executive Engineers as many of them had less than 7 years to go before attaining the age of superannuation. The contention was that Rule 7 (2) of the Rules did not permit discrimination between the promotees and direct recruits in the matter of computing 7 years' service for further promotion as officiating Executive Engineers. The contention was repelled on the ground that direct recruits and promotees in Class II service constituted two distinct groups or classes and the classification was based on intelligible differential, and it was observed : [SCC pp. 193-4, SCC (L&S) P. 122, para. 17]

If a person, like any of the respondents, to avoid the long tortuous wait leaves his position in the "never ending" queue of Temporary/Officiating Deputy Engineers etc., looking for promotion, and takes a short cut through the direct channel, to Class II service, he gives up once for all, the advantages and disadvantages that go with the channel of promotion and accepts all the handicaps and benefits which attach to the group of direct recruits. He cannot, after his direct recruitment, claim the benefit of his pre-selection service and thus have the best of both the worlds. It is well settled that so long as the classification is reasonable and the persons falling in the same class are treated alike, there can be no question of violation of the constitutional guarantee of equal treatment.

In taking that view, that court avoided a doctrinaire approach and approached the problem from a pragmatic view. It was said : [SCC p. 194, SCC (L&S) P. 122, para. 18]

If the claim of the respondents to the counting of their pre-selection service is conceded, it will create serious complications in running the administration; it will result in inequality of treatment rather than in removing it. If the pre-selection service as Officiating Deputy Engineers of direct recruits having such service, is taken into account for the purpose of promotion, it would create two classes amongst the same group and result in discrimination against those direct recruits who had no such pre-selection service to their credit.

23. It would be repugnant to all accepted concepts of service jurisprudence if the claim of persons like respondents 1 and 2 who were employed as Temporary Engineers on ad hoc basis de hors the rules for six months at a time were extended the benefit of their continuous officiation as such ad hoc employees in reckoning their seniority vis-a-vis direct recruits in considering their eligibility under Rule 6 (b) of the Class I Rules for promotion to a higher grade or post of Executive Engineer. In *A. P. M. Mayankutty v. Secretary* the question was whether the period of service rendered by such ad hoc employees appointed under Rule 10 (a) (i) (1) of the Madras State and Subordinate Services Rules purely on an ad hoc basis and as a matter of stop-gap arrangement, were entitled to count for the purpose of seniority, their period of service on ad hoc basis during which they served in a stop-gap arrangement. It was held that such service could not be taken into account for the purpose of seniority from the date of their initial appointment. The court speaking through Chandrachud, C. J. after referring to the provision contained in Rule 10 (a) (i) (1) of the Rules, stated : [SCC pp. 363-64, SCC (L&S) pp. 277-78, para. 7]

This provision contemplates the making of temporary appointments when it is necessary in the public interest to do so to an emergency owing which has arisen for filling a vacancy immediately. Such appointments, in terms, are permitted to be made otherwise than in accordance with the rules. The letters of appointment issued to the appellants mention expressly that they were appointed under Rule 10 (a) (i) (1), that the appointments were "purely temporary necessitated on account of the non-availability of regularly selected candidates conferring no claim for future appointment as Junior Engineers.... and that the appointment is liable to be terminated at any time without previous notice". In face of the provisions of the rule and the terms of the appointment it seems to us clear that the appellants were appointed purely as a matter of stop-gap or emergency arrangement. Since such service cannot be taken into account for purposes of seniority, the appellants cannot contend that the entire service rendered by them from the date of their initial appointment must count for purposes of seniority.

The court distinguished the case of *C. P. Damodaran Nayar v. State of Kerala* on the ground that the temporary service rendered by a District Munsiff recruited in a regular manner through the Public Service Commission could not, by any stretch of imagination, be considered to be purely as a matter of fortuitous or stop-gap arrangement. The distinguishing features in *Mayankutty* case, in the words of Chandrachud, C. J. were : [SCC p. 365, SCC (L&S) p. 279, para. 10]

The distinguishing feature of that case, which is highlighted in the judgment of the court, is that the appellant therein was "appointed in a regular manner through the Public Service Commission" and therefore his appointment could not "by any stretch of imagination" be described as having been made to fill a purely stop-gap or fortuitous vacuum. In our case the initial appointment was not only made without any reference to the Public Service Commission but the various rules and the term of

the appellants' appointment to which we have drawn attention show that the appellants were appointed purely as a matter of fortuitous or stop-gap arrangement. The concurrence of the Public Service Commission to the continuance of the appellants in the posts filled by them, first after the expiry of three months and then after the expiry of one year, was obtained not with a view to regularising the appointments since their inception but for the purpose of meeting the requirements of a provision under which such concurrence is necessary to obtain if an appointment made without selection by the Public Service Commission is required for any reason to be continued beyond three months or a year.

That precisely is the case here. It must therefore be held that the period of service rendered by persons like respondents 1 and 2 who were appointed on ad hoc basis purely as a stop-gap arrangement for six months at a time de hors the rules, cannot be considered for purposes of their seniority in Class II service or in reckoning their eligibility of 8 years' service in that class of service under Rule 6 (b) of Class I Rules.

24. We feel it necessary to emphasise that the principles laid down by this Court in the two cases of N. K. Chauhan and S. B. Patwardhan which were reiterated in Baleshwar Dass case and subsequently followed in several other cases do not lay down any principle to the contrary. These cases are not an authority for the proposition relied upon. On the contrary, they clearly proceed on the principle that persons appointed on an ad hoc basis or for fortuitous reasons or by stop-gap 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 the case of S. B. Patwardhan, Chandrachud, C. J. observed : [SCC p. 424, SCC (L&S) p. 416, para. 51]

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.

In Baleshwar Dass case, Krishna Iyer, J. affirmed the principle in his own charismatic and picturesque language : [SCC pp. 237-38, SCC (L&S) p. 54, para 20]

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.

We must also refer to the decision in *A. Janardhana v. Union of India* where Desai, J. had occasion to observe : [SCC pp. 610-11, SCC (L&S) pp. 476-77, para 15]

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 fact 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 started 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.

To the same effect are the decisions in *O. P. Singla v. Union of India*, *G. S. Lamba v. Union of India*, *P. S. Mahal v. Union of India* and *Pran Krishna Goswami v. State of W. B.* It must now be taken as well established after these decisions that in the absence of any other valid principle of seniority, the inter se seniority between direct recruits and promotees should as far as possible be determined by the length of continuous service whether temporary or permanent in a particular grade or post (this should exclude periods for which an appointment is held in a purely stop-gap or fortuitous arrangement). No doubt, there are certain observations in the two cases of *G. P. Doval* and *Narender Chadha* which seem to run counter to the view we have taken, but these decisions turned on their own peculiar facts and are therefore clearly distinguishable and they do not lay down any rule of universal application.

25. For all these reasons, the appeal succeeds and is allowed. The judgment and order of the High Court quashing the impugned notification of the State Government dated December 20, 1978 making ad hoc promotions of the appellants and respondents 5-24 are set aside. Instead, we direct that the impugned order of the State Government making ad hoc promotions of 62 Assistant Engineers including the appellants and respondents 5-24 as officiating Executive Engineers will stand and they shall continue to function as such, subject to the terms and conditions contained in

the aforesaid order till the process of making appointments by promotion to these posts is completed. We hope and trust that the State Government will strike a just balance between the competing claims of these 62 Assistant Engineers promoted as Executive Engineers on ad hoc basis, and persons like respondents 1 and 2 appointed as Temporary Engineers on an ad hoc basis who could at the most claim that they should be given the benefit of the period of service from April 21, 1975 when they were recruited as Assistant Engineers through the Public Service Commission, provided they satisfy the test of eligibility of 8 years' experience in that class of service, while considering the cases of all eligible members of Class II service for promotion to the post of Executive Engineer in Class I service in accordance with law and will complete the process of appointment within six months from today.

26. There shall be no order as to costs.

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